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Brief of Amici Curiae Fred T. Korematsu Center for Law and Equality, et al in Support of Defendants-Appellees and Affirmance

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No. 15-1874

**IN THE
UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT**

PRO-FOOTBALL, INC.,

Plaintiff-Appellant,

v.

**AMANDA BLACKHORSE, MARCUS BRIGGS-CLOUD,
PHILLIP GOVER, JILLIAN PAPPAN, & COURTNEY TSOTIGH,**

Defendants-Appellees,

and

UNITED STATES OF AMERICA

Intervenor.

**ON APPEAL FROM THE UNITED STATES DISTRICT
COURT FOR THE EASTERN DISTRICT OF VIRGINIA,
ALEXANDRIA DIVISION**

**BRIEF OF AMICI CURIAE FRED T. KOREMATSU CENTER
FOR LAW AND EQUALITY, NATIONAL NATIVE
AMERICAN BAR ASSOCIATION, NATIONAL ASIAN
PACIFIC AMERICAN BAR ASSOCIATION, NATIVE
HAWAIIAN BAR ASSOCIATION, AND CALIFORNIA
INDIAN LAW ASSOCIATION IN SUPPORT OF
DEFENDANTS-APPELLEES AND AFFIRMANCE**

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure and Local Rule 26.1(b)(1), *amici* the Fred T. Korematsu Center for Law and Equality, National Native American Bar Association, National Asian Pacific American Bar Association, Native Hawaiian Bar Association, and California Indian Law Association each states that it is not a publicly-held corporation, does not issue stock, and does not have a parent corporation.

RULE 29(C)(5) STATEMENT

This brief was not prepared, in whole or in part, by counsel for any party; neither a party nor a party's counsel has contributed money intended to fund preparation or submission of this brief; and no person, other than *amici* and its counsel, contributed money to prepare this brief.

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I. INTERESTS OF AMICI CURIAE

The Fred T. Korematsu Center for Law and Equality (the “Korematsu Center”), National Native American Bar Association, National Asian Pacific American Bar Association, Native Hawaiian Bar Association, and California Indian Law Association, respectfully submit this brief in support of the Defendants-Appellees, Blackhorse et al.¹

The Korematsu Center is a nonprofit organization based at Seattle University School of Law and works to advance justice through research, advocacy, and education. The Korematsu Center is dedicated to advancing the legacy of Fred Korematsu who defied military orders during World War II that led to the internment of 110,000 Japanese Americans, and later became an advocate for the civil rights of other victims of excessive government action. The Korematsu Center has a strong interest in ensuring that our courts, laws, and government do not become active participants in perpetuating discrimination. The Korematsu Center does not, in this brief or otherwise, represent the official views of Seattle University.

The National Native American Bar Association (NNABA) is the oldest and largest association of predominantly Native American attorneys in the United States. Founded in 1973 when the first group of Native American attorneys was

¹ All parties have consented to the filing of this brief under Rule 29(a) of the Federal Rules of Appellate Procedure.

entering the legal profession, NNABA represents the interests of approximately 2,700 Native American attorneys. NNABA's core mission since its inception has been to promote the development of Native American attorneys who share the communal responsibility of advancing justice for Native Americans. NNABA seeks to ensure that the government does not become a partner in advancing harmful racial slurs.

The National Asian Pacific American Bar Association (NAPABA) is the national association of Asian Pacific American attorneys, judges, law professors, and law students. NAPABA represents the interests of over 50,000 attorneys and approximately 75 national, state, and local bar associations. Its members include solo practitioners, large firm lawyers, corporate counsel, legal service and non-profit attorneys, and lawyers serving at all levels of government. Since NAPABA's inception in 1988, it has promoted justice, equity, and opportunity for Asian Pacific Americans as the national voice for Asian Pacific Americans in the legal profession. These efforts have included civil rights advocacy on various fronts. In furtherance of its mission to promote justice, equity, and opportunity for Asian Pacific Americans, NAPABA seeks to ensure that the government does not become a partner in advancing harmful racial slurs.

The Native Hawaiian Bar Association (NHBA) is an association of lawyers, judges, and other legal professionals of Hawaiian ancestry that promotes

excellence, unity, cooperation, education, and the exchange of ideas among its members and in the larger community. Formed in 1992, NHBA strives for justice and effective legal representation for Native Hawaiians. Their mission is to heighten dialogue and interaction between Native Hawaiian legal professionals and the larger community. NHBA seeks to ensure that the government does not become a partner in advancing harmful racial slurs.

The California Indian Law Association (CILA) was formed with the purpose of serving as the representative of the Indian law legal profession in California. CILA is dedicated to enhancing the legal profession and tribal justice systems in California and strives to promote the sound administration of justice to advance the status of Indian tribes and American people in the law. CILA is dedicated to helping Indian tribes in California achieve self-determination, self-sufficiency, and to protect tribal sovereignty. CILA seeks to ensure that the government does not become a partner in advancing harmful racial slurs.

II. INTRODUCTION AND SUMMARY OF THE ARGUMENT

Race still matters in this country. For many, that is not an easy concept to accept, given how far removed we are from the Trail of Tears, slavery, and Jim Crow. And so instead of addressing it, oftentimes we resort to distractions, or fall back on academic debates about principles that do not apply but which make it easy to ignore this uncomfortable truth. But the vestiges of racism are all around us. This case is just one example.

For centuries Native Americans² have been arguably the most marginalized group in the United States. While the efforts of other racial groups to overcome their own marginalization are far from over, in some ways the Native American community is still just beginning. Among major ethnic groups in America, Native Americans rank at or near the bottom in income per capita, high school graduation rates, and political representation, and suffer from the highest poverty rate and the highest unemployment rate. The child born in America with the lowest probability of ever achieving the American dream or self-determination is the Native American child. And unfortunately that statement has been true for a very long time.

² *Amici* use the term Native Americans throughout this brief to refer interchangeably and collectively to American Indian, Alaska Native, and Native Hawaiian peoples.

It is against this historical backdrop of marginalization that a \$2.85 billion professional sports team has proudly used a racial slur against Native Americans as its team name. The word “redskins” was around long before Pro-Football, Inc. (PFI or “the Team”) adopted it as its name, logo, and mascot. It has always been clear that the term has been used to dehumanize a group of human beings living in America. Like calling African Americans “niggers” and Latinos “spics”—words that long ago fell out of favor in common lexicon precisely because of their negative effects on those groups—Native Americans have suffered the indignity of being called “redskins” by those who would diminish their humanity.³ The main difference, however, is that Native Americans *continue* to suffer this indignity in the common lexicon. PFI would never call itself the “Washington Spics,” and then have the audacity to argue that it is okay because there is no proof that a “substantial composite” of Latinos find that term offensive.

This case is not about Free Speech, no matter how many colorful *non sequiturs* PFI includes in its brief. Those arguments are distractions, because

³ *Amici* recognize the odious, abhorrent, and offensive nature of these racist slurs, even when they appear in a legal brief that describes their harm and repudiates them. Nevertheless, *amici* use the slurs themselves, rather than their abbreviations, not to be incendiary or exploitative, but to demonstrate a point: as a society, we are far more uncomfortable with certain slurs, such as those that discriminate against African Americans and Latinos, whereas the slur against Native Americans is almost quotidian. This highlights just how invisible Native Americans are from mainstream society, how marginalized they are, and why the government has a strong interest in ensuring that it does not facilitate or contribute to their continued discrimination, dehumanization, and marginalization.

regardless of how this Court rules, PFI can still sell hats, jerseys, helmets, and footballs bearing the emblem of a racist anachronism. PFI has the right to use dehumanizing speech, and no one is trying to take away that right.

But Congress made a policy decision not to register trademarks that disparage. The government has a strong interest in ensuring that it is not viewed as advancing or promoting racial discrimination in commerce, and it is entitled to ensure that its own programs, power, and official symbols—like the federal trademark registry—play no part in such discrimination. The importance of this interest is perhaps best evidenced by the policies implemented the U.S. Board of Geographic Names.⁴ Dead Negro Draw, Texas, ostensibly honors black soldiers who died during a battle, except that it used to be called Dead Nigger Creek on federal maps, until the U.S. Board of Geographic Names intervened.⁵ Over 30 place names in America were originally called “Niggerhead” on federal maps, but most of those names were changed to swap out “Nigger” for Negro, such as Negro Ben Peak, Arizona—“named after a miner known as ‘Nigger Ben McClendon.’”⁶ As late as 1974, there were 200 place names on federal maps that still referenced

⁴ As discussed below, Title II of the 1964 Civil Rights Act is another strong example of the government disavowing harmful racial discrimination in commerce.

⁵ Jennings Brown & Tal Reznik, *Racial Slurs Are Woven Deep Into The American Landscape*, VOCATIV, Oct. 29, 2015, <http://www.vocativ.com/news/244179/racial-slurs-are-woven-deep-into-the-american-landscape/>.

⁶ *Id.*

“Japs,” and even today there are 30 places on federal maps named “Chinaman.”⁷ And until last year, a lake and creek in Washington were called Coon Lake and Coon Creek, respectively, on federal maps. This example shows that when the government creates programs like the federal trademark registry or publishes maps, it may decline to allow others to use them in a manner that contributes to discrimination.

The government’s decision to not subsidize racial discrimination does not implicate the First Amendment because PFI can still express whatever message it wants. But to the extent the decision to cancel PFI’s trademark registrations implicates First Amendment principles, that decision should survive PFI’s facial challenge against Section 2(a) of the Lanham Act given the government’s important interests in not facilitating the debilitating effects of racism.

Affirming the decision below would not be a vote to silence speech or carve apart the First Amendment. It would be an acknowledgement that race still matters in America, and that when it comes to Native Americans, the government ought to start doing something about their marginalization. The government’s decision to cancel PFI’s trademark registrations is one place to start.

⁷ *Id.*

III. ARGUMENT

A. “Redskins” Is a Disparaging Racial Slur, Akin to “Nigger” or “Spic.” That Matters Because the Impacts of Such Blatant Racial Discrimination Are Real and Significant. The Government Can Decline to Promote, Endorse, Facilitate or Associate Itself With Such Discrimination, Particularly Through the Use of One of Its Own Programs.

1. “Redskins” is as bad as “spic” or “nigger.”

Buried at the very end of PFI’s brief, behind a litany of dystopian (but irrelevant) First Amendment analogies, is its most remarkable argument of all: the notion that the term “redskins” is not disparaging at all. This argument is not credible.

First, “redskins” was historically used as a reference to Native Americans during a time when cash bounties were paid for their scalps.⁸ In the same way that other slurs are used to express animus towards marginalized groups, “redskins” conveys animus and hatred toward Native Americans. It is to Native Americans

⁸ See *Value Of An Indian Scalp: Minnesota Paid Its Pioneers a Bounty for Every Redskin Killed*, LOS ANGELES HERALD 26 (Oct. 24, 1897) (“[T]he state treasury once paid out cash as counties for Sioux Indian scalps, just as [it would pay] for wolf scalps.”); see also Note, *A Public Accommodations Challenge to the Use of Indian Team Names and Mascots in Professional Sports*, 112 Harv. L. Rev. 904, 912 n.64 (1999) (quoting Letter from Lawrence R. Baca, Chairman, Indian Law Section of the Federal Bar Association, to John Hope Franklin, Chairman, President’s Advisory Board on Race Relations 2 (June 30, 1997) (on file with Harvard Law Library)) (HEREINAFTER “*Indian Team Names*”).

what “nigger” is to African Americans.⁹ That is the *sine qua non* of disparagement.

Second, it is unlikely that when the Team adopted the name “redskins” in 1932 that it was doing so as an homage to Native Americans. In fact, the next year the Team’s owner, “George Preston Marshall instituted what would become a 13-year league-wide ban on African-American players from the NFL.”¹⁰ It took 30 years—until 1962—for the Team to integrate and finally accept its first African American players, the last NFL team to do so.¹¹

Ironically, the reason the Team desegregated and began signing non-white players was because “[t]he Redskins were preparing to move into a new stadium being built on federally controlled land affiliated with the national parks system,” and the government stipulated that the Team had to integrate to use the new stadium.¹² As the Team integrated in 1962, the Team’s owner lamented that “the

⁹ See Gyasi Ross, “Redskins”: A Native’s Guide to Debating an Inglorious Word, DEADSPIN, Oct. 16, 2013, <http://deadspin.com/redskins-a-natives-guide-to-debating-an-inglorious-1445909360>; *Indian Team Names* at 912 n.65 (quoting Lawrence R. Baca, *What About the Indian Country “N” Word?* 2 (Nov. 17, 1998) (unpublished manuscript, on file with the Harvard Law School Library)).

¹⁰ Nat’l Cong. of Am. Indians, *Ending the Legacy of Racism in Sports & the Era of Harmful “Indian” Sports Mascots*, NCAI 2 (Oct. 2013), http://www.ncai.org/resources/ncai-publications/Ending_the_Legacy_of_Racism.pdf.

¹¹ See Ryan Basen, *Fifty Years Ago, Last Outpost of Segregation in N.F.L. Fell*, N.Y. TIMES, Oct. 6, 2012, <http://www.nytimes.com/2012/10/07/sports/football/50-years-ago-redskins-were-last-nfl-team-to-integrate.html>.

¹² *Id.*

government had the right to tell a showman how to cast the play.”¹³ Five years later, the Team filed for the first of its Redskins federal trademarks.

Third, when applied to the real world, PFI likely does not believe its own argument (which should raise questions about the rest of its case theory). For instance, *amici* encourage the panel to ask PFI whether it would tolerate if one of its human resources managers described a Native American candidate for employment as a “redskin.” (*E.g.*, “A redskin applied for the opening in accounting.”) Or if a PFI owner would condone her daughter referring to her Native Americans classmates or teachers as “redskins.”

The bottom line is this: PFI is likely to admit that it would *never* be appropriate to look a Native American in the eye and call her a “redskin,” just like it would never be appropriate to call a Latino a “spic” or an African-American person a “nigger.”¹⁴ Because it’s racist. These racist connotations do not go away the second one associates the term with a football team. Calling their team the “Washington Spics” or the “Washington Niggers” would not transform those terms

¹³ *Id.*

¹⁴ *Cf. Rodgers v. W.-S. Life Ins. Co.*, 12 F.3d 668, 675 (7th Cir. 1993) (“Perhaps no single act can more quickly ‘alter the conditions of employment and create an abusive working environment’ . . . than the use of an unambiguously racial epithet such as ‘nigger’ by a supervisor in the presence of his subordinates.” (citations omitted)); *Baily v. Binyon*, 583 F. Supp. 923, 927 (N.D. Ill. 1984) (“The use of the word ‘nigger’ automatically separates the person addressed from every non-black person; this is discrimination *per se*.”).

into honorifics. When applied outside the context of their legal brief, PFI's suggestion that its use of "redskins" is not disparaging simply falls apart.

2. Given the pernicious effects of racism, Congress can validly make the policy decision not to endorse, promote, or facilitate racist trademarks through its own program.

PFI belittles the impacts of racism, likening its team name to pornographic trademarks, and suggesting that if these other marks are appropriate, then surely its mark passes muster. This is a facile argument.

i. The deleterious effects of racism on a person's dignity have been undisputed for the past half-century. For instance, laws banning discrimination in public accommodations, such as Title II of the Civil Rights Act of 1964 ("Title II")¹⁵ and state laws like Washington state's Law Against Discrimination,¹⁶ were enacted "to vindicate the deprivation of personal dignity that surely accompanies denials of equal access to public establishments."¹⁷ They were enacted to ensure that government's power to regulate commerce was used to combat racial discrimination—rather than promote it.

¹⁵ 42 U.S.C. § 2000a.

¹⁶ Wash. Rev. Code § 49.60.

¹⁷ *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241, 250 (1964) (quoting S. Rep. No. 88-872, at 16-17 (1964), reprinted in 1964 U.S.C.C.A.N. 2355, 2370); Wash. Rev. Code § 49.60.010 (the WLAD recognizes that race and sexual orientation discrimination "threatens not only the rights and proper privileges of its inhabitants but menaces the institutions and foundation of a free democratic state").

Indeed, the legislative history accompanying Title II reveals that Congress's primary intent was, in fact, to address racism's deleterious effects on a person's dignity.¹⁸ And in his "Letter from a Birmingham Jail," Dr. Martin Luther King, Jr. described the devastating toll racism in public accommodations inflicts on children:

[Y]ou suddenly find your tongue twisted and your speech stammering as you seek to explain to your six-year old daughter why she cannot go to the public amusement park that has just been advertised on television, and see tears welling up in her little eyes when she is told that Funtown is closed to colored children, and see the depressing clouds of inferiority begin to form in her little mental sky¹⁹

Back in the 1960s, in a not-so-distant echo of the arguments PFI raises here, proponents of racial discrimination challenged state and federal laws banning discrimination in public accommodations under the First Amendment, asserting they violated constitutional guarantees of free association and free exercise. But none of those challenges succeeded.

ii. The federal government's policies about how to name geographic locations provides a strong analogy to this case. Nigger Lake, New York; Wetback Tank Reserve, New Mexico; Chink's Peak, Idaho; Squaw Tit, Nevada. Those are

¹⁸ S. Rep. No. 88-872, at 16-17 (1964), *reprinted in* 1964 U.S.C.C.A.N. 2355, 2370.

¹⁹ Martin Luther King, Jr., *Letter from a Birmingham Jail* 6-7 (Apr. 16, 1963), *reprinted in* WHY WE CAN'T WAIT 76 (1964).

just a few of the thousands of place names in the United States that had racially derogatory names. The elders in *amici*'s respective organizations are all too familiar with living their daily lives in the shadows of these racist place names. The shadows cast by these names were made darker because these racist place names were "approved" by the federal government and appeared on federal maps.

In order to distance itself from promoting or approving racism, the government has adopted a mechanism by which the United States Board of Geographic Names (the Board) can change the name as it is reported on federal maps after a name change proposal is received—particularly where the existing name is based on a racist slur.²⁰ This mechanism ensures that neither the government nor its official signage and maps are associated with racial discrimination.

In fact, in the 1960s the Board began altering place names that contained racial slurs such as "Nigger" or "Jap."²¹ And for decades the Board's guidelines have specifically prohibited the word "Jap" or "Nigger," "whether or not it is

²⁰ See Donald J. Orth & Roger L. Payne, *Principles, Policies, and Procedures: Domestic Geographic Names*, U.S. BOARD ON GEOGRAPHIC NAMES 21-22 (1997), http://geonames.usgs.gov/docs/pro_pol_pro.pdf (HEREINAFTER "*Domestic Geographic Names*"); see also 43 U.S.C. § 364.

²¹ See Michael Muskal, *In Washington and Oregon, offensive names of places are quietly taken off the maps*, L.A. Times, Nov. 16, 2015, available at <http://www.latimes.com/nation/la-na-racist-maps-20151116-story.html>.

current local usage and regardless of by whom proposed.”²² Of course, locals remain free to call places whatever they want. But the federal government will not participate in furthering these private practices or be viewed as promoting racial discrimination by publishing racist names on federal maps and signage.

Like the authority vested in the Board to refuse to publish racist names on federal maps, the Patent and Trademark Office has authority to refuse to register and to rescind registrations of racially derogatory trademarks. And like the locals who remain free to call their place names whatever they want, PFI is free to use its racially derogatory name and trademarks. The federal government, however, may refuse to enable, promote, or associate itself with these usages through its own programs, as it does with racist place names.

iii. The government’s decision to decline to register racist slurs makes sense for all the same reasons that the government regulates discrimination in public accommodations and geographic place names—because the harms of disparagement are real. “Indian team names and mascots in particular have been charged with fostering ‘racial stereotyping,’ causing low self-esteem amongst American Indians, and setting up Indian children as targets for physical harassment by their peers.”²³ And that’s not all:

²² *Domestic Geographic Names* at 22.

²³ *Indian Team Names*, supra note 8, at 911 (footnotes omitted).

The studies suggest that American Indian mascots have harmful psychological consequences for the group that is caricatured by mascots. This is true whether . . . the mascot represented an American Indian university, a mainstream university, or a professional sports team.

.....

American Indian mascots thus remind American Indians of the limited ways in which others see them. Moreover, because identity construction is not solely an individual process (i.e., you cannot be a self by yourself), the views of American Indians held by others can also limit the ways in which American Indians see themselves.²⁴

The bombardment of slurs has a lasting negative effect on Native Americans, not only “threaten[ing] the psychological functioning of American Indians” but also “facilitating the expression of discriminatory and explicitly racist attitudes toward American Indians” by non-Native people.²⁵ As Professor Steinfeldt explained to Congress:

Having a cultural icon like Chris Berman provide colorful commentary on Washington’s pro football team doesn’t mean that such a hateful racial [epithet] (*i.e.*, Redskin) doesn’t hurt people—rather, it means that the people using this hateful term have become desensitized to the fact that they are hurting people with their historical tradition of dishonor. Despite how members of mainstream society want to frame the issue, this is NOT

²⁴ Stephanie A. Fryberg, et al., *Of Warrior Chiefs and Indian Princesses: The Psychological Consequences of American Indian Mascots*, 30 BASIC & APPLIED SOC. PSYCHOL. 208, 216 (2008).

²⁵ *Stolen Identities: The Impact of Racist Stereotypes on Indigenous People: Hearing Before the S. Comm. on Indians Affairs* 112 Cong. 69 (2011) (prepared statement of Jesse A. Steinfeldt, Assistant Professor, Indiana University-Bloomington).

an issue of mere sensitivity, offensiveness, or “political correctness.” Rather this is an issue involving oppression, stereotyping, and inflicting psychological harm[.]²⁶

Indeed, the human costs of racism that Dr. King described are not limited to those contexts where an accommodation is denied. If a hotel clerk begrudgingly accepts African-American and Native American patrons, but calls each one a “nigger” and a “redskin,” those harms are not cut off at the front desk; a father is still left with the unenviable task of explaining to his daughter, “tongue twisted and [his] speech stammering,” why those terms are still accepted as normal parlance in 2016.²⁷ Likewise, if hotels (and sports teams) admit minorities, but use names like “Redskins Inn,” “Nigger Inn,” or “Spic Inn”—and even get such names federally-registered as trademarks—the impact is similar to a denial of public accommodations.

“When the symbol for a federally registered trademark, ®, is affixed to a mark, it is a declaration by the federal government that it has *approved* that mark.” *Pro-Football, Inc. v. Blackhorse*, 112 F. Supp. 3d 439, 461 (E.D. Va. 2015). PFI tries to downplay the significance of this federal approval. At the same time,

²⁶ *Id.*

²⁷ *See Jones v. City of Boston*, 738 F. Supp. 604, 605 (D. Mass. 1990) (noting that calling patron a “nigger” at a bar—despite serving him—still satisfies the Title II requirement “of showing that he was denied equal access to a place of public accommodation on the basis of race” because “[t]he term ‘nigger’ is intimidating by its very nature”).

however, PFI asserts that cancelling its registration based on the notion that “‘Redskins’ disparages Native Americans tarnishes the Team’s name,” which is an acknowledgement that *federal approval* helps inoculate PFI against charges of racism. *See* Opening Br. of App. at 44. Explicit federal approval of a racist mark is not a right under any cognizable First Amendment theory. But that’s the world PFI wants to create: a world where “Spic Beans” could get a federal trademark, “Nigger Head Ice Cream” could get a federal trademark, and the “Washington Redskins” could maintain their federal trademark.

And so, the Native American father must still explain to his daughter why it remains acceptable for others to think nothing of calling their people “redskins” on SportsCenter, and why the federal government has approved and endorsed the use of its ® next to a slur and done nothing to distance itself from such racial discrimination.

B. The Government’s Decision to Cancel PFI’s Racist Trademark Does Not Violate the First Amendment.

1. Cancelling PFI’s trademark does not restrict any speech or expression.

No matter how the Court rules in this case, PFI can continue calling its team whatever it wants, and continue selling hats, jerseys, helmets, and footballs inscribed with its racist moniker. Because cancelling PFI’s trademark registrations “do[es] not burden, restrict, or prohibit PFI’s ability to use the marks,” PFI remains

free to continue making money off the commercialization of a dehumanizing slur.²⁸ But given the severe, tangible, and lasting impacts of racism, the government can refuse to endorse or facilitate PFI's intolerance by registering PFI's trademarks.²⁹ The government can also refuse to subsidize or facilitate PFI's ability to maximize profit from its racist mark as a valid exercise of its ability to set limitations on its own programs. *See Rust v. Sullivan*, 500 U.S. 173, 193-94 (1991) (finding that government may set limits on Title X spending program); *Regan v. Taxation with Representation of Wash.*, 461 U.S. 540, 546 (1983) (rejecting argument that government must subsidize First Amendment rights).

PFI does not credibly argue that the government must accept *every proposed trademark*, so long as it is unique. As with all its programs, the government has some discretion, and that discretion must be exercised reasonably. Here, given the racist underpinnings of PFI's marks and the impacts of racism (both explained in Section III.A. above), the government exercised its discretion, pursuant to Section 2(a), in a reasonable fashion. That decision is consistent with the government's

²⁸ *Pro-Football, Inc.*, 112 F. Supp. at 455; accord *Specialized Seating, Inc. v. Greenwich Indus., L.P.*, 616 F.3d 722, 728 (7th Cir. 2010) (noting that cancellation of registration "does not affect the mark's *validity*, because a trademark need not be registered to be enforceable"); *Volkswagenwerk Aktiengesellschaft v. Wheeler*, 814 F.2d 812, 819 (1st Cir. 1987) ("[T]he cancellation of a trademark registration does not extinguish common law rights that registration did not create.").

²⁹ *Cf. Ysura v. Pocatello Educ. Ass'n.*, 555 U.S. 353, 355 (2009) (noting difference between "abridging" and "declining to promote" free speech).

other anti-discrimination policies with respect to racism, such as ensuring equal access to public accommodations.

Cancelling's PFI's registrations does not restrict speech. Unlike denial of a parade license, which affirmatively *prevents* expression, PFI cannot identify a single act of speech that it would be unable to express if the decision below were affirmed. PFI's reliance on *Sorrell v. IMS Health Inc.*, 131 S. Ct. 2653 (2011), is misplaced. There, the Court invalidated a Vermont law that “forb[ade],” “bar[red],” “prohibit[ed],” and “prevent[ed]” pharmacies from selling certain marketing information and pharmaceutical sales companies from using this information in their marketing activities. *See id.* at 2663. It is axiomatic that a law that prohibits or prevents parties from saying certain things qualifies as a “specific, content-based burden on protected expression” because it involves direct obstacles and restrictions placed by the government in the path of “speech.” *See id.* at 2664. That is not the issue here, because even if the Court affirms, PFI could still use the same name, logo, and mascot.

PFI has not identified any First Amendment principle that entitles it to government assistance in enforcing its trademarks. Simply because the government is not *helping* PFI express itself, does not mean that PFI is unable or somehow obstructed from expressing its ideas—no matter how odious they may be. Nevertheless, PFI likens the cancellation of its trademarks to the government

“turn[ing] the lights off at a Redskins night game . . . and defend[ing] the action because the Redskins can still play in the dark.” Opening Br. of App. at 5. That is an inapt analogy. Cancelling its registration does not block PFI from using the Redskins name, selling memorabilia featuring that slur, or drafting and signing players to compete on their team. PFI even admits that losing its registration does not prevent it from going after those PFI believes is infringing on its mark. No one’s turned off the lights.

Cancellation simply means the government will not affirmatively allow its own program to be used to endorse, promote, or subsidize PFI’s ability to capitalize of its mark, or help PFI stop those who might use the mark in a different way. *See Regan*, 461 U.S. at 546 (“We again reject the notion that First Amendment rights are somehow not fully realized unless they are subsidized by the State.” (citation and quotations omitted)); *Ysursa*, 555 U.S. at 359 (“[T]he State’s decision not to [provide deductions for union dues] is not an abridgment of the unions’ speech; they are still free to engage in such speech as they see fit. They simply are barred from enlisting the State in support of that endeavor.”); *Lyng v. Int’l Union, United Auto., Aerospace & Agric. Implement Workers of Am., UAW*, 485 U.S. 360, 366 (1988) (rejecting First Amendment challenge to law barring certain workers who are on strike from receiving food stamps).

PFI's insistence that the government help PFI defend its marks is where PFI's First Amendment argument capsizes. PFI is not looking to *protect* speech; it wants to *curtail* speech by having a federally-recognized trademark it can use to silence its critics. PFI is afraid of the inevitable counter-speech that it predicts will "infringe or dilute the communicative value of [its] marks." Opening Br. of App. at 11. Admittedly, in the wake of the cancellation, other speakers may be emboldened to challenge PFI's marks in the marketplace of ideas by caricaturing it, or by trying to re-appropriate "redskins" for the Native American community. Regardless of the nature or scope of this counter-speech, it will be up to PFI to defend its marks, and PFI admits that post-cancellation it will still have the legal means of doing so. Opening Br. of App. at 19. If PFI's mark is truly distinctive then the common law will still protect it from infringement; and if PFI's mark truly reflects non-discriminatory messages, then PFI has little to fear from potential counter-speakers trying to "dilute" its message. But the First Amendment's Free Speech Clause does not, *ipso facto*, entitle PFI to government protection against the speech that *others* might engage in that may (or may not) dilute its trademark.

2. Section 2(a) does not implicate the doctrine of unconstitutional conditions.

A federally recognized trademark is a public benefit, and the government may not condition the receipt of that benefit on a condition that "effectively prohibit[s] the recipient from engaging in [constitutionally] protected conduct

outside the scope of the federally funded program.” Rust, 500 U.S. at 197 (emphasis added). PFI asserts that the government’s decision to cancel its trademark imposes an unconstitutional condition on protected speech. Opening Br. of App. at 31-32. But the doctrine of unconstitutional conditions does not apply here because PFI’s speech “*outside the scope of the federally funded program*” is not restricted in any way.

The distinction between imposing conditions on a government *program* and on a *recipient* of that program’s benefits is critical. For instance, in *Rust* the Court explained how Congress’s decision to prohibit federal funds from being used on abortions as a condition for receiving Title X funds was not an unconstitutional condition because *recipients* of Title X funds could still perform abortions, *using non-federal funds*, and still be eligible for the program. 500 U.S. at 196. By contrast, had Congress stated that no recipient of federal funds under Title X could perform abortions no matter what—even outside the context of that recipient’s use of Title X funds—that would have been an unconstitutional condition targeted at the recipient’s rights to engage in constitutional conduct outside the scope of Title X, rather than a discretionary limit on a federal program.

Likewise, in *Lyng*, the Court upheld the constitutionality of the Food Stamp Act, even though that legislation stated “that no household shall become eligible to participate in the food stamp program” if a member of the household is on strike.

485 U.S. at 362. The Court acknowledged that although “[d]enying such benefits makes it harder for strikers to maintain themselves” and even “exerts pressure on them” to stop striking, “the strikers’ right of association does not require the Government to furnish funds to maximize the exercise of that right.” *Id.* at 368; *see also Bd. of Dirs. of Rotary Int’l v. Rotary Club*, 481 U.S. 537, 548 (1987) (rejecting First Amendment challenge to law requiring Rotary Clubs to admit women because the law “does not require the clubs to abandon or alter” any of their activities or their basic goals).

Like Title X and the Food Stamp Act, Section 2(a) of the Lanham Act is a reasonable limitation on a federal *program* (trademark registration), rather than an unconstitutional condition on *recipients* of that program. There is no extraneous consequence to a registrant who uses a trademark that the federal government refuses to register. Whether or not the government cancels PFI’s federal trademarks, the Team can continue to call itself the Redskins, and still register *any other trademarks* it wishes (so long as those trademarks independently qualify). In fact, PFI could still use the Lanham Act’s other provisions to enforce its trademarks.³⁰

Put differently, engaging in speech that the government refuses to register as trademarks does not *disqualify* PFI from using the Lanham Act to register and

³⁰ *See* 15 U.S.C. § 1125(a).

enforce trademarks. It is simply a narrow limitation on PFI's ability to force the government to publish this *one mark* in the federal register.

3. Section 2(a) does not chill speech.

PFI's assertion that Section 2(a) chills speech also has no merit. An indirect burden on speech can chill speech enough to trigger heightened scrutiny. *See Sorrell v. IMS Health Ins.*, 131 S. Ct. 2653, 2664 (2011). In *Sorrell*, the Court found that because Vermont barred pharmaceutical manufacturers and detailers from buying, selling, using, or in any way disclosing valuable marketing information to physicians, this had the effect of chilling First Amendment exercise because it essentially took certain words right out of the speakers' mouths. *Id.* at 2663. ("Vermont's law thus has the effect of preventing detailers . . . from communicating with physicians in an effective and informative manner."). That is a far cry from this case.

Unlike the regulation at issue in *Sorrell*, Section 2(a) has not erected any barriers in PFI's path to express whatever message it wishes to express. *Sorrell* would apply if cancellation meant that PFI could no longer *use* its trademark. But unlike *Sorrell*, PFI is in the same First Amendment position it was in before the Lanham Act was enacted. The notion that the government chills speech every time it declines to endorse or subsidize speech is foreign to First Amendment jurisprudence.

4. Section 2(a) is viewpoint neutral.

According to PFI, Section 2(a) is viewpoint-based discrimination, and therefore subject to strict scrutiny, “because it regulates speech based on a ‘particular point of view.’” Opening Br. of App. at 14 (quoting *FCC v. League of Women Voters of Cal.*, 468 U.S. 364, 383-84 (1984)). Setting aside PFI’s flawed premise that Section 2(a) *regulates* speech (it does not regulate, much less restrict, any messages), as written and as applied, Section 2(a) is viewpoint neutral.

Viewpoint-based discrimination occurs when laws target “the specific motivating ideology or the opinion or perspective of the speaker.” *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 829 (1995). But here, Section 2(a) prevents the registration of any trademark—regardless of the viewpoint—that “disparage[s] . . . persons, living or dead.” 15 U.S.C. § 1052(a). For example, a Native American organization trying to *re-appropriate* the term *redskins*—i.e., the opposite side of PFI in this debate—would similarly be barred from registering a trademark bearing this term. In fact, the Trademark Trial and Appeal Board (TTAB) denied registration to a band comprised of Asian musicians trying to re-appropriate the term “slants,” a racial slur against Asians. *In re Tam*, 108 U.S.P.Q.2d 1305, 2103 WL 5498164, at*5-*8 (T.T.A.B. 2013), *aff’d*, 785 F.3d 567

(Fed. Cir. 2015), *vacated and remanded by*, 808 F.3d 1321 (Fed. Cir. 2015).³¹

Likewise, the TTAB denied registration to a Jewish magazine seeking to register “Heeb,” an anti-Semitic slur. *In re Heeb Media, LLC*, 89 U.S.P.Q.2d 1071 (T.T.A.B. 2008). General proscriptions against disparaging speech do not “give one group an advantage over another in the marketplace of ideas,” and are therefore viewpoint neutral. *Am. Freedom Def. Initiative v. Mass. Bay Transp. Auth.*, 781 F.3d 571, 582 (1st Cir. 2015), *cert. denied*, 135 S. Ct. 793 (2016) (citation omitted).

5. Even if Section 2(a) implicates free speech—and it does not—it is a valid regulation of commercial speech.

The only conceivable speech at issue here is commercial speech.³² The Court has loosely defined commercial speech as the “dissemination of information as to who is producing and selling what product, for what reason, and at what price.” *Va. State Bd. of Pharm. v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748, 765 (1976). As designations used to “identify and distinguish” a person’s goods, 15 U.S.C. § 1127 (defining “trademark”), trademarks fall within the

³¹ The federal circuit reversed the TTAB in *Tam*, concluding that Section 2(a) was viewpoint discriminatory. Amici respectfully disagree with that decision.

³² Even if, however, the Court were to find that trademarks are not commercial speech—and instead applies strict scrutiny to Section 2(a)—*amici* would argue that the government’s interest in avoiding the harms caused by disparaging trademarks is so compelling that Section 2(a) would survive strict scrutiny. Thus, though the arguments below are tailored to commercial speech, they apply equally to a strict scrutiny analysis.

commercial speech rubric. *See Dastar Corp. v. 20th Century Fox Film Corp.*, 539 U.S. 23, 34 (2003) (calling trademarks “source-identifying mark[s]”).

Because commercial speech holds a “subordinate position in the scale of First Amendment values,” it enjoys less First Amendment protection. *Fla. Bar v. Went For It, Inc.*, 515 U.S. 618, 623 (1995). Consequently, regulations of truthful, non-deceptive commercial speech are permissible if: (i) “the asserted government interest [behind the regulation] is substantial,” (ii) “the regulation directly advances the governmental interest asserted,” and (iii) “[the regulation] is not more extensive than is necessary to serve that interest.” *Cent. Hudson Gas & Elec. Corp. v. Pub. Service Comm’n of N.Y.*, 447 U.S. 557, 566 (1980). Even if this Court applies the *Central Hudson* framework, Section 2(a) survives scrutiny.

i. First, as outlined above, given our nation’s unfortunate history of mistreatment of racial minorities, particularly Native Americans, legislatures on the state and federal level repeatedly have concluded that combatting the degrading impacts of racism is a compelling state interest.³³ That is the underlying purpose

³³ *R.A.V. v. City of St. Paul, Minn.*, 505 U.S. 377, 395 (1992) (recognizing that “help[ing] to ensure the basic human rights of members of groups that have historically been subjected to discrimination, including the right of such group members to live in peace where they wish” is a compelling state interest); *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 396 (1978) (Marshall, J., concurring) (“In light of the sorry history of discrimination and its devastating impact on the lives of Negroes, bringing the Negro into the mainstream of American life should be a state interest of the highest order.”); *Ostergren v. Cuccinelli*, 615 F.3d 263, 277 (4th Cir. 2010) (“[A]lthough a state government might practice racial

of Title II of the Civil Rights Act, and the constellation of state analogues of that federal legislation.

Like Title II, the Lanham Act's objective is two-fold: first, to protect trademark holders; second, and more importantly, to protect, promote, and advance full participation in commerce by all consumers. *See* 15 U.S.C. § 1127.

Consistent with these objectives, the Lanham Act prohibits registration of trademarks that do not further these government interests and goals. Thus, in addition to prohibiting registration of marks which may disparage institutions or groups, Section 2(a) also prohibits registration of marks that are likely to cause confusion among consumers, implicate their privacy interests, or are otherwise misleading or deceptive—all things likely to harm consumers or impact their ability and desire to participate fully in commerce. *See* 15 U.S.C. § 1052.

Just like marks that confuse or mislead consumers, or marks that invade consumer privacy, marks that disparage individual or group identities have the effect of decreasing full consumer participation in commerce while also sending the message that the government is a participant in endorsing, advancing, and promoting that behavior. Section 2(a) alleviates these harms and directly advances the government's interests in distancing itself from racial discrimination thereby

discrimination for decades—and many have—we would not therefore be barred from considering racial equality a state interest of the highest order.” (citing *Bakke*, 438 U.S. at 396)).

discouraging the perpetuation of racial discrimination in commerce and encouraging full participation by all consumers in commerce.

ii. Denying registration directly advances the government's interest in not facilitating racial discrimination. As PFI itself acknowledges, the government's "approval" in the form of a federal trademark *helps* its brand; because that brand disparages Native Americans, a historically marginalized group, the government has a substantial interest not to *help* PFI express hateful messages.³⁴ A number of commercial speech cases have recognized substantial interests that are unavoidably entangled with government disapproval of a certain message.³⁵

Disparaging speech may have some value in certain First Amendment contexts, but the commercial speech context is not one of them. "Resort to epithets . . . is not in any proper sense communication of information or opinion safeguarded by the Constitution." *Cantwell v. State of Conn.*, 310 U.S. 296, 309-310 (1940). No First Amendment value is served by allowing PFI to use the federal registration system to more easily profit from labeling its brand, football team, cheerleaders, mascot, and apparel with a racist slur. *In re Tam*, 808 F.3d at 1367 (Dyk, J., concurring in part, dissenting in part).

³⁴ See *Sambo's Rests., Inc. v. City of Ann Arbor*, 663 F.2d 686, 695 (6th Cir. 1981) (noting that "racial harmony and equality is a substantial state interest").

³⁵ See, e.g., *Posadas de Puerto Rico Associates v. Tourism Co. of Puerto Rico*, 478 U.S. 328, 341 (1986) (discouraging gambling); *Ohralik v. Ohio State Bar Ass'n*, 436 U.S. 447, 466-67 (1978) (regulating in-person attorney solicitation).

Invalidating Section 2(a) would further have the incongruous effect of providing more protection to corporate entities when others misappropriate their marks while leaving marginalized groups like Native Americans unprotected while their identities are disparaged, denigrated, and exploited by others for profit. And while Section 2(a) does not, on its face, seek to “protect underrepresented groups in our society from being bombarded with demeaning messages,” doing so serves the Lanham Act’s broader goal of facilitating interstate commerce.³⁶ Decisions upholding public accommodation laws lend analogous support for this proposition because in the same way discriminatory conduct has the power to exclude others from market participation, so does disparaging speech.³⁷

iii. Section 2(a) is also appropriately tailored. The First Amendment does not require that the fit between a commercial speech regulation and a substantial interest be “perfect” or “the least restrictive means.” *Bd. of Trs. of State Univ. of N.Y. v. Fox*, 492 U.S. 469, 480 (1989).

Section 2(a) is appropriately tailored because it does not impose a ban on *using* disparaging trademarks and it has nothing to do with creation of ownership

³⁶ *In re Tam*, 808 F.3d at 1364 (Dyk, J., concurring in part and dissenting in part); accord 15 U.S.C. § 1127.

³⁷ *E.g.*, *Katzenbach v. McClung*, 379 U.S. 294, 299-300 (1964) (finding discriminatory practices depressed spending in interstate commerce by African Americans); *Jones v. City of Boston*, 738 F. Supp. 604, 605 (D. Mass. 1990) (holding that use of a racial epithet shows an intent to discriminate on the basis of race and is sufficient to violate state public accommodations law).

“rights” in those marks (as those arise through use). And the Lanham Act’s statutory cancellation procedure places the burden on disparaged parties to bring challenges to cancel a mark. 15 U.S.C. § 1064. This helps ensure that registration will be cancelled only in those instances where marks are shown to be disparaging.

PFI and its *amici* suggest that Section 2(a) is not narrowly tailored because it is underinclusive. To make this point, PFI employs a crass but ultimately meaningless device: it highlights dozens of examples it describes as “misogynistic, vulgar, or otherwise offensive” marks registered by the Patent and Trademark Office. *See* Opening Br. of App. at 4, 24, 39-40. But likening racial slurs to “JIZZ underwear” and “ANAL FANTASY COLLECTION” is precisely the sort of distracting debasement that has allowed racial discrimination to continue in the first place. *Id.* at 4, 24. Moreover, PFI’s analogies are beside the point: failing to capture all offensive marks does not render Section 2(a)’s disparagement provision underinclusive; rather it shows that the registration prohibition is aimed squarely at disparaging marks and does not affect any more speech than necessary. *See Williams-Yulee v. Fla. Bar*, 135 S. Ct. 1656, 1661 (2015) (concluding because perfect tailoring is “impossibl[e]” that “the First Amendment does not confine a State to addressing evils in their most acute forms”).

In sum, even if the Court concludes that Section 2(a) implicates the First Amendment, its restrictions impact no more and no less commercial speech than necessary to achieve the government's goals.

IV. CONCLUSION

Racism is not a buzzword. It is real. And its impacts are far reaching, pernicious, and profound. That's the real issue in this case, and far more important than the colorful, but ultimately irrelevant academic debate PFI hopes the Court focuses on. *Amici* respectfully request that the Court affirm the decision below.

Dated: February 11, 2016

Respectfully submitted,

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**CERTIFICATION OF COMPLIANCE
PURSUANT TO FED. R. APP. 32(A)(7)(C) AND
CIRCUIT RULE 32-1 FOR CASE NO. 15-1874³⁸**

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4. *Amicus Briefs*

Pursuant to Fed. R. App. P. 29(d) and 9th Cir. R. 32-1, the attached amicus brief is proportionally spaced, has a typeface of 14 points or more and contains 7,000 words or less,

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DATED this 11th day of February, 2016

/s/ Elvira Castillo

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Indian Law Association

³⁸ The Clerk of the Court advised counsel for amici in a telephone call that statements of interest would not count towards the word count limit.

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I HEREBY CERTIFY that, on this 11th day of February, 2016, the foregoing Brief of Amici Curiae Fred T. Korematsu Center for Law and Equality, National Native American Bar Association, National Asian Pacific American Bar Association, Native Hawaiian Bar Association, and California Indian Legal Association in Support of Defendants-Appellees Amanda Blackhorse, Marcus Briggs-Cloud, Phillip Gover, Jillian Pappan, and Courtney Tsotigh, was filed electronically through the Court's CM/ECF system. Notice of this filing will be sent by e-mail to all parties by operation of the Court's electronic filing system.

/s/ Elvira Castillo

Elvira Castillo

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I certify that on February 11, 2016 the foregoing document was served on all parties or their counsel of record through the CM/ECF system if they are registered users or, if they are not, by serving a true and correct copy at the addresses listed below:

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