



AP FILE PHOTO

A Washington Redskins helmet is seen on the sidelines during an NFL football game. The Supreme Court on Monday struck down part of a law that bans offensive trademarks in a ruling that is expected to help the Washington Redskins in their legal fight over the team name.

## Local lawyer laments trademark ruling

### Baird's Redskins fight paved way for 'disparaging' marks decision

By Mike Mosedale  
mmosedale@minnlawyer.com

At the start of his legal career, Steve Baird had a Eureka moment that fueled a legal and political fight whose reverberations have been felt across the country for the past quarter-century.

On Monday, the U.S. Supreme Court kicked the legs out from under the law that undergirded Baird's pioneering effort.

As you might imagine, Baird, who now the chair of the intellectual prop-

erty practice at the Minneapolis firm Winthrop & Weinstine, reacted to the news with a measure of dismay.

"It's the exact opposite of what I hoped for," Baird said of the ruling, which struck down a 70-year old provision of federal trademark law that barred the registration of "disparaging" trademarks. "My heart goes out to those who invested so much time and money pursuing these kinds of claims."

Baird's long history with the issue dates back to 1992 when, as a first-year associate at the Dorsey & Whit-

ney firm, he came up with an idea that he hoped would make the Washington Redskins football team abandon a nickname he and many Native Americans consider racist.

At the time, the mascot and team name controversy was heating up in Minnesota amid protests ignited by a pair of high-profile championships at the Metrodome: the 1991 World Series, which pitted the hometown Twins against the Atlanta Braves (and their controversial mascot,

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## Court strong, saving trees —thanks to eCourtMN

By Barbara L. Jones  
bjones@minnlawyer.com

The state of the judicial branch is strong, Chief Justice Lorie Gildea reported in her annual address to the legal community from the Minnesota State Bar Association convention on June 16, 2017.

It's also bright green, thanks to the implementation of eFiling, which now consists of an average of 284,000 documents per month—the equivalent of a stack of paper 24 stories tall.

In 2012 the judicial branch launched eCourtMN in order to move from paper-based court files to electronic records.

It established eFiling and eService, giving parties and lawyers the ability to file and serve documents electronically through an online portal. It became mandatory for most court users on July 1, 2016. (See accompanying chart for eFiling statistics.)

ECharging and eCitations also became mandatory on July 1, 2016. The eCharging system allows prosecutors to file complaints electronically and the eCitation system automatically transfers citation information entered into a squad car computer to law enforcement and court databases.

Electronic search warrant applications and judge signing processes are



Chief Justice Lorie Gildea

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## Roy looks to data in push to cut recidivism

By Kevin Featherly  
kfeatherly@minnlawyer.com

Corrections Commissioner Tom Roy has an abiding faith in data's power to help Minnesota realize the goal of fewer inmates and less crime. Not everybody does. Therein, Roy said, lies one of his greatest frustrations.

Scanning his desk littered with stud-

ies and reports, Roy sees a path to more effective cost containment and reduced recidivism. One of his key problems, he said, is convincing the legislators who hold his purse strings that he is right.

"Clearly legislators have constituencies that are focused on a single topic sometimes," Roy said. "Especially if those constituents have been victims, that gut-level passion sometimes super-

sedes — it's tough for me to say this — good research."

Roy has no problem punishing offenders, some of whom he knows likely will never change. He just thinks that corrections should be driven by data, not emotion, in its quest to assist those who can change.

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Weekly musings on government news by people in the know.

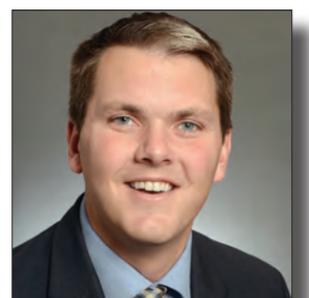
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### BREAKING THE ICE

Get to know Sen. Mark Johnson, R-East Grand Forks, who's focusing on building trust.

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# Court: University wrong to block pot T-shirt

Associated Press

DES MOINES, Iowa — Iowa State University lost another appeal in a federal court case over the decision of administrators to prevent a marijuana advocacy group from printing a T-shirt that included the university logo and a marijuana leaf.

The 8th U.S. Circuit Court of Appeals ruled earlier this month that ISU administrators, including former President Steven Leath, violated First Amendment rights of two students who were top officers of the ISU chapter of the National Organization for Reform of Marijuana Laws.

The ruling also finds the four administrators including former Senior Vice President Warren Madden, former Senior Vice President for Student Affairs Tom Hill and Leesha Zimmerman, director of ISU's trademark office can be held personally responsible for violating the students' constitutional rights, setting up the potential for the students to seek monetary damages.

Iowa taxpayers would be responsible for paying, since state law indemnifies state employees sued in federal court for action pertaining to their jobs.

The students, Paul Gerlich and Erin Furleigh, planned in 2012 to print T-shirts "NORML ISU" on the front with the university's mascot, Cy the Cardinal. On the back the shirt read, "Freedom is NORML at ISU" with a small cannabis leaf above NORML.

The university initially approved the group's design but later blocked it claiming it violated the school's trademark policy after getting pressure from conservative lawmakers and an



AP FILE PHOTO  
In this photo taken Nov. 15, 2012, Josh Montgomery, the former president of the Iowa State University chapter of the National Organization for the Reform of Marijuana Legislation, displays a T-shirt that shows the organization's logo on the front with an ISU mascot.

appointee of then-Republican Gov. Terry Branstad.

The students sued in July 2014 and in early 2016 U.S. District Judge James Gritzner ruled the administrators violated the students' free speech rights and barred the university from prohibiting printing the T-shirt. The administrators appealed.

The appeals court in February agreed with Gritzner, concluding that the administrators' unusual trademark approval process for the NORML group was motivated in part by political pressure and confirmed that universities cannot discriminate against students or their advocacy organizations based on political views.

The court ruling also denied the administrators' contention that they had qualified immunity, a legal protection available to public officials who are found to have made reasonable decisions and who do not knowingly violate the law.

The university administrators asked the appeals court to rehear the case and in an unusual move the three-judge appeals panel that decided the case unanimously chose to rehear it. On June 13 they reaffirmed their earlier decision, however, this time on a 2-1 vote with two Democratic presidential appointees concluding since the university officials took action that violated the former students' First

Amendment rights they're not protected by qualified immunity.

James Loken, a George W. Bush appointee disagreed and wrote in a dissenting opinion the case is different enough from others that there is no precedent for holding school officials personally responsible for the actions specified in this case.

The attorney for the students, Robert Corn-Revere, said last week they plan to "pursue all available remedies." They include seeking compensatory damages and attorney fees once the appeals process is exhausted.

The case, even though it centers on the pro-marijuana legalization group, drew support from several conservative organizations including anti-abortion and campus free speech groups. Their attorney, Casey Mattox said the finding of personal responsibility is important part of the June 13 decision.

"What we find with many universities is they're violating students' free speech rights and there's little accountability. A decision like this helps to build accountability into the law where they have to make sure they're not violating students' rights rather than just being able to rely upon on the courts later," Mattox said.

Of the four administrators only Zimmerman remains at the university. Leath left last month to head Auburn University. Madden and Hill retired last year.

The university could appeal the decision by seeking further review in the 8th Circuit or by asking the U.S. Supreme Court to review it.

"Iowa State has received the order, and we're evaluating next steps," said spokeswoman Annette Hacker.

## Trademark

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Chief Noc-A-Homa), and the 1992 Super Bowl, where the aforementioned Washington Redskins defeated the Buffalo Bills.

As Baird was putting the finishing touches on a law review article, it occurred to him that a little noted provision of the law he was writing about — the Lanham Act — could provide the ideal toehold for Native American activists.

Under the act's "anti-disparagement clause," individuals were authorized to petition the federal government to cancel registration of trademarks found to "disparage or falsely suggest a connection with persons, living or dead, institutions, beliefs, or national symbols, or bring them into contempt or disrepute."

While the broadly worded provision had been on the books since 1946, Baird's research showed that no third party had ever invoked it to force the cancellation of an existing trademark.

On a trip to Washington, D.C., Baird pitched his idea to the Native American activist Suzan Harjo. Harjo was intrigued. So after getting the green light from his bosses at Dorsey to take the pro bono case, Baird put his theory to test and cobbled together a petition to the Trademark Trial and Appeal Board.

"It was viewed by many as a silly challenge that would never go anywhere," Baird recalled.

But as it turned out, Baird's insight launched a battle that continued unabated for more than two decades.

For nine years, Baird worked on case and, following his departure from Dorsey, tracked developments

as other lawyers, adopting his theory, notched a series of legal victories.

Those wins culminated with a 2015 ruling from U.S. District Judge Gerald Lee of the Eastern District of Virginia who upheld the cancellation of six of the club's trademarks on the ground that they "may disparage a substantial composite of Native Americans."

The fight over the team's name — the legal fight, at least — was upended again on Monday when the U.S. Supreme Court, ruling in a separate case, struck down the Lanham Act's anti-disparagement clause as unconstitutional.

"We now hold that this provision violates the Free Speech Clause of the First Amendment," Justice Samuel Alito wrote. "It offends a bedrock First Amendment principle: Speech may not be banned on the ground that it expresses ideas that offend."

In an interview, Baird said he was frustrated by the court's reasoning, beginning with that opening salvo from Alito.

"I think the court conflated the act of registration [of the trademark] by the government with the content of the trademark in question. There is no speech being banned in this case. What would be banned was the circle 'r,'" opined Baird. "But the Supreme Court has spoken and there's no other court to say that they got it wrong."

The case before the court involved an Asian-American rock band called "The Slants," who sued after the Patent & Trademark Office declined to register the band's name as a trademark. From the outset, The Slants insisted that they had no intention to disparage. As their attorneys argued in a brief to the high court, rather, they were "fighting bigotry with the

time-honored technique of seizing the bigot's own language."

But like the Washington Redskins, who were simultaneously trying to get their challenge before the high court, The Slants said they had a constitutional beef with the anti-disparagement clause, as well as the Patent and Trademark Office's "haphazard" application of the rule.

In an amicus brief to The Slants case, Pro-Football, Inc. -- the football team's corporate identity -- listed 18-pages worth of PTO-approved trademarks that would seem to run afoul of the anti-disparagement rule, including "HALF-BREED" (for a line of hats), "BAKED BY A NEGRO" (baked goods), and "YELLOWMAN" (clothing).

That may have been persuasive to the court but, in Baird's view, inconsistent applications of trademark law are hardly confined to the PTO's invocations of the anti-disparagement clause.

"You can see the same kind of inconsistency if you were to look at likelihood-of-confusion cases," said Baird. "You get a wide range of zeal depending on the examining attorney you draw."

While the decision only strikes down the disparagement clause, most experts agree that the court's rationale will prove fatal to a separate provision of the Lanham Act which bars registration of trademarks for "immoral, deceptive, or scandalous matter."

Some lawyers, including Baird, fear that means that the government will now be forced to not only approve trademarks with racist connotations but also to approve those that are profane and vulgar.

J. Michael Keyes, a trademark lawyer in Dorsey's Seattle office who was

not involved in either the Redskins or The Slants litigation, agreed with Baird that the scandalous and immoral provision is likely toast.

"Under the court's reasoning, those are both content-based restrictions," said Keyes. But he was more skeptical of the notion that the court's ruling would open the floodgates to a torrent of offensive trademark applications.

"I don't see it," said Keyes. "From a practical point of view, in order to obtain a trademark registration, you have to establish that you've got commercial rights associated with it and the only way to do that is to show that you're actually using it in commerce."

But the court's decision does appear to foreclose further challenges to the Washington Redskins' trademark and, on Twitter, team owner Daniel Snyder pronounced that he was "THRILLED" with the ruling.

In Baird's view, Snyder shouldn't be gloating.

"This decision does nothing to invalidate the decisions from a federal court and two Trademark and Trial Appeal Boards saying his team's name is a racial slur that offends Native Americans," he said. "I have no doubt that Daniel Snyder hasn't heard the end of protests about his team's name."

"I think the silver lining is all the awareness and attention this issue has received over the past quarter century and the hundreds of [sports team] names that have been changed as a result of that awareness," he added.

And despite the apparent death blow to his former client's case, Baird said it was "very gratifying" to be part of the Native American community's effort to be heard. "We were making law," he said. "It had never been done before."