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THE WASHINGTON REDSKINS' DEFLATING HOPE: THE LANHAM ACT SURVIVES THE FIRST AMENDMENT CHALLENGE

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I. INTRODUCTION

On June 18, 2014, the Trademark Trial and Appeal Board (TTAB) of the United States Patent and Trademark Office (PTO) cancelled the registration of the trademarks for the Washington Redskins.¹ Five Native-American petitioners brought the cancellation proceeding pursuant to section 14 of the Lanham Act of 1946.² The Washington Redskins have since appealed the trademark cancellations to the United States District Court for the Eastern District of Virginia.³ In its appeal, the Washington Redskins argued that “the trademark board ‘improperly penalized the Washington Redskins based on the content of the team’s speech in violation of the First Amendment.’”⁴ The TTAB did not address the First Amendment argument because, as an administrative tribunal, it does not have the authority to rule on the constitutionality of the Lanham Act.⁵

Under section 2(a) of the Lanham Act, a trademark can be cancelled if the trademark is disparaging and brings people, institutions, beliefs, or national symbols into contempt or disrepute.⁶ Section 14(c) of the Lanham Act allows

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1. *Blackhorse v. Pro-Football, Inc.*, 111 U.S.P.Q.2d (Lexis) 1080, 1082 (T.T.A.B. 2014).

2. *Id.* (citing 15 U.S.C. § 1064 (2014)).

3. Erik Brady & Megan Finnerty, *Washington Redskins Appeal Decision to Cancel Trademark*, USA TODAY (Aug. 14, 2014), <http://www.usatoday.com/story/sports/nfl/redskins/2014/08/14/washington-redskins-appeal-federal-trademark-registrations/14066527/>.

4. *Id.*

5. *Blackhorse*, 111 U.S.P.Q.2d at 1082–83; *see also* Harjo v. Pro-Football, Inc., 30 U.S.P.Q.2d (Lexis) 1828, 1833 (T.T.A.B. 1994) (citing *Panola Land Burgers Ass’n v. Shuman*, 762 F.2d 1550 (11th Cir. 1985); *McGowan v. Marshall*, 604 F.2d 885, 892 (5th Cir.1979); *Finnerty v. Cowen*, 508 F.2d 979, 982 (2d Cir. 1974)).

6. § 1052(a).

any person who believes he or she is, or will be, damaged by a trademark to file a petition to cancel registration of the trademark that includes claims of disparagement and disrepute.⁷ Courts have held that a trademark will be cancelled if a substantial composite of the population finds the mark disparaging or offensive.⁸ However, the Washington Redskins filed an appeal, in which it argued that cancelling the trademarks under sections 2(a) and 14(c) of the Lanham Act violates the First Amendment,⁹ which states, “Congress shall make no law . . . abridging the freedom of speech.”¹⁰

Determining the constitutionality of the Lanham Act requires exploring and resolving the intersections of various bodies of First Amendment law. However, determining the constitutionality of the Lanham Act also raises several questions. For example, whether trademark registration falls within the realm of commercial speech, and if so, can the speech be restricted? Whether the Lanham Act provides a governmental benefit, and if so, can the government regulate the speech when it provides such a benefit? On its surface, the First Amendment may seem to hold sections 2(a) and 14(c) of the Lanham Act unconstitutional. However, the grey areas within the intersections of various First Amendment doctrines allow the government to regulate the expressive content of trademarks, such as the Washington Redskins.

Part II provides a background on the history of the commercial speech doctrine, section 2(a) of the Lanham Act, and of the current litigation. Part III.A discusses whether the government is able to restrict speech under the commercial speech doctrine. Part III.B discusses whether trademarks are a form of government benefit that allows the government to regulate their expressive content. Part III.C argues that trademarks are within the non-public forum, thereby increasing the government’s regulatory power to restrict speech. Part III.D compares the speech regulation under section 2(a) of the Lanham Act with government-issued, custom license plates to argue that governmental regulation of the content of trademarks is permitted.

7. § 1064.

8. *In re McGinley*, 660 F.2d 481, 485 (C.C.P.A. 1981) (citing *In re Riverbank Canning Co.*, 95 F.2d 327, 329 (C.C.P.A. 1938)).

9. See Brady & Finnerty, *supra* note 3 (“The team release says that the trademark board ‘improperly penalized the Washington Redskins based on the content of the team’s speech in violation of the First Amendment’ . . .”).

10. U.S. CONST. amend. I.

II. BACKGROUND

A. *The Development of Commercial Speech*

The purpose of the Lanham Act is to give federal protection to trademarks to protect a trademark producer and consumers in the marketplace.¹¹ Rather than creating any new federal rights, the Lanham Act drafters merely codified the common law of trademarks.¹² Historically, trademarks were initially used as a way for merchants to identify their own goods to claim them if the goods were lost in transit.¹³ In “the first reported trademark decision by an English common law court,” the court in *Sykes v. Sykes* awarded an injunction to the plaintiff because the defendant used the plaintiff’s trademark on the defendant’s products.¹⁴ *Sykes* is one of the earliest examples of limiting speech in favor of regulating the marketplace.¹⁵

Congress did not address any First Amendment issues when enacting the Lanham Act in 1946 because First Amendment protections did not extend to commercial speech until decades later.¹⁶ In 1942, the Court in *Valentine v. Chrestensen* held that commercial speech was not protected by the First Amendment.¹⁷ The Court gave no other reasoning in upholding the city ordinance that prohibited distribution of any advertisement in or upon any street.¹⁸ In 1951, the Court in *Breard v. City of Alexandria* reaffirmed the *Chrestensen* ruling that First Amendment protections do not extend to

11. H.R. REP. NO. 79-219 (1945); *see also* *Springfield Fire & Marine Ins. Co. v. Founders’ Fire & Marine Ins. Co.*, 115 F. Supp. 787, 792 (N.D. Cal. 1953) (“Today, a trade-mark performs a three-fold function: (1) to indicate origin; (2) to guarantee; and (3) to advertise and sell. . . . Today, the trade-mark still serves to indicate origin, but the identity of the origin is often unknown to the consumer. The mark merely indicates to him that goods bearing the mark come from the same origin, whatever that origin may be.”).

12. Kenneth L. Port, *The Illegitimacy of Trademark Incontestability*, 26 IND. L. REV. 519, 520 (1993); *see also In re Trade-Mark Cases*, 100 U.S. 82, 99 (1879) (holding unconstitutional the trademark legislation that imposed criminal penalties against those who produced or consumed counterfeited trademarks).

13. Mark P. McKenna, *The Normative Foundations of Trademark Law*, 82 NOTRE DAME L. REV. 1839, 1849 (2007) (“Producers relied on identifying marks, for example, to demonstrate ownership of goods recovered at sea.”).

14. *Id.* at 1853 (citing *Sykes*, (1824) 107 Eng. Rep. 834 (K.B.)).

15. *See id.* at 1853 n.46.

16. Kimberly A. Pace, *The Washington Redskins Case and the Doctrine of Disparagement: How Politically Correct Must a Trademark Be?*, 22 PEPP. L. REV. 7, 36 (1994).

17. 316 U.S. 52, 54 (1942) (“We are equally clear that the Constitution imposes no such restraint on government as respects purely commercial advertising.”).

18. *Id.* at 54–55.

commercial speech.¹⁹ *Breard* upheld a law that prohibited merchants from soliciting business door-to-door.²⁰ However, the Court reasoned that it was the “commercial feature[s]” of the activity that upheld the law, preventing salesmen from going door-to-door.²¹ The Court added that under the First Amendment, the law could not prohibit “the press or oral advocates of ideas” from soliciting door-to-door.²²

It was not until *Bigelow v. Virginia* in 1975 that commercial speech received First Amendment protection.²³ The Court struck down a Virginia law that made it a crime to advertise procuring an abortion.²⁴ The Court reasoned that just because the advertisement in the newspaper had commercial aspects, the commercial aspect of the speech in itself “did not negate all First Amendment [protection].”²⁵

The Supreme Court in *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.* made clear that commercial speech receives First Amendment protection.²⁶ The Court struck down a Virginia law that prohibited pharmacists from advertising the prices, fees, discounts, and premiums of any prescription drugs.²⁷ The Court reasoned that “speech which does ‘no more than propose a commercial transaction’²⁸ is [not] so [far] removed from any ‘exposition of ideas,’²⁹ and from ‘truth, science, morality, and arts in general’³⁰ . . . that it lacks all protection.”³¹ Further, the Court reasoned that advertisements may be “tasteless [or] excessive,” but they still disseminate important information as to who is producing and selling what product.³² The Court expanded on the reasoning that the dissemination of

19. *See* 341 U.S. 622, 644–45 (1951).

20. *Id.*

21. *Id.* at 642.

22. *Id.* at 641.

23. 421 U.S. 809, 828–29 (1975).

24. *Id.* at 812–13, 829 (quoting VA. CODE ANN. § 18.1–63 (1960)) (“If any person, by publication, lecture, advertisement, or by the sale or circulation of any publication, or in any other manner, encourage or prompt the procuring of abortion or miscarriage, he shall be guilty of a misdemeanor.”).

25. *Id.* at 818 (citing *Murdock v. Pennsylvania*, 319 U.S. 105, 110–111 (1943)) (“The State was not free of constitutional restraint merely because the advertisement involved sales or ‘solicitations.’”).

26. 425 U.S. 748, 771 (1976).

27. *Id.* at 771.

28. *Id.* at 762 (quoting *Pittsburgh Press Co. v. Human Relations Comm’n*, 413 U.S. 376, 385 (1973)).

29. *Id.* (quoting *Chaplinsky v. New Hampshire*, 315 U.S. 568, 572 (1942)).

30. *Id.* (quoting *Roth v. United States*, 354 U.S. 476, 484 (1957)).

31. *Id.*

32. *Id.* at 765. First Amendment protection of commercial speech is provided in situations such as this, where prices of prescription drugs are unpredictable, because not extending First Amendment

information in a free-flow commercial economy can be used to form intelligent, and work to enlighten, decision-making in a democracy.³³ However, the Court limited the First Amendment protection by excluding any commercial speech that is “false or misleading.”³⁴

The Supreme Court in *Central Hudson Gas & Electric Corp. v. Public Service Commission of New York*³⁵ set forth a four-part test analyzing government restrictions on commercial speech. The *Central Hudson* test asks whether (1) the speech at issue “concern[s] lawful activity and [is] not . . . misleading”; (2) “the asserted governmental interest is substantial”; and, if both are answered affirmatively, (3) “the regulation directly advances the governmental interest asserted[;] and” (4) the regulation “is not more extensive than is necessary to serve that interest.”³⁶ Thus, as long as the commercial speech is not misleading and addresses a lawful activity, it is entitled to receive First Amendment protection.³⁷

B. The History of Section 2(a) of the Lanham Act

The TTAB previously refused registration for other trademarks, such as for a cigarette company seeking to name its product “Senussi” because the Senussi-sect of the Islamic faith forbids smoking.³⁸ The TTAB refused the trademark by holding “that [t]he application of the name of any religious order or sect to a product whose use is forbidden to the followers or adherents of such sect or order is an affront to such persons and tends to disparage their beliefs.”³⁹

In 2010, the TTAB refused the trademark sought by the Lebanese Arak Corporation when it sought to trademark “KHORAN.”⁴⁰ The TTAB found the term disparaging because the alcoholic product to be trademarked could be

protection creates more of an inconvenience to the general public than it serves a governmental interest.
Id.

33. *Id.*

34. *Id.* at 771.

35. 447 U.S. 557, 566 (1980).

36. *Id.*

37. *See id.* at 564 (“If the communication is neither misleading nor related to unlawful activity, the government’s power is more circumscribed. The State must assert a substantial interest to be achieved by restrictions on commercial speech. Moreover, the regulatory technique must be in proportion to that interest. The limitation on expression must be designed carefully to achieve the State’s goal.”).

38. Pace, *supra* note 16, at 28 (citing *In re Reemtsma Cigarettenfabriken G.M.B.H.*, 122 U.S.P.Q. (Lexis) 339 (T.T.A.B. 1959)).

39. *Id.* at 28–29 (alteration in original) (quoting *Reemtsma*, 122 U.S.P.Q. at 339).

40. *In re Lebanese Arak Corp.*, 94 U.S.P.Q.2d (Westlaw) 1215, 1215–16 (T.T.A.B. Mar. 4, 2010).

perceived as a misspelling of the Islamic holy book, the Koran.⁴¹ The TTAB further found that the general public would take the trademark to mean the sacred book of Islam, rather than the Armenian term “altar.”⁴² The TTAB reasoned that even if it accepted the Armenian term, the radio advertisements would pronounce the alcoholic beverage “Koran,” which would disparage a substantial composite of the Muslim population.⁴³

Finally, just because a trademark may be self-disparaging, it still will not receive trademark protection if it offends a “substantial composite” of the subgroup being disparaged.⁴⁴ One such example is when the TTAB denied the African-American comedian Damon Wayans from trademarking the word “NIGGA” for his entertainment services company.⁴⁵

C. A Brief History of the Case-at-Large

In 1966, the Washington Redskins filed for trademark protection for “the Redskins,” which was granted in 1967 without opposition from any Native-American groups.⁴⁶ “In 1992, Suzan Shown Harjo and six other Native-Americans . . . petitioned the TTAB to cancel the [Redskins] trademarks” in *Pro-Football, Inc. v. Harjo*.⁴⁷ It was not until 1999 that the TTAB ruled in favor of the Native-American petitioners and cancelled the Washington Redskins trademarks.⁴⁸ In holding for the petitioners, the TTAB explained that federal trademarks have a presumption of validity.⁴⁹ Therefore, the petitioners had the burden of proving disparagement.⁵⁰ The TTAB held that

41. *Id.* at 1216 (“[T]he Koran is the sacred text of Islam [and] the Koran forbids consumption of alcoholic beverages, including wine; and therefore that the use of KHORAN for wine is disparaging to the beliefs of Muslims.”).

42. *See id.* at 1219.

43. *Id.* at 1220.

44. Francine Ward & Stephanie Quick, *Offensive Marks: The Policing of Trademarks in a Diverse World*, LANDSLIDE, Mar.–Apr. 2013, at 52, 53.

45. *Id.*

46. Mark S. Nagel & Daniel A. Rascher, *Washington “Redskins”—Disparaging Term or Valuable Tradition?: Legal and Economic Issues Concerning Harjo v. Pro-Football, Inc.*, 17 FORDHAM INTELL. PROP., MEDIA & ENT. L.J. 789, 792–93 (2007).

47. 284 F. Supp. 2d 96, 99 (D.D.C. 2003); Nagel & Rascher, *supra* note 46, at 793.

48. 284 F. Supp. 2d at 100.

49. *Id.* at 123 n.24 (citing J. THOMAS MCCARTHY, MCCARTHY ON TRADEMARKS & UNFAIR COMPETITION § 20:64 (4th ed. 1997)).

50. *Id.* at 122; *see also* Pace, *supra* note 16, at 51 (“If Petitioners can prove that the ‘Redskins’ trademark can reasonably be understood to refer to them as Native Americans and that reasonable Native Americans or a substantial composite of Native Americans could have found the mark disparaging in 1967 when registration was issued, then the ‘Redskins’ trademark should be cancelled.”).

the petitioners met the burden of proving disparagement, because the trademark was used with a pictured logo of a Native-American.⁵¹ In 2003, a district court found that the TTAB erred in finding there was sufficient evidence to conclude that the name “Redskins” was disparaging to Native Americans.⁵² Furthermore, the court held that the best time to resolve the case would have been shortly after 1967, when the Washington Redskins trademarks were initially granted.⁵³ The court ruled in favor of the Washington Redskins in granting the defense of laches and held that the petitioners lacked standing to challenge the trademarks.⁵⁴

In 2005, the United States Court of Appeals for the District of Columbia reversed and remanded the case back to the district court, holding that the defense of laches applied to all but one petitioner, who was only one-year-old when the trademarks were filed, and therefore, was the only petitioner with standing.⁵⁵ The court of appeals based its holding on the defenses of laches, not on the central issue of disparagement.⁵⁶ As a result, in 2006, a new petition was filed involving younger Native-American petitioners who had recently reached the age of majority, as determined by the holding of the court of appeals.⁵⁷ Blackhorse testified in front of the TTAB in March of 2013.⁵⁸

At the conclusion of *Harjo*, six new individual petitioners filed a petition to cancel the same registrations for the Washington Redskins trademarks.⁵⁹ In June of 2014, TTAB once again cancelled the Washington Redskins trademarks, finding that the trademarks were disparaging towards the Native-American community.⁶⁰ Among other evidence, the TTAB relied heavily on a resolution

51. *Pro-Football, Inc.*, 284 F. Supp. 2d at 126–27.

52. *Id.* at 144 (“The findings do not come close to shedding any light on the legal inquiry. There is no evidence in the record that addresses whether the use of the term ‘redskin(s)’ in the context of a football team and related entertainment services would be viewed by a substantial composite of Native Americans, in the relevant time frame, as disparaging.”).

53. *See id.* at 142 (“The Court finds that constructive and actual notice on the part of Defendants, widespread use of Pro-Football’s trademarks, and the over twenty-five years that have passed since first notice of the mark, accompanied by an insufficient excuse from Defendants for their delay, requires this Court to find undue delay on the part of Defendants.”).

54. *Id.* at 145.

55. *Pro-Football, Inc. v. Harjo*, 415 F.3d 44, 49–50 (D.C. Cir. 2005).

56. *See id.*

57. *Blackhorse v. Pro-Football, Inc.*, 111 U.S.P.Q.2d (Lexis)1080, 1114 (T.T.A.B. 2014).

58. Erik Brady, *New Generation of American Indians Challenges Redskins*, USA TODAY (May 10, 2013), <http://www.usatoday.com/story/sports/nfl/redskins/2013/05/09/native-americans-washington-mascot-fight/2148877/> (“No matter how it is decided, appeals are likely, and the case could go on for years, as it did the first time.”).

59. *Blackhorse*, 111 U.S.P.Q.2d at 1084.

60. *Id.* at 1082.

passed by the National Congress of American Indians (NCAI) in finding that the trademarks were disparaging towards Native-Americans.⁶¹ The TTAB reasoned that circumstances surrounding the NCAI's resolution painted a fair representation of a substantial composite of the Native American population that found the trademarks disparaging.⁶² For example, the NCAI resolution referred to several dictionary definitions of the word "Redskin" during the relevant time frame of 1967 through 1990 and found that several dictionaries defined the term as "*Often Offensive*" or "*Slang (often disparaging and offensive)*."⁶³ Additionally, the NCAI found wide usage of the term in various media sources prior to the late 1960s when the Washington Redskins acquired the trademark protection.⁶⁴

III. ANALYSIS

The government restricts "false or misleading" speech under the commercial speech doctrine.⁶⁵ Therefore, cancelling the Washington Redskins trademarks for being disparaging towards Native Americans is unconstitutional if viewed solely under the doctrine of commercial speech.⁶⁶ The constitutional rule has long held that the government cannot "forbid particular words" to censor offensive speech.⁶⁷ However, the government has greater power to regulate speech when the government provides subsidies⁶⁸ and the speech is in

61. *See id.* at 1110–11.

62. *Id.* at 1098 ("[T]he circumstances under which the resolution was passed, i.e., that approximately 150 tribes were represented by NCAI at that time and at least one third of the tribal members were present to pass the resolution.").

63. *Id.* at 1093 (quoting RANDOM HOUSE DICTIONARY OF THE ENGLISH LANGUAGE 1204 (1967); RANDOM HOUSE DICTIONARY OF THE ENGLISH LANGUAGE 1618 (2d ed. 1987)).

64. *Id.* at 1095–98. ("Merrit Meets the Enemy. Victory over our Frontier Foes. Thirty-Seven Redskins Sent to the Happy Hunting Grounds. The Indian Problem Reaching a Conclusion. . . . 'Fort Wicked' Too Tough for Redskins. . . . Headline from *Rocky Mountain News* (October 21, 1931). 'Good luck, get a redskin for me.' Excerpt from the 1940 movie *Northwest Passage*. 'There is reason in her words!' at length broke from his compressed and trembling lips; 'ay, and they bear the spirit of Christianity; what might be right and proper in a redskin, may be sinful in a man who has not even a cross in blood to plead for his ignorance.'").

65. *Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748, 771 (1976).

66. *See id.* at 770, 771–73 (providing the various forms of speech that can be regulated by the government under the commercial speech doctrine, of which, disparaging or scandalous speech is not listed).

67. *See Cohen v. California*, 403 U.S. 15, 26 (1971) ("[W]e cannot indulge the facile assumption that one can forbid particular words without also running a substantial risk of suppressing ideas in the process. Indeed, governments might soon seize upon the censorship of particular words as a convenient guise for banning the expression of unpopular views.").

68. *See infra* Part IV.

the non-public forum.⁶⁹

A. Government Restrictions on Trademarked Speech Does Not Pass the Central Hudson Four-Part Test

Section 2(a) of the Lanham Act forbids trademarks that are offensive, scandalous, and disparaging, such as the Washington Redskins.⁷⁰ However, such governmental restriction must pass the *Central Hudson* four-part test for the government to restrict speech on trademarks under the commercial speech doctrine.⁷¹ The first prong requires that the speech at issue concerns a lawful activity and is not misleading.⁷² The Washington Redskins trademarks are affiliated with lawful activities of a football team in the National Football League.⁷³ Additionally, although trademarks in general have the potential to confuse consumers, the Washington Redskins use of the trademarks is not used to mislead consumers in the marketplace.⁷⁴ As such, section 2(a) of the Lanham Act fails the first prong of the *Central Hudson* four-part test and prevents the government from restricting speech through the commercial speech doctrine. However, other First Amendment principles work together and allow the government to restrict offensive and disparaging trademarks under section 2(a) of the Lanham Act.

B. When the Government Provides Trademark Protections or Other Government Benefits, the Government Can Restrict Content-Based Speech

Although trademarks, like those for the Washington Redskins, are privately owned, the government subsidizes trademarks through federal registration.⁷⁵ In *National Endowment for the Arts v. Finley*,⁷⁶ the Supreme Court upheld a requirement that the National Endowment of the Arts (NEA) consider standards of “decency and respect” for Americans’ diverse beliefs and values when

69. *See infra* Part V.

70. 15 U.S.C. § 1052(a) (2014).

71. *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm’n of N. Y.*, 447 U.S. 557, 566 (1980).

72. *Id.*

73. *See* Jeffrey Lefstin, Note, *Does the First Amendment Bar Cancellation of Redskins?*, 52 STAN. L. REV. 665, 682 (2000).

74. *Id.*

75. Leslie Gielow Jacobs, *The Public Sensibilities Forum*, 95 NW. U. L. REV. 1357, 1367 (2001) (“Because the government provides assistance to private speech as private speech, the constitutional values that allow the government great discretion in choosing the content of its own speech do not apply.”).

76. 524 U.S. 569 (1998).

selecting grant recipients for arts.⁷⁷ The NEA was created in 1965 and “has distributed over \$3 billion in grants to individuals and organizations” to promote the arts.⁷⁸ The NEA was provided with broad discretion to award grants, as its only requirements were to ensure “‘artistic and cultural significance, giving emphasis to American creativity and cultural diversity,’ ‘professional excellence,’ and the encouragement of ‘public knowledge, education, understanding, and appreciation of the arts.’”⁷⁹ In 1990, the National Foundation on the Arts and the Humanities Act was amended to “establish[] procedures to judge the artistic merit of grant applications, to ‘tak[e] into consideration general standards of decency and respect for the diverse beliefs and values of the American public.’”⁸⁰

The Court rejected a challenge to the 1990 amendment over the basis that the adoption of the “decency and respect” clause did not allow the NEA to deny funding for viewpoint discrimination.⁸¹ The Court further explained that “‘decency and respect’ criteria do not silence speakers by . . . ‘threaten[ing] censorship of [any particular] ideas.’”⁸² Finally, the Court reasoned that when it comes to government subsidies, the government regulates speech “according to criteria that would be impermissible were direct regulation of speech or a criminal penalty at stake.”⁸³

The Court in *Finley* cited *R.A.V. v. City of St. Paul*⁸⁴ to provide an example of where the government recognized the permissibility of content discrimination when speech restriction does not run the danger of discriminating against an idea or viewpoint.⁸⁵ The Supreme Court in *R.A.V.* found that if the reason for content discrimination is neutral enough to support exclusion of the entire class of speech, then the same reason must also be “neutral enough to form the basis of distinction within the class.”⁸⁶ The Court provided an example illustrating

77. *Id.* at 572–73.

78. *Id.* at 574.

79. *Id.* at 573 (quoting 20 U.S.C. § 954(c)(1), (3), (5) (2013)).

80. *Id.* at 576 (alteration in original) (quoting § 954(d)(1)).

81. *Id.* at 581.

82. *Id.* at 583 (quoting *R.A.V. v. City of St. Paul*, 505 U.S. 377, 393 (1992)).

83. *Id.* at 587–88. “Congress may ‘selectively fund a program to encourage certain activities it believes to be in the public interest, without at the same time funding an alternative program which seeks to deal with the problem in another way.’” *Id.* at 588 (quoting *Rust v. Sullivan*, 500 U.S. 173, 193 (1991)).

84. *See generally* 505 U.S. 377 (1992).

85. *Id.* at 388. “When the basis for the content discrimination consists entirely of the very reason the entire class of speech at issue is proscribable, no significant danger of idea or viewpoint discrimination exists.” *Id.*

86. *Id.*

that “[a] State might choose to prohibit only that obscenity which is the most patently offensive *in its prurience—i.e.*, that which involves the most lascivious displays of sexual activity. But it may not prohibit, for example, only that obscenity which includes offensive *political* messages.”⁸⁷ According to the Court, restricting speech is permitted when an entire class of speech is restricted, rather than just specific elements within a larger class of speech.⁸⁸

In its appeal, the Washington Redskins may argue that section 2(a) of the Lanham Act violates *R.A.V.*'s rationale in that section 2(a) restricts only those elements of commercial speech that are disparaging or offensive.⁸⁹ In *R.A.V.*, the St. Paul statute restricting speech stated:

[w]hoever places on public or private property a symbol, object, appellation, characterization or graffiti, including, but not limited to, a burning cross or Nazi swastika, which one knows or has reasonable grounds to know arouses anger, alarm or resentment in others on the basis of race, color, creed, religion or gender commits disorderly conduct and shall be guilty of a misdemeanor.⁹⁰

The Washington Redskins could further argue that the statute in *R.A.V.* operated similarly in restricting speech as section 2(a) of the Lanham Act.⁹¹ The Washington Redskins argument against section 2(a) of the Lanham Act would be that both the St. Paul statute in *R.A.V.* and section 2(a) operate similarly to restrict speech when such speech is used to offend a group of people. However, there is a key distinction between the language used in the St. Paul statute and section 2(a) of the Lanham Act that sets the two apart.

The Court in *Board of Regents of the University of Wisconsin System v. Southworth*⁹² held that the government must maintain viewpoint neutrality when restricting speech through content discrimination.⁹³ *Southworth* held that mandatory student fees at a public university were constitutional because the

87. *Id.*

88. *Id.*

89. *See id.* at 387 (“Even the prohibition against content discrimination that we assert the First Amendment requires is not absolute. It applies differently in the context of proscribable speech than in the area of fully protected speech.”).

90. *Id.* at 380 (quoting ST. PAUL, MINN. LEGIS. CODE § 292.02 (1990)).

91. *See id.*; cf. 15 U.S.C. § 1052(a) (2014).

92. *See generally* 529 U.S. 217 (2000).

93. *See id.* at 221.

university maintained viewpoint neutrality.⁹⁴ The University of Wisconsin “required full-time students . . . to pay a nonrefundable activity fee,” which was “segregated from the University’s tuition charge.”⁹⁵ The fees were collected to maintain a fund supporting the extracurricular activities of many of the university’s student organizations.⁹⁶ The parties in *Southworth* stipulated that “[t]he process for reviewing and approving allocations for funding is administered in a viewpoint-neutral fashion,” and that the University does not use the fee program for “advocating a particular point of view.”⁹⁷ The students challenging the university’s student activity fees argued that “the University [of Wisconsin] must grant them the choice not to fund those [student organizations] that engage in political and ideological expression offensive to their personal beliefs.”⁹⁸ The Court held that the fees were permissible so long as the funds collected from the fees were administered in a viewpoint-neutral manner.⁹⁹

Finley, R.A.V., and *Southworth* illustrate situations where the government can regulate speech based on its content, so long as the restriction is viewpoint neutral. Section 2(a) of the Lanham Act allows any trademark to be cancelled if it is offensive, scandalous, or disparaging.¹⁰⁰ The Washington Redskins will surely argue that a cancellation of its trademarks under section 2(a) is viewpoint discrimination.¹⁰¹ However, as illustrated in *R.A.V.*, there is little risk of viewpoint discrimination when content discrimination is not tied to any particular group based on creed, race, religions, or gender.¹⁰² Section 2(a) of the

94. *Id.* (“The First Amendment permits a public university to charge its students an activity fee used to fund a program to facilitate extracurricular student speech if the program is viewpoint neutral.”).

95. *Id.* at 222.

96. *Id.*

In the University’s view, the activity fees “enhance the educational experience” of its students by “promot [ing] [sic] extracurricular activities,” “stimulating advocacy and debate on diverse points of view,” enabling “participa[tion] in political activity,” “promot[ing] student participa[tion] in campus administrative activity,” and providing “opportunities to develop social skills,” all consistent with the University’s mission.

Id. at 222–23 (alterations in original).

97. *Id.* at 224 (alteration in original).

98. *Id.* at 227.

99. *Id.* at 233 (“The proper measure, and the principal standard of protection for objecting students, we conclude, is the requirement of viewpoint neutrality in the allocation of funding support.”).

100. 15 U.S.C. § 1052(a) (2014).

101. *C.f.* Eugene Volokh, *Patent & Trademark Office Cancels Several Washington Redskins Trademarks*, WASH. POST (June 18, 2014), <http://www.washingtonpost.com/news/volokh-conspiracy/wp/2014/06/18/patent-trademark-office-cancels-several-washington-redskins-trademarks/> (“An exclusion of marks that disparage groups while allowing marks that praise those groups strikes me as viewpoint discrimination.”).

102. *R.A.V. v. City of St. Paul*, 505 U.S. 377, 388, 391 (1992).

Lanham Act requires that regardless of the viewpoint represented, any trademark will be cancelled if it is scandalous, offensive, or disparaging.¹⁰³

C. The Government Can Restrict Speech in Non-Public Forums to Dissociate Its Speech from Private Speakers

The government does not engage in viewpoint discrimination when “it has merely chosen to fund one activity to the exclusion of the other.”¹⁰⁴ *Rust v. Sullivan* upheld the constitutionality of denying family planning funds to private parties who engage in abortion counseling.¹⁰⁵ The Supreme Court in *Rust* reasoned that “the Government has not discriminated on the basis of viewpoint; it has merely chosen to fund one activity to the exclusion of the other.”¹⁰⁶ *Rust* distinguished the government subsidizing certain programs or entities from the doctrine of unconstitutional conditions.¹⁰⁷ Unconstitutional conditions occur when “the Government has placed a condition on the *recipient* of the subsidy rather than on a particular program or service, thus effectively prohibiting the recipient from engaging in the protected conduct outside the scope of the federally funded program.”¹⁰⁸ Section 2(a) of the Lanham Act does not place a condition on the recipient of a trademark, but instead imposes that trademarks may not be issued for content that is offensive, scandalous, or disparaging.¹⁰⁹ Applied to the Washington Redskins, the government would not require the Washington Redskins to change its name to receive a trademark but instead requires that the TTAB not issue trademarks that it deems inappropriate.

As illustrated by *Southworth*, when the government speaks, “it can choose what to say.”¹¹⁰ To serve the interests of its citizens, the government “can discriminate in its own speech against unpopular ideas or modes of expression that are constitutionally protected when privately uttered.”¹¹¹ Trademarks, however, fall between protected private speech and unprotected government

103. § 1052(a).

104. *Rust v. Sullivan*, 500 U.S. 173, 193 (1991).

105. *Id.* at 178.

106. *Id.* at 193.

107. *Id.* at 197.

108. *Id.* “Congress has merely refused to fund such activities out of the public fisc, and the Secretary has simply required a certain degree of separation from the Title X project in order to ensure the integrity of the federally funded program.” *Id.* at 198.

109. *See* 15 U.S.C. § 1052(a) (2014).

110. Jacobs, *supra* note 75, at 1358 n.11 (citing Bd. of Regents of the Univ. of Wis. Sys. v. Southworth, 529 U.S. 217, 235 (2000); Rosenberger v. Rector & Visitors of the Univ. of Va., 515 U.S. 819, 833 (1995)).

111. *Id.*

speech.¹¹² When speech falls between the realm of private and government speech, the question of regulating such speech is decided by whether the speech occurs in a public forum or a non-public forum.¹¹³ “[A] public forum . . . [is a] government designat[ed] . . . place . . . of communication for use by the public at large for assembly and speech”¹¹⁴ As the public forum is created for the purposes of exchanging ideas, the government cannot restrict speech without a compelling governmental interest.¹¹⁵ In *Widmar v. Vincent*,¹¹⁶ a public forum was created when the state university had an express policy of making its meeting facilities available to student groups.¹¹⁷ As such, the university could not exclude specific groups from using the facilities for religious purposes.¹¹⁸

Just as “[t]he First Amendment does not guarantee access to property simply because it is owned or controlled by the government,” a public forum is only created when there is clear evidence that the government intended to create one.¹¹⁹ A non-public forum is where the government creates a private speech forum, allowing the government “to discriminate among [certain] types of speech.”¹²⁰ Regulating “access to a nonpublic forum can be based on subject matter and speaker identity so long as the distinctions drawn are reasonable in light of the purpose served by the forum and are viewpoint neutral.”¹²¹ Therefore, in a non-public forum, the government is allowed to restrict the content of particular speech, so long as the government does not suppress individual viewpoints.¹²²

In the non-public forum, the government unusually conditions the access to private speakers by setting “standards such as the speech being in good taste, decent, not controversial or not offensive. Often the standards forbid specific types of speech, such as those which pertain[s] to sexual conduct, are

112. *See id.* “Between the extremes of private speech and government speech lies the vast middle ground of government/private speech interaction. This type of interaction occurs in the many instances where the government subsidizes private speech by allocating funds or property access to support it.” *Id.*

113. *See Cornelius v. NAACP Legal Def. & Educ. Fund, Inc.*, 473 U.S. 788, 802 (1985).

114. *Id.* at 814.

115. *Id.* at 800.

116. *See generally* 454 U.S. 263 (1981).

117. *Id.* at 277.

118. *See id.* at 267.

119. *Cornelius*, 473 U.S. at 803 (quoting *U.S. Postal Serv. v. Council of Greenburgh Civic Ass’ns*, 453 U.S. 114, 129 (1981)).

120. Jacobs, *supra* note 75, at 1359.

121. *Cornelius*, 473 U.S. at 806.

122. *Id.*

derogatory toward particular groups, disparage a deity, or relate to an intoxicating substance.”¹²³ Typical examples of non-public forums “include ‘vanity’ license plate[s] . . . advertis[ements] in public spaces, and art displays in public places.”¹²⁴

The Supreme Court in *Lehman v. City of Shaker Heights*¹²⁵ upheld the city’s decision to deny advertising space on city buses to political candidates running for office.¹²⁶ “When [the] petitioner [in *Lehman*] applied [to advertise on a city bus], he was informed . . . that, although the space was then available . . . the city did not permit political advertising.”¹²⁷ However, the city did allow “advertis[ement]s from cigarette companies, banks, savings and loan associations, liquor companies, retail and service establishments, churches, and civic and public-service oriented groups.”¹²⁸ The Ohio Supreme Court found that even though the city allowed advertisements on its city buses, there was no violation of equal protection “because, [a]s a class, all candidates for political office are treated [equally] under the . . . advertising policy.”¹²⁹ The Supreme Court found that it was constitutional for the city to engage in content discrimination by disallowing any political advertisement in non-public forums, so long as the city was not engaged in viewpoint discrimination.¹³⁰ Like the petitioners in *Lehman*, the Washington Redskins could argue that similar to advertisement space on city buses, trademarks “constitute a public forum

123. Jacobs, *supra* note 75, at 1360–61 (citing *United Food & Commercial Workers Union, Local 1099 v. Sw. Ohio Reg’l Transit Auth.*, 163 F.3d 341, 346 (6th Cir. 1998); *Air Line Pilots Ass’n v. Dep’t of Aviation of Chi.*, 45 F.3d 1144 (7th Cir. 1995); *AIDS Action Comm. of Mass. v. Mass. Bay Transp. Auth.*, 42 F.3d 1, 3–4 (1st Cir. 1994); *Sons of Confederate Veterans, Inc. v. Glendering*, 954 F. Supp. 1099, 1100 (D. Md. 1997); *Claudio v. United States*, 836 F. Supp. 1230, 1232, 1235 (E.D.N.C. 1993); *Kahn v. Dep’t of Motor Vehicles*, 20 Cal. Rptr. 2d 6, 9 (Cal. Ct. App. 1993); Jean Godden, *Foolin’ State on Your Plate NOEZTSK*, SEATTLE TIMES, Apr. 16, 1995, at B1; Frank J. Prial, *Wine Talk*, N.Y. TIMES, May 7, 1997, at C8).

124. *Id.* at 1361.

125. *See generally* 418 U.S. 298 (1974).

126. *Id.* at 299–300, 304.

127. *Id.* at 300.

128. *Id.*

129. *Id.* at 301.

130. *See id.* at 303–04.

Because state action exists, however, the policies and practices governing access to the transit system’s advertising space must not be arbitrary, capricious, or invidious. Here, the city has decided that “[p]urveyors of goods and services saleable in commerce may purchase advertising space on an equal basis, whether they be house builders or butchers.”

Id. (quoting *Lehman v. City of Shaker Heights*, 296 N.E.2d 683, 685 (Ohio 1973)).

protected by the First Amendment, and that there is a guarantee of nondiscriminatory access to such publicly owned and controlled areas of communication ‘regardless of the primary purpose for which the area is dedicated.’”¹³¹ Just as the city engaged in issuing advertisement space, the government must make “managerial decision[s]” when issuing trademarks.¹³² The Supreme Court in *Lehman* held that the government’s managerial decision to use innocuous and less controversial content in its non-public forum did not violate the First Amendment.¹³³

When issuing trademarks, the government is engaged in regulating a market of goods to ensure that consumers are not confused or misled.¹³⁴ The non-public forum in the context of trademark law is open for trademark owners to have their goods protected by the government. The government creates a non-public forum when it issues trademarks and allows trademark owners to attach the government stamp on their products.¹³⁵ In doing so, the government has greater leeway to discriminate content that is in bad taste, disparaging, controversial, or offensive.¹³⁶ Therefore, the government does not violate the First Amendment by choosing not to assign trademarks to the Washington Redskins.

In *Claudio v. United States*,¹³⁷ the Eastern District Court of North Carolina upheld the government’s decision to revoke a permit that allowed the plaintiff to display his painting in a federal building.¹³⁸ The painting was taken down because it contained a larger-than-life, frontal image of a nude female, accompanied by a realistic depiction of a human fetus, umbilical cord, and placenta.¹³⁹ Upon unveiling the painting, the field office manager of the federal building notified Claudio that his license was revoked and removed the painting.¹⁴⁰ Claudio argued that “any person is entitled by the United States Constitution to exhibit in any manner designated by anyone as ‘art,’ any rendition of any subject, idea or issue in or on any federal building.”¹⁴¹ Further,

131. *Id.* at 301.

132. *See id.* at 304.

133. *Id.* (“Were we to hold to the contrary, display cases in public hospitals, libraries, office buildings, military compounds, and other public facilities immediately would become Hyde Parks open to every would-be pamphleteer and politician. This the Constitution does not require.”)

134. *See* Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, 425 U.S. 748, 771 (1976).

135. *See* Sonia K. Katyal, *Trademark Intersectionality*, 57 UCLA L. REV. 1601, 1679 (2010).

136. Jacobs, *supra* note 75, at 1361–62.

137. *See generally* 836 F. Supp. 1230 (E.D.N.C. 1993).

138. *Id.* at 1237.

139. *Id.* at 1232.

140. *Id.* at 1233.

141. *Id.* at 1234.

Claudio relied on *Cohen v. California*¹⁴² where the Court held “the Government could not prohibit [Cohen] from wearing [his] jacket [in the courtroom, which read] ‘Fuck the Draft.’”¹⁴³ Therefore, Claudio argued that he could display his painting in the federal building.¹⁴⁴ However, the district court distinguished *Claudio* from *Cohen* by holding that the plaintiff’s shirt in *Cohen* could only be attributed to the plaintiff himself, whereas in *Claudio*, people would associate the painting with the government.¹⁴⁵ Similarly, a government trademark gives the perception that the government endorses such speech,¹⁴⁶ and as such, the government can set the standards of what speech to trademark, so long as the standard remains viewpoint neutral.

D. The Government’s Ability to Restrict Speech on Vanity License Plates Is Analogous to Its Ability to Restrict Speech on Trademarks

In *Claudio*, the non-public forum was a setting where the government acted as a proprietor.¹⁴⁷ Vanity license plate programs are more comparable to Section 2(a) of the Lanham Act, because in both situations, the government acts as a licensor, rather than a proprietor.¹⁴⁸ Vanity license plates are vehicle license plates that allow a vehicle owner to choose a combination of letters or words to display on their license plates instead of a randomly chosen license plate assigned by the Department of Motor Vehicles (DMV).¹⁴⁹ For example, in Vermont, “a vehicle owner may obtain vanity plates by paying an additional fee”¹⁵⁰ However, many states reject requests for vanity plates with words that are offensive or objectionable in anyway.¹⁵¹ Similarly, Section 2(a) of the

142. See generally 403 U.S. 15 (1971).

143. *Claudio*, 836 F. Supp. at 1234.

144. *Id.*

145. See *id.* at 1234–35 (“In the instant case, the offensive expression literally was **physically attached** to the courthouse itself, and it was so large and situated in such a location that anyone entering the Federal Building *had* to look at it.”) (emphasis in original).

146. *Trademark FAQs*, USPTO, http://www.uspto.gov/faq/trademarks.jsp#_Toc275426682 (last visited Dec. 14, 2015) (“You may only use the federal registration symbol ‘®’ after the USPTO actually registers a mark, not while an application is pending.”) (emphasis added).

147. *Claudio*, 836 F. Supp. at 1237.

148. See *Perry v. McDonald*, 280 F.3d 159, 167–69 (2d Cir. 2001).

149. See *id.* at 163.

150. *Id.*

151. See, e.g., *Registration – Specialty Plates*, MVA, <http://www.mva.maryland.gov/About-MVA/INFO/27300/27300-29T.htm> (last visited Dec. 14, 2015) (“The [Maryland] MVA reserves the right to decline a requested message because . . . it is objectionable”); *Restrictions on Personalized Plates*, N.Y. ST. DMV, <http://dmv.ny.gov/custom-plates/restrictions-personalized-plates> (last visited Dec. 14, 2015) (New York restricts vanity license plates that are “obscene, lewd, lascivious, derogatory

Lanham Act also requires that a trademark be rejected if it is offensive or objectionable to the public.¹⁵²

In *Perry v. McDonald*,¹⁵³ the Second Circuit held that the government can restrict speech on vanity license plates by finding that vanity license plates are within the non-public forum.¹⁵⁴ Perry requested vanity license plates that read “SHTHPNS.”¹⁵⁵ Vermont initially issued the vanity license plates but later revoked the plates upon discovering that “SHTHPNS” stood for “Shit Happens.”¹⁵⁶ Vermont revoked Perry’s vanity license plates and found them offensive to the general public under the Vermont statute.¹⁵⁷ In upholding Vermont’s decision, the Second Circuit reasoned that vanity license plates fall within the non-public forum because Vermont did not intend to use vanity license plates to create a public forum open for discourse.¹⁵⁸

The Second Circuit provided several reasons illustrating that Vermont did not intend to create a public forum.¹⁵⁹ One such reason provides that Vermont’s policy in issuing license plates (including vanity license plates) “is to aid in vehicle identification,” rather than opening a public forum intended for public discourse.¹⁶⁰ Additionally, the Second Circuit reasoned that “the general public does not have [full] access to Vermont license plates, including vanity plates[, in that] only Vermont vehicle owners who have *obtained permission* to do so may place a message of their choice on their vanity plate.”¹⁶¹ Given these reasons, the Second Circuit found the Vermont statute denying offensive terms on vanity license plates constitutional.¹⁶² Similarly, Congress passed the Lanham Act to “provide[] federal protection for distinctive marks that are used

to a particular ethnic or other group, or patently offensive.”).

152. 15 U.S.C. § 1052(a) (2014).

153. *See generally Perry*, 280 F.3d 159.

154. *Id.* at 169, 172–73.

155. *Id.* at 163.

156. *Id.* at 164.

157. *Id.* (“[T]he Vermont statutes empowers the Commissioner of the DMV to ‘refuse to honor any request [for special plates] that might be offensive or confusing to the general public.’”) (alteration in original).

158. *Id.* at 167 (quoting *Cornelius v. NAACP Legal Def. & Educ. Fund, Inc.* 473 U.S. 788, 802 (1985)) (“The government ‘does *not* create a public forum by inaction or by *permitting limited discourse*, but only by intentionally opening a nontraditional forum for public discourse.’”).

159. *Id.* at 167–69.

160. *Id.* at 167.

161. *Id.* at 168 (quoting *Cornelius*, 473 U.S. at 804) (“[G]overnment property remains a nonpublic forum ‘when it does no more than reserve eligibility for access to the forum to a particular class of speakers, whose members must then, as individuals, *obtain permission* to use it.’”).

162. *Id.* at 175.

in commerce.”¹⁶³ Additionally, individuals-at-large do not have unfiltered protection under trademark law unless an individual first obtains permission from a reviewing attorney at the PTO.¹⁶⁴

The Second Circuit in *Perry* also found that Vermont had authority to restrict speech on vanity license plates as a means of disassociating itself from a private party’s message on a vanity license plate.¹⁶⁵ The Second Circuit reasoned that “[a]lthough the owner of a vehicle chooses the characters that appear on a vanity plate, the Vermont DMV must approve of a vanity plate before issuing it.”¹⁶⁶ As a result, the Second Circuit found that Vermont “ha[d] a legitimate interest in not communicating the message that it approves . . . offensive . . . terms.”¹⁶⁷ Vanity license plates and trademarks are first approved by the government, and in both instances, it would be unreasonable to associate private speech on vanity license plates and in trademarks as the government’s speech.

The Utah Supreme Court decision in *McBride v. Motor Vehicle Division of Utah State Tax Commission* is illustrative of the parallel in the government’s ability to restrict speech on vanity license plates and section 2(a) of the Lanham Act.¹⁶⁸ Utah prohibits terms “that may carry connotations offensive to good taste and decency or that would be misleading.”¹⁶⁹ In *McBride*, the Native American petitioners “object[ed] to the use of the term ‘redskin’ on Utah license plates.”¹⁷⁰ The vanity license plate owners argued that they are fans of the Washington Redskins and “the only reason they requested the plates was to show their support and admiration for that team.”¹⁷¹ The petitioners testified that based on their personal experiences, “the term ‘redskin’ . . . is offensive and derogatory to them personally, to their families, and to all Native Americans.”¹⁷² The Utah Supreme Court reversed the lower court’s decision and held that if a reasonable person finds the vanity license plates offensive, Utah may revoke the use of

163. *Trademark*, LEGAL INFO. INST., <http://www.law.cornell.edu/wex/trademark> (last visited Dec. 14, 2015) (citing 15 U.S.C. §§ 1051 et seq. (2014)).

164. *See* 15 U.S.C. § 1062(a).

165. *Perry*, 280 F.3d at 169–70 (citing *Gen. Media Commc’ns., Inc. v. Cohen*, 131 F.3d, 273, 281 n.10 (2d Cir. 1997)).

166. *Id.* at 169.

167. *Id.*

168. *See generally* 1999 UT 9, 977 P.2d 467.

169. *Id.* ¶ 3 (quoting UTAH CODE ANN. § 41-1a-411 (West. 1996)).

170. *Id.* ¶ 2.

171. *Id.* ¶ 5.

172. *Id.*

those license plates.¹⁷³ However, the Utah Supreme Court did not address the First Amendment constitutionality of the state's right to restrict speech on government-issued license plates.¹⁷⁴

In March of 2015, the Supreme Court heard arguments on the legality of the Texas specialty license plate program.¹⁷⁵ A specialty license plate program provides individuals with a variety of license plate designs and offers “drivers willing to pay an extra fee . . . a ‘specialty’ plate containing a specialized design or message.”¹⁷⁶ Specialty license plates differ from vanity license plates, in that specialty license plates allow individuals to design the entire license plate that others individuals can purchase,¹⁷⁷ whereas, vanity license plates allow one individual to customize his or her letters or numbers used on the license plate to identify the vehicle registration.¹⁷⁸

In the *Walker III v. Texas Division, Sons of Confederate Veterans, Inc.* oral argument, the Supreme Court sought an answer to whether the government had an interest in regulating speech on specialty license plates.¹⁷⁹ According to Stephen Baird, there are “five . . . substantial government interests served by denial of” offensive and disparaging trademarks.¹⁸⁰ These interests are “preventing the [trade]marks from: (1) carrying the imprimatur of the federal government, (2) receiving the support of public funds, (3) being the subject of exclusive ownership, (4) having their use encouraged through the trademark registration scheme, and (5) interfering with the public's health and welfare.”¹⁸¹ Similarly, Corey Brettschneider and Nelson Tebbe argue Texas has a substantial interest in banning the Confederate flag, because “[Texas] wanted to avoid even the risk of seeming complicit in official nostalgia for the institution of slavery.”¹⁸²

Additionally, in *Berger v. American Civil Liberties Union of North Carolina*, the Supreme Court has been asked to decide whether North Carolina

173. *Id.* ¶ 18.

174. *See generally McBride*, 1999 UT 9, 977 P.2d 467.

175. *See generally* Transcript of Oral Argument, *Walker III v. Tex. Div., Sons of Confederate Veterans*, 576 U.S. ____ (2015) (No. 14-144), http://www.supremecourt.gov/oral_arguments/argument_transcripts/14-144_5i36.pdf.

176. *Id.* at *4.

177. *See id.* at *4–5.

178. *See Perry v. McDonald*, 280 F.3d 159, 163 (2d Cir. 2001).

179. Transcript of Oral Argument, *supra* note 175, at 24.

180. Lefstin, *supra* note 73, at 683.

181. *Id.* at 683–84.

182. Corey Brettschneider & Nelson Tebbe, Opinion, *A License to Say Anything?*, N.Y. TIMES (Jan. 9, 2015), http://www.nytimes.com/2015/01/10/opinion/a-license-to-say-anything.html?_r=0.

rightfully barred a specialty license plate containing the phrase “Choose Life.”¹⁸³ However, unlike in *Walker III*, “there is no strong government interest in denying pro-choice messages. The right to terminate a pregnancy is currently enshrined in law; the government does not have an important interest in preventing citizens from advertising their existing rights.”¹⁸⁴ However, the government has a strong interest in disassociating itself with offensive and disparaging speech that a “substantial composite of the general public” finds offensive.¹⁸⁵ By content discriminating against offensive and disparaging speech, the government is able to disassociate itself with such speech.¹⁸⁶ Therefore, the government has an interest in disassociating itself from the Washington Redskins, because the government found the team’s name offensive to the substantial composite of the Native American population. Conversely, no strong governmental interest exists in denying a trademark like the Philadelphia Eagles because the substantial population does not find the speech offensive.¹⁸⁷

IV. CONCLUSION

Although the commercial law doctrine prevented challenges to section 2(a) of the Lanham Act at its inception, the Lanham Act still survives First Amendment challenges. The government’s protection to trademarked products provides a governmental benefit to private parties, which thereby allows the government to engage in content-based discrimination. Additionally, the government has greater power to regulate speech when it occurs in a non-public forum. When the government does not open a forum for speech and does not want private speech to be associated with it, the government has the authority to restrict speech. The primary purpose of the Lanham Act is to ensure stability in the goods and services market. Trademark law is not a forum created by the government for the sole purpose of expression. Trademarks’ similarity with vanity license plates, for which the government allows content-based speech restriction, provides strong reasoning that section 2(a) of the Lanham Act will survive the constitutional challenges by the Washington Redskins.

183. *Id.*; *US Supreme Court Keeps NC ‘Choose Life’ License Plates Alive*, ALLIANCE DEFENDING FREEDOM (June 29, 2015), <http://www.adfmedia.org/News/PRDetail/9688>.

184. Brettschneider & Tebbe, *supra* note 182.

185. *In re McGinley*, 660 F.2d 481, 485 (C.C.P.A. 1981) (citing *Riverbank Canning Co.*, 95 F.2d 327, 329, n.7 (C.C.P.A. 1938)).

186. *See* Brettschneider & Tebbe, *supra* note 182.

187. *See McGinley*, 660 F.2d at 485; Brettschneider & Tebbe, *supra* note 182.