

No. 15-1007

IN THE
Supreme Court of the United States

UNITED STATES OF AMERICA,
Petitioner,

v.

KOURTNEY LUHV,
Respondent.

**On Writ of Certiorari To
The United States Court of Appeals
For The Federal Circuit**

BRIEF FOR THE PETITIONER

QUESTIONS PRESENTED

1. Whether the United States Court of Appeals, Federal Circuit erred in affirming the Patent and Trademark Office's rejection of Kourtney Luhv's application to register the trademark "Dumb Blonde" as her stage name on the ground that the mark may be disparaging to women within the meaning of Section 2(a) of the Lanham Act.

2. Whether the Federal Circuit erred in holding that Section 2(a) of the Lanham Act's prohibition on registering marks that may be disparaging, particularly "Dumb Blonde," violates the United States Constitution.

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OPINIONS AND JUDGMENT BELOW

The Trademark Trial and Appeal Board upheld the Patent and Trademark Office's decision to refuse registration to Kourtney Luhv for her mark "Dumb Blonde."

Petitioner appealed the Trademark Trial and Appeal Board's decision to the United States Court of Appeals, Federal Circuit. A majority opinion written by Chief Judge Gilmore of the Federal Circuit upheld the Trademark Trial and Appeal Board's decision to refuse registration on the grounds that the mark may be disparaging to a substantial composite of the referenced group. Further, the court held that refusal to register a disparaging mark under Section 2(a) of the Lanham Act is a violation of the First Amendment. Judge McCartney dissented.

STATEMENT OF THE CASE

A. SUMMARY OF THE FACTS

Respondent Kourtney Luhv (“Luhv”) is a musician performing under the stage name “Dumb Blonde”. (R. 1). Luhv has been performing under the name “Dumb Blonde” at live venues throughout the Southern California region since 2012. (R. 1). Luhv has also performed at venues in various other states. (R. 1).

Since 2012, Luhv has grown a devoted fan base for "Dumb Blonde", attracting roughly 40,000 followers on www.soundpuff.com, an online music streaming site, as well as about 1,000,000 active subscribers on www.uTube.com, a video hosting site, under the name DumbBlondeMusic. (R. 1).

Luhv’s music focuses on issues faced by women in today’s society. (R. 1). Luhv contends that her music, and the chosen mark “Dumb Blonde”, are a way to reclaim the stereotype associated with blonde women. (R. 2). Luhv chose the mark to raise awareness of the challenges which arise from gender discrimination and the negative stereotypes that are faced by all women. (R. 2).

In June 2014, Luhv recorded an EP under the “Dumb Blonde” name and negotiated a deal with a record label for its release. (R.1). The contract included a \$2,000,000 advance upon execution. (R. 1). This contract was contingent on Luhv’s acquiring trademark registration for the mark “Dumb Blonde.” (R. 1).

On July 9, 2014, Luhv sought to register the mark “Dumb Blonde” by filing with the Patent and Trademark Office (“P.T.O.”) Application No. 99/989,052 (“052 application”). (R. 2). Luhv sought to register the mark for “entertainment, namely

live performances by a musical band” and “clothing, namely sweatshirts, t-shirts, tank tops, and headwear.” (R. 2). The P.T.O. refused to register the mark on the grounds that the mark may be disparaging to women under Section 2(a) of the Lanham Act (the “Lanham Act”). (R. 2). Lanham Act §2(a), 15 U.S.C.A. § 1052(a) (2006).

On appeal, the Trademark Trial and Appeal Board (“T.T.A.B.”) affirmed the P.T.O.’s rejection of the mark. The T.T.A.B. held that the mark may be disparaging to a substantial composite of the referenced group, namely women who have a blonde hair color. (R. 2). In reaching this decision, the T.T.A.B. cited to Luhv’s website, which depicted images of a blonde woman eating plastic fruit and applying Wite-Out® to text displayed on her computer monitor. (R. 2). Further, the T.T.A.B. cited to dictionary definitions of “Dumb Blonde” as potentially disparaging to a substantial composite of women, finding the term to imply a negative, stereotypical view of women. (R. 2). The T.T.A.B. also looked to numerous articles and user comments on Luhv’s uTube videos as proof that “Dumb Blonde” is offensive. (R. 2).

B. SUMMARY OF THE PROCEEDINGS

This is an appeal from the June 6, 2015 decision in the United States Court of Appeals, Federal Circuit. (R. 1). The Federal Circuit upheld the T.T.A.B.’s refusal to register the mark “Dumb Blonde”. (R. 4). The case was reviewed de novo, reviewing two issues. (R. 1). The first issue considered the refusal to register “Dumb Blonde” as a stage name on the grounds that the mark may be disparaging under Section 2(a) of the Lanham Act. (R. 1). The second issue on appeal was whether

Section 2(a) of the Lanham Act violates the First Amendment. (R. 1).

The court upheld the T.T.A.B.'s decision that "Dumb Blonde" is disparaging to a substantial composite of blonde women. (R. 4). The court based this decision off of the dictionary definition of the term and its use in the marketplace. (R. 3).

Considering the constitutionality of Section 2(a) of the Lanham Act, the Federal Circuit found that Section 2(a) violated the First Amendment. (R. 6). The Federal Circuit held that Section 2(a) impermissibly conditioned a government benefit by inhibiting a markholder's First Amendment Rights. (R. 6). Furthermore, the Federal Circuit applying the Central Hudson Test found that the government lacked a substantial interest in prohibiting the registration of marks based on their disparaging content. (R. 6).

I. KOURTNEY LUHV'S MARK "DUMB BLONDE" IS HIGHLY DISPARAGING TO WOMEN BECAUSE THE MARK IS OFFENSIVE TO A SUBSTANTIAL COMPOSITE OF BLONDE WOMEN.

A. "Dumb Blonde" is disparaging under the first prong of the Harjo I Test because it is offensive.

Section 2(a) of the Lanham Act ("Section 2(a)"), which guides this Court in its evaluation of trademarks, states that "[N]o trademark by which the goods of the applicant may be distinguished from the goods of others shall be refused registration on the principal register on account of its nature unless....[the mark] consists of or comprises immoral, deceptive, or scandalous matter; or matter which may disparage...." Lanham Act §2(a), 15 U.S.C.A. § 1052(a) (2006). In determining whether a mark is disparaging as set forth under Section 2(a), the court applies a two prong test ("Harjo I Test"). *Harjo v. Pro-Football, Inc.*, 50 U.S.P.Q.2d 1705, 1740–41 (T.T.A.B. 1999), *rev'd on other grounds*, 284 F. Supp. 2d 96 (D.D.C. 2003). The first prong of this analysis examines the likely meaning of the mark in question, "Dumb Blonde". This determination takes into account dictionary definitions, the nature of the goods or services, and the manner in which the mark is used in the marketplace. The second prong of the Harjo I Test examines whether the determined meaning of the mark may be disparaging to a substantial composite of the referenced group if the meaning does in fact refer to identifiable persons. *Id.* See also *In re Geller*, 751 F.3d 1355, 1358 (Fed. Cir. 2014); *In re Lebanese Arak Corp*, 94 U.S.P.Q.2d 1215, 1217 (T.T.A.B. 2010); *In re Heeb Media LLC*, 89 U.S.P.Q.2d 1071, 1074 (T.T.A.B. 2008); *In re Squaw Valley Development Co.*, 80 U.S.P.Q.2d 1264, 1267 (T.T.A.B. 2006).

In applying the Harjo I Test to the mark at bar, it is evident that the mark “Dumb Blonde” is highly disparaging to a substantial composite of blonde women and retains its disparaging meaning when used in connection with Luv’s musical services. Dictionary definitions represent more than a reflection of individual views because these represent the collective understanding of the community with respect to commonly used language. *In re Boulevard Entm’t*, 334 F.3d 1336, 1340 (Fed. Cir. 2003). When considering the dictionary definitions of “Dumb Blonde,” the term is disparaging on its face. Oxford Dictionary defines “Dumb Blonde” as, “A blond-haired woman perceived in a stereotypical way as being attractive but unintelligent.” The Oxford English Dictionary (1989), *available at* <http://www.oxforddictionaries.com/us>. MacMillan Dictionary defines the term as, “An insulting word for a woman with blonde hair who is considered to be sexually attractive but not very intelligent”. MacMillan Dictionary, <http://macmillandictionary.com> (last visited on Oct. 8, 2015). Further, Dictionary.com defines “Dumb Blonde” as, “A light-haired woman who is stereotyped as beautiful but unintelligent.” Dictionary.com, <http://www.dictionary.com> (last visited October 7, 2015).

The example uses provided by each dictionary provide further proof that the phrase is disparaging: “Why didn’t the critics and powers that be realize, as I did when I was going to her movies in the ‘50s, what a fine comedic actress Marilyn was instead of treating her as a “Dumb Blonde”?” Dictionary.com, <http://www.dictionary.com> (last visited October 7, 2015). Urban Dictionary’s defines

the term as, “A person with blond hair that is incredibly stupid or retarded, a.k.a. an airhead.” Urban Dictionary, <http://www.urbandictionary.com> (last visited October 10, 2015). This definition is particularly relevant as Urban Dictionary definitions are can be published online, instantaneously, by anybody, and without review. *Id.* These definitions are then voted on by the general public, providing an up-to-date account of the public’s perception of a term. *Id.*

Luhv does not dispute that her musical name is derived from a derogatory term. Her goal is to transform this derogatory term into one that empowers women using her music as a vehicle. (R. 4). This desire articulated by Luhv demonstrates the disparaging nature of the term. If a term was not considered disparaging, an attempt to reform its meaning through music would not be necessary. This clear conclusion, along with the stated dictionary definitions, provides ample evidence to support the claim that society views the “Dumb Blonde” mark as implying a negative, stereotypical view of women. In turn, the T.T.A.B. correctly characterized this mark as disparaging.

The marketplace use of “Dumb Blonde” is further proof that the term does disparage. *See In re Boulevard Entm’t*, 334 F.3d at 1478; *In re Heeb*, 89 U.S.P.Q.2d at 1074; *In re Squaw Valley*, 80 U.S.P.Q.2d at 1267. To determine the meaning of “Dumb Blonde” in the context of the marketplace, we must look at Luhv’s use of the mark to advertise and market her music. Luhv’s website is instructive of such use. Luhv posts pictures on her website of blonde women eating plastic fruit, and applying Wite-Out® to text displayed on a computer monitor. (R. 2). These images

show that Luhv is intending to capitalize on the fact that the phrase is harmful and disparaging by using the phrase in a way that demonstrates its offensive nature towards women. Luhv's own depictions of the usage of "Dumb Blonde" are evidence that the general public does, in fact, associate "Dumb Blonde" with its derogatory definition, as opposed to Luhv's "alternate definition".

Comments and writings of third parties should be taken into consideration when determining the meaning of the term, as this gives valuable insight into the public perception of the term. *See Harjo*, 50 U.S.P.Q.2d at 1742, n. 111. The comments written by Luhv's fans on her various social media platforms further prove that Luhv is capitalizing on the disparaging definition of "Dumb Blonde." (R. 3). One user commented, in regards to Luhv's music, "your ability to bring attention to the challenges faced by women is inspiring." (R. 3). This is evidence that Luhv is using the mark to reference the stereotype of "Dumb Blonde." Another fan wrote "As a blonde woman I totally support you even if the haters gon' hate." (R. 3). This is a direct reference to those who feel that the term is disparaging and an inappropriate name for a musician. Luhv's interpretation of the mark may be used to determine that the mark as used in the marketplace is disparaging. Luhv asserts that she aims to recast the phrase "Dumb Blonde" in a positive light by displaying it prominently alongside a woman with a successful career and through musical lyrics which shed light on critical issues faced by women. (R. 4). This intent is proof that Luhv herself recognizes the stereotypical derogatory meaning of the

word. Luhv actively seeks to associate her service with this offensive meaning as a way to embrace it, to take ownership of the stereotype.

Despite Luhv's attempt at recasting the stereotype of the term, the mark still retains its negative meaning in the marketplace. "Dumb Blonde" retains its disparaging meaning particularly through Luhv's use of imagery on her website. On Luhv's website, an image depicts a blonde woman attempting to use Wite-Out® on her computer screen. (R. 2). Another image shows a blonde woman trying to eat a plastic fruit. (R. 2). The images that Luhv uses on her website to promote her brand serve to broadcast the disparaging definition of "Dumb Blonde." In a nearly identical situation, the District of Columbia Circuit Court of Appeals ruled against Pro-Football, Inc. and canceled their registration of the mark REDSKINS. *Harjo*, 50 U.S.P.Q.2d at 41. The court found that REDSKINS is a disparaging mark which retained its meaning through use in the marketplace by the registrant's use of Native American imagery in connection with the football team. *Id.* In *Harjo*, the registrant's use of REDSKINS in the marketplace shows that the term clearly alludes to the ethnic slur of Native Americans. *Id.* Luhv claims that her mark was always intended to empower blonde women. Similarly, the REDSKINS symbol was chosen because of the strong, positive attributes of Native Americans. The owners of the REDSKINS mark continued use of the mark in admiration of these qualities possessed by Native Americans. An applicant's good intentions when using the term does not obviate the fact that a substantial composite of the referenced group finds the term objectionable. *Id.* at 17. *See also In re Heeb*, 89 U.S.P.Q.2d at 1077.

Similar to *Harjo* and like the case at bar, in *In re Heeb*, a media company attempted to capitalize on the Jewish community's movement to take ownership of the offensive term "heeb". *Id.* at 1074. Many Jewish philanthropies and organizations were using the term and in support of the media company's magazine. Regardless of the intent of the magazine to alter the meaning of the term amidst such a movement, the T.T.A.B. still found that a substantial composite of Jewish people would still find "heeb" to possibly disparage. *Id.*

Consideration of the use of the mark in the marketplace must be made "in the context of contemporary attitudes." *In re Mavety Media Grp. Ltd.*, 33 F.3d 1367 at 1371 (Fed. Cir. 1994). As previously explained, contemporary attitudes toward "Dumb Blonde" are overwhelmingly negative. Courts have used an objective, reasonable person test rather than a subjective intent test to determine whether a mark is disparaging. *Id.* Luhv's ambitious intent to recast the mark is valiant, yet completely irrelevant when determining whether a mark is disparaging on its face. In turn, Luhv's claims have little merit as to the marketplace use of the mark.

Under Section 2(a) of the Lanham Act, the context in which the mark is used and the persons or groups of persons that the mark targets both factor into whether a mark can be considered disparaging on its face. *See* Lanham Act §2(a), 15 U.S.C.A. § 1052(a) (2006); *Boswell v. Mavety Media Group Ltd.*, 52 U.S.P.Q.2d 1600 (T.T.A.B. 1999). Given the above evidence incorporating dictionary definitions, applicant's web pages, applicant's personal statements, and overall public

perception, it is clear that the court correctly found the “Dumb Blonde” mark to be disparaging.

B. "Dumb Blonde" is disparaging to a substantial composite of blonde women globally.

In evaluating the second prong of the Harjo I Test and given the established offensive meaning of “Dumb Blonde,” it is evident that a substantial composite of the referenced group finds the term to be disparaging. Consequently, this Court must consider whether that meaning may be disparaging towards a reasonable blonde female. *See In re Prosynthesis Labs, Inc.*, 77902555, 2012 WL 1267929, at *6 (2012). This Court is charged with taking into account the views of the entire referenced group in any ordinary course of trade, which includes and extends far beyond the Luhv fan base. *In re Heeb*, 89 U.S.P.Q.2d at 1075. Music and merchandise can be accessed and viewed anywhere with an internet connection. Blonde women live throughout the world. Consequently, this court must entertain perceptions of blonde women globally and not just among fans of Luhv’s music.

In order to satisfy this prong of the test, this Court need not find that a majority of blonde women worldwide view “Dumb Blonde” in a disparaging contemporary context. *In re Squaw Valley*, 80 U.S.P.Q.2d at 1269. Instead, only a substantial composite of this group need to find the term disparaging. *Id.*; *Harjo*, 50 U.S.P.Q.2d at 1758 (substantial composite does not necessarily equate to a majority); *See also In re McGinley*, 660 F.2d 481 (C.C.P.A. 1981) (there is no bright line rule for determining a substantial composite). Yet it has been previously held that thirty percent of the referenced group is undoubtedly a substantial composite.

Blackhorse v. Pro-Football, Inc., 111 U.S.P.Q.2d 1080 (T.T.A.B. 2014). This Court's consideration of whether "Dumb Blonde" is disparaging is not restricted to the perception of Luhv's fans who have no objection to Luhv's stage name. *In re Heeb* 89 U.S.P.Q.2d at 1077. This Court must turn to the precedent set forth in both *Heeb*, *Squaw* and *Harjo*, that the referenced group is larger than just Luhv's fan base. *Id.* At 1077; *Harjo*, 50 USPQ2d at 42; *In re Squaw Valley*, 80 U.S.P.Q.2d at 5. As stated earlier, this Court must use an objective standard in evaluating whether "Dumb Blonde" is disparaging. The perceptions of the entire reference group must be taken into consideration. *Mavety Media*, 33 F.3d at 1371.

"Dumb Blonde" may still cause injury to other members of the referenced group. It was previously found in *Heeb Media* that targeted sales prospects did not view the term HEEB as disparaging. *In re Heeb*, 89 U.S.P.Q.2d at 1077. However, the court held that targeted sales prospects did not make up a sufficiently substantial composite of people and this group alone could not be used to determine that a mark is no longer disparaging. *Id.* Similarly, Luhv's targeted US audience, some of whom do not find "Dumb Blonde" to be disparaging, is not evidence that the mark is not disparaging to the referenced group as a whole. While Luhv has shown evidence that some members of the referenced group support her attempt to recast "Dumb Blonde" in a positive light, there is strong evidence to support that this term is viewed by the global population as disparaging.

The significant number of lawsuits filed by women and on behalf of woman that reference dumb blonde provide further proof that the phrase "Dumb Blonde" is

still contemporaneously viewed negatively. Even when used in jest, “[s]ignificant evidence suggests that women view [the] Dumb Blonde jokes negatively.” (R. 3). KAREN ROSS, *THE HANDBOOK OF GENDER, SEX, AND MEDIA* 88 (John Wiley & Sons, Sep. 7, 2011). As recently as 2014 a woman filed suit, based in part on derogatory language directed at her. *Knitter v. Corvias Military Living, LLC*, 758 F.3d 1214 (10th Cir. 2014). In *Knitter v. Corvias Military Living*, a female vendor brought suit against a property management company alleging wage discrimination, retaliatory termination, and retaliatory denial for her application to be a vendor. *Id.* Plaintiff’s evidence included being referenced as a “Dumb Blonde,” a phrase she clearly believes has a negative connotation. *Id.* at 1223. In *Speedway SuperAmerica*, a woman called a stupid bitch and a “Dumb Blonde” brought suit. *Speedway SuperAmerica, LLC v. Dupont*, 933 So. 2d 75 at 81 (Fla. Dist. Ct. App. 2006). Similarly, in *Weiss v. Coca-Cola*, a woman brought suit after being called a dumb blond. *Weiss v. Coca-Cola Bottling Co. of Chicago*, 990 F.2d 333 at 335 (7th Cir.1993). Although the defendant alleged that the term was being used in jest, the plaintiff still took offense. *Id.* These cases provide clear evidence that women still view the term “Dumb Blonde” as disparaging and harmful. *Id.* See also *Abbott v. Marketstar Corp.*, 563 F. App’x 227 (4th Cir. 2014); *Haire v. Bd. of Sup’rs of Louisiana State Univ. Agric. & Mech. Coll.*, 719 F.3d 356, 362 (5th Cir. 2013); *Pacheco v. Comprehensive Pharmacy Servs.*, No. 12 CIV. 1606 AJN, 2013 WL 6087382 (S.D.N.Y. 2013); *Frentz v. City of Elizabethtown*, No. CIV.A. 08-621-JBC,

2010 WL 4638768 (W.D. Ky. Nov. 4, 2010); *Semsroth v. City of Wichita*, 304 F. App'x 707 (10th Cir. 2008).

Luhv argues that her case is analogous to *In re San Francisco Women's Motorcycle* ("Dykes on Bikes"), where trademark registration was granted to a supposedly offensive mark. (R. 4). *In re San Francisco Women's Motorcycle Contingent Appeal*, No. 000020-007200US (T.T.A.B. 2005). However, Dykes on Bikes runs counter to precedent set forth in *Blackhorse v. Pro-Football, Harjo*, *In re Squaw Valley Dev. Co.*, *In re Lebanese Arak*, *In re Geller*, *In re Heeb Media*, *In re Red Bull GmbH*, *Boston Red Sox baseball Club Ltd. P'ship*, among many others. *Blackhorse*, 111 U.S.P.Q.2d at 1080; *In re Squaw Valley*, 80 U.S.P.Q.2d at 1267; *In re Lebanese Arak*, 94 U.S.P.Q.2d at 1217; *In re Geller*, 751 F.3d at 1355; *In re Heeb*, 89 U.S.P.Q.2d at 1074; *In Re Red Bull GmbH*, 78 U.S.P.Q.2d 1375 (T.T.A.B. 2006); *Boston Red Sox Baseball Club Ltd. P'ship*, 88 U.S.P.Q.2d 1581 (T.T.A.B. 2008). The case at bar is distinguishable from Dykes on Bikes in regards to the substantial composite prong of the test in application. The mark "Dykes on Bikes" was registered by a limited group of people marching in the gay pride parade. *In re San Francisco Women's Motorcycle Contingent Appeal*, No. 000020-007200US (T.T.A.B. 2005). The group is narrowly defined and decided as a whole to use this term in an endearing manner. Further, the exposure of "Dykes on Bikes" is limited to those attending the gay pride parade in San Francisco who would clearly understand that the term was not meant to be disparaging based upon the parade's purpose. *Id.* Women with blonde hair, on the other hand, make up a significant portion of the

global population. Instantaneously changing the commonplace definition “Dumb Blonde” is impossible given the sheer size of the group being disparaged. Further, given the fact that Dykes on Bikes was registered for the purposes of a pride parade, use of the word “dyke” had to be assessed in context. *Id.* Assessment of “Dumb Blonde” in the context of Luhv’s use, as discussed earlier, proves that the word still retains its disparaging meaning. It is not used as a singular point of pride for a community that collectively agreed to use the mark.

The *Dykes on Bikes*, which was decided by the T.T.A.B., is not binding on this Court. It is merely persuasive. Where a decision endorses something so fundamentally against the government’s goals, it should not be extended.

The goal of registering a trademark is to protect consumers from confusion. Even if Luhv is trying to redefine “Dumb Blonde,” how are women to know the difference if they do not know what Luhv’s music and message is all about? *Knitter*, *Speedway SuperAmerica* and *Weiss* are proof that even if “Dumb Blonde” is intended in one sense (jokingly, or in the case at bar, as part of a feminist movement), women are still disparaged by its use. *See Abbott*, 563 F. App’x 227; *Knitter*, 758 F.3d 1214; *Haire*, 719 F.3d 356, 362; *Pacheco*, No. 12 CIV. 1606 AJN, 2013 WL 6087382; *Frentz*, No. CIV.A. 08-621-JBC, 2010 WL 4638768; *Semsroth*, 304 F. App’x 707; *Speedway SuperAmerica*, 933 So. 2d 75; *Weiss*, 990 F.2d at 335.

As a matter of public policy, Luhv should not be permitted to register “Dumb Blonde” because, taken out of context, women cannot distinguish Luhv’s “transformative” use of “Dumb Blonde” from the dictionary definition, and thus, the

mark is disparaging on its face. There is no blatant context, as there was with *Dykes on Bikes* (marching in the gay pride parade), to allow a substantial composite of blonde, female consumers to understand that the mark is not intended to be disparaging. The reach of this mark spans much more than just music. “Dumb Blonde” will be used as a brand and consequently, will be used on merchandise. If this Court were to allow registration of “Dumb Blonde,” the government would be endorsing something that will negatively affect members of society.

Naturally blonde women make up about 2% of the world population. Dr. C. George Boeree, *Race*, Shippensburg.edu (Oct. 10, 2015, 9:55 PM), <http://webpace.ship.edu/cgboer/race.html>. If we were to say that every single one of Luhv's 140,000 fans is a blonde woman, which most likely is not the case, and each one of those fans were to believe Luhv's positive spin of the term which again, likely isn't the case, her fan base would equate to just .1% of the blonde women worldwide. There is no evidence and no reason to support the notion that the remaining 99.9% of blonde women do not find the term “Dumb Blonde” disparaging. *See Abbott*, 563 F. App'x 227; *Knitter*, 758 F.3d 1214; *Haire*, 719 F.3d 356, 362; *Pacheco*, No. 12 CIV. 1606 AJN, 2013 WL 6087382 ; *Frentz*, No. CIV.A. 08-621-JBC, 2010 WL 4638768; *Semsroth*, 304 F. App'x 707; *Speedway SuperAmerica*, 933 So. 2d 75; *Weiss*, 990 F.2d at 335.

This court has long held that refusal to register a mark under Section 2(a) “is not an attempt to legislate morality, but, rather, a judgment by Congress that [scandalous] marks not occupy the time, services, and use of funds of the federal

government.” *McGinley*, 660 F.2d at 486. This Court should not set precedent that allows the general public to expect a government entity to endorse the use of a term that is clearly held out to be disparaging by a large portion of the global population.

The T.T.A.B.’s refusal of Luhv’s application for the trademark "Dumb Blonde" should be upheld. The mark is disparaging on its face. This is proven by the dictionary definitions of the phrase, society’s general view of the phrase, and its use in the marketplace in connection with Luhv’s music and musical performances. Consequently, as the mark is disparaging towards a substantial composite of blonde women, this Court should affirm the ruling of the T.T.A.B.

II. SECTION 2(A) OF THE LANHAM ACT DOES NOT IMPLICATE THE UNCONSTITUTIONAL CONDITIONS DOCTRINE BECAUSE THE STATUTE DOES NOT INHIBIT OR PENALIZE SPEECH.

A. Section 2(a) of the Lanham Act does not inhibit speech.

The unconstitutional conditions doctrine prohibits the government from using a government benefit to indirectly abridge an individual’s constitutional rights. *Speiser v. Randall*, 357 U.S. 513, 526 (1958); *See* U.S. CONST. amend. I. Section 2(a) does not implicate the unconstitutional conditions doctrine because the statute neither prescribes nor inhibits a mark holder’s speech. When determining whether a particular government benefit violates the unconstitutional conditions doctrine, the inquiry must focus on whether the condition compels the individual to speak in a way which is beneficial to the government or in such a manner as to suppress speech, “[F]or if the government could deny a benefit to a person because of his constitutionally protected speech....his exercise of those freedoms would in effect be

penalized and inhibited.” *Perry v. Sindermann*, 408 U.S. 593, 597 (1972); *See also Agency for Int’l Dev. v. Alliance for Open Soc’y Int’l, Inc.*, 133 S. Ct. 2321, 2332 (2013).

Undisputedly, trademark registration is a government benefit. However, Section 2(a) in no way inhibits speech. *See* U.S. CONST. amend. I. The user of a mark may continue to use a mark even if it is unregistrable under Section 2(a) or the mark’s message runs counter to government interests. *In re McGinley*, 660 F.2d 481, 484 (C.C.P.A. 1981) (citation omitted) (holding that Section 2(a) does not violate the first amendment because trademark registration neither forbids or surpasses a mark holders speech); 15 U.S.C. § 1052(a). *In re Mavety Media Grp. Ltd.*, 33 F.3d at 1374; *In re Boulevard Entm’t, Inc.*, 334 F.3d at 1343; *Test Masters Educ. Servs., Inc. v. Singh*, 428 F.3d 559, n.9 (5th Cir. 2005); *See In re Fox*, 702 F.3d 633, 634-35 (Fed. Cir. 2012); *Pro-Football, Inc. v. Blackhorse*, No. 1-14-CV-01043-GBL, 2015 WL 4096277, at *8-9 (E.D. Va. July 8, 2015). Section 2(a) simply is a manifestation of Congress’s intent to exclude disparaging marks from receiving the government endorsement acquired via registration. “[C]ongress expressed its will that such marks not be afforded the statutory benefits of registration.... [It is] a judgment by the Congress that such marks not occupy the time, services, and use of funds of the federal government.” *In re McGinley*, 660 F.2d at 486.

In cases where this Court has found an unconstitutional condition, the acceptance of the benefit had the effect of fully inhibiting the individual or organization accepting the benefit. In *Agency for Int’l Dev. v. Alliance for Open Soc’y*

Int'l, Inc., the government conditioned subsidies to nongovernmental organizations on the condition that the organizations would not promote or advocate in favor of the legalization of prostitution, and must have a policy in opposition to prostitution. *Agency for Int'l Dev. v. Alliance for Open Soc'y Int'l, Inc.*, 133 S. Ct. 2321, 2324 (2013). The respondent argued that the condition on the grant inhibited the organization's speech outside the scope of the subsidy. *Id.* at 2326. The NGO was unable to function without this government subsidy and in turn, this Court found the condition unconstitutional because it *forced* the organization to adopt a government view "[affecting] protected conduct outside the scope of the federally funded program." *Id.* at 2330 (citing *Rust v. Sullivan*, 500 U.S. 173, 197 (1991)).

The condition in *Agency for Int'l Dev.* is distinguishable from Section 2(a) because the P.T.O. does not mandate that a mark holder refrain from speech, which is contrary to a government position as a condition to registration. In this sense Section 2(a) does not "[G]o beyond defining the limits of the federally funded program to defining the recipient." *Id.* at 2330-31 (citing *Rust v. Sullivan*, 500 U.S. 173, 197 (1991)).

The effect of an unconstitutional condition is "[I]n effect to penalize [the subject] for such speech. Its deterrent effect is the same as if the State were to fine [the subject] for this speech." *Speiser*, 357 U.S. at 518. Users of unregistrable marks are free to continue to use the marks in commerce in absence of registration, because Section 2(a) does not penalize for the use of the marks. In *Perry v. Sindermann*, the respondent alleged that he was terminated after making critical

comments of his employer in public. *Perry v. Sindermann*, 408 U.S. 593, 595 (1972). The Court in *Perry* found that the respondent's allegations presented an unconstitutional conditions question because the condition could be seen as fully foreclosing the petitioner from expressing his first amendment rights. *Id.* at 597. Similar to *Agency for Int'l Dev.*, the government's action in *Perry* had the effect of penalizing the respondent for this speech both within the scope of his employment, as well as chilling his freedom of speech outside the scope of his employment. *Id.* at 597; *See Agency for Int'l Dev.*, 133 S. Ct. at 2330. Furthermore, in *Texas v. Johnson*, the state manifested its intent to ban flag burning by creating a criminal penalty that had the effect of inhibiting expression of such speech. *Texas v. Johnson*, 491 U.S. 397, 400 (1989).

Unlike the government's punitive actions taken in *Perry* and *Texas*, Section 2(a) does not penalize mark holders for exercising their First Amendment rights since a mark holder remains free to use their unregistrable mark without incurring costly penalties like the ones described above. Whereas the statute in *Texas* and the punitive actions in *Perry* had the express purpose to chill a certain form of expression, Section 2(a) merely expresses the government's choice to omit the endorsement of speech which it views as disparaging. The denial of trademark registration does not impose a penalty because the government is not actively suppressing the expression of the speech by the mark holder.

B. Contrary to assertions of the Federal Circuit, the benefits associated with trademark registration do implicate Congress's Spending Clause powers.

The Spending Clause gives Congress broad power to spend federal moneys on certain programs which it sees as benefiting the public. U.S. Const. art. I, § 8, cl. 1. When government exercises its spending power to establish a program, it may define who is eligible to receive such benefits. *Rust v. Sullivan*, 500 U.S. 173, 194 (1991) (“[W]hen the Government appropriates public funds to establish a program it is entitled to define the limits of that program”). While this power is not without limits, Congress may fund certain activities at the exclusion of others without violating the Constitution. *Regan v. Taxation With Representation of Washington*, 461 U.S. 540, 549 (1983) (“We have held in several contexts that a legislature’s decision not to subsidize the exercise of a fundamental right does not infringe the right,...”); *Rust v. Sullivan*, 500 U.S. at 193 . When a program implicates funds derived from Congress’s spending power, directly or indirectly, Congress may legislate to certain ends without implicating the unconstitutional conditions doctrine,

Since the P.T.O. and the trademark registration process implicates funds derived from the Spending Clause, the Unconstitutional Conditions Doctrine does not apply. *Contra In re Tam*, 785 F.3d 567, 578 (Fed. Cir.) (Moore, J. additional views) *reh'g en banc granted, opinion vacated*, 600 F. App'x 775 (Fed. Cir. 2015). Federal trademark registration entitles a mark holder to a number of valuable benefits including, “[T]he right to request customs officials to bar the importation of goods bearing infringing trademarks....” *Georator Corp. v. United States*, 485 F.2d 283, 285 (4th Cir. 1973), *abrogated in part on other grounds by NCNB Corp. v.*

United States, 684 F.2d 285 (4th Cir. 1982). See also *In re McGinley*, 660 F.2d 481, 486 (C.C.P.A. 1981). The United States Customs and Border Protection Agency (“CBPA”) is funded by a Congressional appropriation pursuant to Congress’s Spending Clause power. U.S. Const. art. I, § 8, cl. 1; Department of Homeland Security Appropriations Act, 2015, Pub. L. 11404, 129 Stat.41-42. As the CBPA’s enforcement of trademark infringement costs money authorized through the Spending Clause, the benefits of trademark registration exempt Section 2(a) from the unconstitutional conditions doctrine. Additionally, the P.T.O. directly implicates funds derived from Congress’s Spending Clause power because employee benefits such as insurance and pensions are funded using treasury funds. *Figueroa v. United States*, 466 F.3d 1023, 1028 (Fed. Cir. 2006).

III. SECTION 2(A) OF THE LANHAM ACT IS A PERMISSIBLE REGULATION OF COMMERCIAL SPEECH UNDER THE CENTRAL HUDSON TEST.

A. A Trademark Is A Form Of Commercial Speech Subject To Regulation By the Government

Luhv’s mark “Dumb Blonde” is a form of protected commercial speech subject to regulation by the government. In *Bolger v. Youngs Drug Products Corp.*, this Court considered the constitutionality of a federal statute which “[P]rohibits the mailing of unsolicited advertisements for contraceptives.” *Bolger v. Youngs Drug Products Corp.*, 463 U.S. 60, 61 (1983). Finding that the mailing was a form of commercial speech, the Court in *Bolger* considered three factors: (i) whether the mailing could be considered an advertisement; (ii) whether the mailing referenced a

specific product; (iii) whether the company had an economic motivation for the speech. *Id.* at 66-67.

When applying the Bolger test to the case at bar, we must first determine if the mark used here can be considered an advertisement. As Luhv intends to use the mark “Dumb Blonde” to market her musical act, the mark in question can, in fact, be considered a form of advertisement. When a potential purchaser views a mark connected with a familiar product, they may use the mark as an information short cut helping determine the cost of a potential transaction with the mark holder. Furthermore, a potential purchaser who is unfamiliar with Luhv’s musical services may choose to further inquire into the product itself. In this way, Luhv’s mark is similar to certain advertisements serving to entice potential customers and build her fan base by omitting information, thus fulfilling the first prong of the Bolger Test. For example, a famous advertisement for Apple Computer involved photographs of famous scientists, musicians and political figures who changed the world in their respective fields. Rob Siltanen, The Real Story Behind Apple's 'Think Different' Campaign (Dec. 14, 2011), <http://www.forbes.com/sites/onmarketing/2011/12/14/the-real-story-behind-apples-think-different-campaign/3/>.

The advertisements simply included the picture of the figure, along with the phrase “Think Different” and the distinctive Apple logo without including any information related to their product. *Id.* To a viewer who may be unaware that Apple produces computers, this omission creates a sense of curiosity in which encourages further exploration into the nature of the product. Like the “Think Different” campaign,

Luhv will be using the mark “Dumb Blonde” as a mere solicitation for a commercial transaction.

Luhv contends that the use of “Dumb Blonde” does more than propose a commercial transaction. The mark was supposedly selected in an effort to re-appropriate its negative connotation and empower women. While the mark may include a non-commercial element, there is a “[C]ommon sense distinction between speech proposing a commercial transaction, which occurs in an area traditionally subject to government regulation, and other varieties of speech.” *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of New York*, 447 U.S. 557, 562 (1980) (citation omitted). Additionally, this Court has “[M]ade clear that advertising which ‘links a product to a current public debate’ is not thereby entitled to the constitutional protection afforded noncommercial speech. *Bolger*, 463 U.S. at 68 (citation omitted). While Luhv may have a non-commercial element to the mark (the social commentary), the overwhelming purpose and intended use of the mark is to further her musical career, not to proselytize a feminist message to the public.

As Luhv uses “Dumb Blonde” to market her musical act, the mark is being used to reference her product and thus fulfills the second prong of the *Bolger* test. Luhv has an economic motivation for using the mark because, album sales and ticket sales depends on the public’s recognition of her brand, thus fulfilling the third prong of the *Bolger* test. The more visible Luhv’s mark is in the marketplace, the more likely she is to generate further ticket and album sales. As such, the trademark “Dumb Blonde” is a form of protected commercial speech.

B. Under the Central Hudson test, Section 2(a) of the Lanham Act is a permissible regulation of commercial speech.

In *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of New York*, this Court developed a four-part test to determine whether a regulation of commercial speech is constitutionally permissible (“the Central Hudson test”). *Cent. Hudson Gas & Elec. Corp.*, 447 U.S. at 566. Under the Central Hudson test the Court considers the following factors: (1) whether the speech in question is not misleading and concerns lawful activity, (2) whether the government has a substantial interest underlying the commercial speech regulation, (3) whether the regulation advances the government’s interest, and finally (4) whether the regulation is no more extensive than necessary to serve the government’s interest. *Id.* at 566.

When viewed through the lens of Central Hudson, Section 2(a) is a permissible regulation of commercial speech. Under the first prong of the *Central Hudson* test, the mark “Dumb Blonde” poses a significant risk of consumer confusion in the marketplace and is therefore misleading. *Id.* at 566. In *Friedman v. Rogers*, this Court stated that government restrictions, “[O]n false, deceptive, and misleading commercial speech....” are permissible as “Untruthful speech, commercial or otherwise, has never been protected for its own sake.” *Friedman v. Rogers*, 440 U.S. 1, 9 (1979) (citation omitted). In relation to trademark registration, terms used to define a product or service are divided into four groups: generic, descriptive, arbitrary, or fanciful. See J. THOMAS MCCARTHY, MCCARTHY ON TRADEMARKS AND UNFAIR COMPETITION § 11:2, Westlaw (database updated

September 2015). A descriptive mark is one which “[I]mmediately conveys information concerning a quality or characteristic of the product or service. The perception of the relevant purchasing public sets the standard for determining descriptiveness.” *In re MBNA Am. Bank, N.A.*, 340 F.3d 1328, 1332 (Fed. Cir. 2003) (citation omitted); *See* J. THOMAS MCCARTHY, MCCARTHY ON TRADEMARKS AND UNFAIR COMPETITION § 11:16, Westlaw (database updated September 2015). At best, the trademark “Dumb Blonde” is descriptive because it directly relates to a subsection of females who have blonde hair. For a descriptive mark to be registered, the mark must be used in commerce for a substantial amount of time and it must acquire secondary meaning. *See Chrysler Grp. LLC v. Moda Grp. LLC*, 796 F. Supp. 2d 866, 873 (E.D. Mich. 2011). A mark gains secondary meaning when the public associates the mark with the identity of its source. *See Two Pesos, Inc. v. Taco Cabana, Inc.*, 505 U.S. 763 (1992). “Dumb Blonde,” however, has not achieved secondary meaning because a reasonable consumer in the marketplace would more readily associate “Dumb Blonde” with its disparaging definition rather than Luhv’s musical services.

The mark “Dumb Blonde” poses a significant threat of consumer confusion because, taken out of context, the term is connected to the denigration of blonde woman rather than Luhv’s music services. Unlike a traditional descriptive mark which is developed in the marketplace over a period of years to create a direct association between the mark and the product, Luhv’s music career is quite young. It is more likely that a layman who views another on the street wearing a shirt with

Luhv's stage name will associate the mark with the widely acknowledged disparaging definition as opposed to Luhv's musical services.

While there is nothing wrong with wearing a disparaging mark, a pillar of trademark law is to prevent consumer confusion. *See Two Pesos, Inc.*, 505 U.S. at 767; *See* J. THOMAS MCCARTHY, MCCARTHY ON TRADEMARKS AND UNFAIR COMPETITION § 2:8, Westlaw (database updated September 2015). If the majority of consumers associate the descriptive mark "Dumb Blonde" with its disparaging definition, then the trademark registration should not be allowed. For example, if American Airlines did not exist today and someone attempted to register the term tomorrow, there would be very little chance of registration. A large portion of the general public would associate the term American Airlines to refer to any American airline instead of that particular airline using the mark. *See* PAUL SIEGAL, COMMUNICATION LAW IN AMERICA 654 (Rowman & Littlefield Publishers 4th ed, 2014). Because the mark "Dumb Blonde" poses a significant risk of consumer confusion, Section 2(a) is a permissible regulation of misleading commercial speech.

Under the second prong of the Central Hudson analysis, Section 2(a) is the manifestation of the government's substantial interest in preventing the endorsement of speech that it views as disparaging to a substantial subsection of the public. The principal role of government is to legislate to ends it sees as promoting the general welfare of the public. U.S. Const. art. I, § 8, cl. 1. To promote certain beneficial conduct, Congress uses government benefits in various forms to encourage individuals and organizations to engage in conduct which is beneficial to

the public. *See Rust*, 500 U.S. at 193. In this way, Congress uses government benefits to endorse such conduct by giving certain protections and advantages to promote these interests.

A registered trademark holder acquires significant government support. *See Pro-Football, Inc. v. Blackhorse*, No. 1-14-CV-01043-GBL, 2015 WL 4096277, at *7 (E.D. Va. July 8, 2015). The conferral of these benefits is a signal directed to the mark holder, and the public, that the government is willing to spend public resources to protect it. *See In re McGinley*, 660 F.2d at 486. If the government was forced to confer a tacit endorsement to trademarks that are disparaging, it would be seen by the public as a government approval of a disparaging message. *See id.* at 486.

Contrary to the contention of the Federal Circuit, Section 2(a) does not suppress offensive speech. For example, if a car manufacturer sought to promote its brand using insignia associated with ‘well-being’ and ‘good fortune’ they may decide to adopt the swastika, a symbol with ancient roots in the Hindu religion. Mukti Jain *Campion*, *How The World Loved The Swastika-Until Hitler Stole It*, BBC (Oct. 23, 2014), <http://www.bbc.com/news/magazine-29644591>. If the manufacturer sought to register this trademark, it would surely be rejected by the P.T.O on the basis that a substantial portion of the public associates it with the nefarious message of the Nazi party and its associated crimes against humanity. However, Section 2(a) would not prohibit the use of the mark by the car company, or restrict the sale of its product, or create an economic disincentive to dissuade the purchase

of the vehicle. See *In re McGinley*, 660 F.2d at 484. The reasoning behind the P.T.O.'s rejection of Luhv's trademark registration is nearly identical to this hypothetical. Although Luhv seeks to use the mark "Dumb Blonde" to promote her musical services, because a substantial subsection of the public identifies the term as disparaging, it is not in the interest of the government to endorse such a message.

Under the third prong of the Central Hudson analysis, we must determine "[W]hether the regulation directly advances the governmental interest asserted...." *Cent. Hudson Gas & Elec. Corp.*, 447 U.S. at 566. Section 2(a) directly advances the government interest in rejecting an opportunity to endorse a disparaging mark by refusing registration of that mark.

According to *Bd. of Trustees of State Univ. of New York v. Fox*, *Central Hudson's* fourth prong requires "[A] 'fit' between the legislature's ends and the means chosen to accomplish those ends....a fit that is not necessarily perfect, but reasonable....a means narrowly tailored to achieve the desired objective....we leave it to governmental decision makers to judge what manner of regulation may best be employed." *Bd. of Trustees of State Univ. of New York v. Fox*, 492 U.S. 469, 480 (1989) (citation omitted). The means by which the government rejects disparaging marks under Section 2(a) is not more extensive than necessary because a mark holder is afforded multiple layers of due process to ensure that Section 2(a) rejections are not indiscriminate. *In re McGinley*, 660 F.2d at 484.

IV. SECTION 2(A) OF THE LANHAM ACT IS PART OF THE FEDERAL TRADEMARK REGISTRATION PROCESS WHICH IS A FORM OF GOVERNMENT SPEECH EXEMPT FROM FIRST AMENDMENT SCRUTINY.

“When government speaks, it is not barred by the Free Speech Clause from determining the content of what it says.” *Walker v. Texas Div., Sons of Confederate Veterans, Inc.*, 135 S. Ct. 2239, 2245 (2015) (citing *Pleasant Grove City v. Summum*, 555 U.S. 460, 467–468 (2009)). It is the essential function of government that it may speak to the people with a specific viewpoint. “Were the Free Speech Clause interpreted otherwise, government would not work.” *Walker*, 135 S. Ct. at 2246 (citing *Pleasant Grove City v. Summum*, 555 U.S. 460, 467–468 (2009)). In light of this Court’s recent decisions in *Pleasant Grove* and *Walker*, the trademark registration process, of which Section 2(a) is a component, is a form of government speech exempt from First Amendment scrutiny.

In *Pleasant Grove City*, this Court considered whether a municipality was obligated to display a donated monument in a public park when the municipality had previously accepted and displayed similar monuments. *Pleasant Grove City v. Summum*, 555 U.S. 460,464 (2009). This Court held that the municipality’s exercise of editorial control over the monuments it approved for display in a public park amounted to government speech. In holding as such, this Court recognized that monuments have historically been used to convey government messages to the public. *Id.* at 470. Similarly, the “®” symbol, which designates a registered trademark, is a literal government stamp of approval on a registered trademark. *Pro-Football, Inc. v. Blackhorse*, No. 1-14-CV-01043-GBL, 2015 WL 4096277, at *12

(E.D. Va. July 8, 2015). If “Dumb Blonde” was to receive this stamp of approval, it would convey to the public that the government agrees with the mark’s disparaging message. Furthermore, registered trademarks are published so as to give the public notice of the mark’s registration. *In re McGinley*, 660 F.2d at 486. As this serves to provide constructive notice of registration, it can be said that the publishing of registered trademarks is used by the government when communicating with the public. *Blackhorse*, No. 1-14-CV-01043-GBL, 2015 WL 4096277, at *7.

The municipality in *Pleasant Grove* maintained a policy by which the government only gave approval to display monuments that “[E]ither (1) directly relate to the history of Pleasant Grove, or (2) were donated by groups with longstanding ties to the Pleasant Grove community.” *Pleasant Grove*, 555 U.S. at 465. The municipality carefully considered which monuments were to be displayed because a viewer routinely associates the message conveyed by the monument with the property owner. *Id.* at 471. Similarly, the designation of a registered trademark may reasonably be associated with a communication on the government’s behalf as it is widely known that the P.T.O. is a government entity, and that the government actively enforces trademark rights. *Blackhorse*, No. 1-14-CV-01043-GBL, 2015 WL 4096277, at *12. As most consumers associate “Dumb Blonde” with its disparaging message towards women, it is in the government’s interest to not further this message with a government endorsement.

Finally, like the municipality in *Pleasant Grove*, the P.T.O. has the right of final approval over trademark registration. This is similar to the municipality’s

editorial control over the placement of monuments in the public park. *Pleasant Grove*, 555 U.S. at 472; *Blackhorse*, No. 1-14-CV-01043-GBL, 2015 WL 4096277, at *12. Editorial control over a message presented to the public is equivalent to a government endorsement of certain speech over other speech.

In *Walker v. Texas Div., Sons of Confederate Veterans, Inc.*, the Texas Department of Motor Vehicles (“the board”) denied an application by the Sons of Confederate Veterans to create a specialty license plate displaying the confederate flag. 135 S. Ct. 2239, 2245 (2015). The license plate was rejected by the board because many members of the public associate the confederate flag with a message of hate. *Id.* at 2245. Section 2(a) serves the same function as the board in *Walker*. A custom license plate, like a registered trademark, can be construed as a government endorsement of speech. *See id.* at 2249; *Blackhorse*, No. 1-14-CV-01043-GBL, 2015 WL 4096277, at *12. As such, the government has an interest in carefully scrutinizing the message it conveys to the public.

Section 2(a) of the Lanham Act does not violate the First Amendment because the government is not penalizing or prohibiting speech by rejecting the registration of a trademark. Rather, the government has a substantial interest in ensuring that its imprimatur is not being affixed to trademarks which condense and degrade women on a broad basis. Trademark registration is a form of government speech as the public associates registration with a government endorsement. In turn, it is important that the government be able to control which marks receive registration so as to prevent the government endorsement of

disparaging speech. This Court should reverse the Federal Circuit and uphold the constitutionality of Section 2(a).