

Case 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 Supreme Court

Brief for the Respondent

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October 20, 2015*

QUESTIONS PRESENTED

1. Under the Lanham Act, the Patent and Trademark Office may refuse to register a trademark if the mark is disparaging to a substantial composite of the referenced group. Although the Patent office registered identical marks in the past, it refused to register Ms. Luhv's stage name DUMB BLONDE, even though the mark is not disparaging to women and she uses it to raise awareness about women's issues. Did the court err by refusing registration?

2. The government cannot engage in viewpoint discrimination of private speech or require an individual to surrender their First Amendment rights in exchange for a benefit. Ms. Luhv was required to forfeit her rights to free speech, in exchange for the benefits associated with a registered trademark. The government denied her application solely based on the mark's socio-political message. Does Section (a) violate the First Amendment?

3. The Fifth Amendment voids laws which fail to notify individuals of the law's proper application. The government must pay compensation for a regulation that results in property losing substantial value. Section (a) is subjective, vague and difficult to apply and it results in a mark holder losing a majority of the mark's value. Ms. Luhv's rejection cost her \$2,000,000 and an inability to enforce her mark. Does Section (a) violate the Fifth Amendment?

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STATEMENT OF JURISDICTION

This case involves an appeal from a decision of the Trademark Trial and Appeal Board with respect to an application for registration of a mark provided in section 21 of the Trademark Act of 1946 (15 U.S.C. §1071). 28 U.S.C. §1295. The Federal Circuit Court of Appeals had subject matter jurisdiction under 28 U.S.C. §1295 (a)(4)(B). This Court has appellate jurisdiction under Article III of the United States Constitution. *U.S. Const. art. III §2, cl. 2*. In addition, this Court has accepted the party's writ of certiorari to review the judgment of this case. *Jurisdiction on Writ of Certiorari*, Rules of the Supreme Court of the United States, Part III, Rule 12.

STANDARD OF REVIEW

A conclusion that a mark is disparaging "is a conclusion of law based upon underlying factual inquiries." *In re Mavety*, 33 F.3d 1367, 1371 (Fed. Cir. 1994) (holding this standard to apply to both scandalous and immoral marks under the Lanham Act). The reviewing court requires substantial evidence to affirm a lower court's ruling, while the decision to refuse registration of a mark is reviewed de novo. *In Re Geller*, 751 F.3d 1355, 1358 (Fed. Cir. 2014) (citing *In re Fox*, 702 F.3d 633, 637 (Fed. Cir. 2012)). In cases involving First Amendment claims, an appellate court must make an independent examination of the whole record. *Bose Corp. v. Consumers Union of United States, Inc.*, 466 U.S. 485, 499 (1984). Furthermore, a constitutional challenge to a statutory provision as being void for vagueness is reviewed de novo. *McNary v. Haitian Refugee Ctr., Inc.*, 498 U.S. 479, 493 (1991). Lastly, the issue of "whether a taking has occurred is a question of law based on factual underpinnings." *Stearns Co. v. United States*, 396 F.3d 1354, 1357 (Fed. Cir. 2005)

STATEMENT OF CASE

Procedural Background:

Kourtney Luhv filed an application to register a trademark with the United States Patent and Trademark Office (“PTO”). *U.S. v. Luhv*, 1337 F.3d 455, 456 (Fed. Cir. 2015). Ms. Luhv sought to register the mark DUMB BLONDE as her stage name. *Id.* at 455. The examining attorney refused to register the mark because it might be disparaging to women under §1052(a) of the Lanham Act. *Id.* at 456. Ms. Luhv appealed the decision to the Trademark Trial and Appeal Board (“TTAB”), but the board affirmed the examining attorney’s decision to refuse trademark status. *Id.* Ms. Luhv appealed the TTAB’s decision because her stage name is not disparaging to a substantial composite of women. *Id.* at 457. Further, she argued that the Lanham Act’s prohibition on registering disparaging marks was unconstitutional. *Id.* Although the Federal Circuit Court of Appeals found Section (a) of §1052 to be unconstitutional, the court affirmed the TTAB’s decision to reject the DUMB BLONDE mark because it was disparaging to women. Therefore, both parties appealed to this Court and a writ of certiorari was granted.

Statement of the Facts:

Ms. Luhv is a vocalist and solo artist who is known among her large fan base as DUMB BLONDE. *Id.* at 455. Ms. Luhv has used the DUMB BLONDE stage name to champion issues focused by women in today’s society. *Id.* Ms. Luhv has a sizable fan base – consisting mostly of women in their twenties and thirties – who

attend her concerts and listen to her music using online streaming services such as www.soundpuff.com (“Soundpuff”). *Id.*, *Id.* at 457. Further, Ms. Luhv has an active video account on www.uTube.com (“uTube”) under the name DumbBlondeMusic. *Id.* at 455-56. Between the two accounts, Ms. Luhv has over 140,000 active fans. *Id.* at 456.

On June 2014, Ms. Luhv finished recording several pieces of music she planned to release in a record label. *Id.* In order for her to release her music and receive a \$2,000,000 advance, she was required by the label company to register DUMB BLONDE as a trademark. *Id.*

Therefore, Ms. Luhv filed an application to register DUMB BLONDE with the PTO. *Id.* She sought registration for both an entertainment and social purpose. *Id.*; *Id.* at 457-58. Ms. Luhv’s proposed mark was aimed at both furthering her commercial interests, along with raising awareness of the challenges posed by gender discrimination. *Id.* at 456; *Id.* at 457. Even with these facts in mind, the examining attorney unilaterally refused registration of the mark because it might disparage women. *Id.* at 456. Based on this subjective analysis, both the TTAB and the examining attorney found that the phrase DUMB BLONDE implies a “negative stereotypical view of women.” *Id.*

Although the TTAB claimed there was significant evidence that “women view ‘dumb blonde’ jokes negatively,” Ms. Luhv presented substantial evidence that women who comprise the bulk of her fan are not offended by the mark. *Id.* at 457-58. Ms. Luhv cited numerous posts from

women in her fan base, including one blog post that stated, “there need to be more women like you serving as positive role models for young girls.” *Id.* at 458. She also presented evidence about how her lyrics and the pictures on her website promoted gender empowerment. *Id.* However, the Federal Circuit Court of Appeals overlooked this substantial evidence and affirmed the TTAB’s decision.

SUMMARY OF THE ARGUMENT

The mark DUMB BLONDE is not disparaging to a substantial composite of blonde-haired women. Although the dictionary definition for DUMB BLONDE has a negative connotation, it does not rise to the level of disparagement necessary to bar registration under the Lanham Act. The PTO has registered the mark DUMB BLONDE in the past. Case law allows applicants to register questionable marks when the applicant is a member of the referenced group or if they are attempting to reclaim the phrase for the betterment of the referenced group. Ms. Luhv is able to register the DUMB BLONDE mark under both of these precedents.

The court erred by relying on flimsy evidence based on an outcome driven analysis of the facts. It failed to balance substantial evidence provided by Ms. Luhv showing her intent was to promote both gender empowerment and women's issues. In the event there are disparate views on the issue of disparagement, courts resolve publication in favor of the applicant because of the subjective nature of the disparagement analysis. Although the court expressly recognized both the disparate views and substantial evidence in favor of publication, it still refused registration of the mark DUMB BLONDE in error.

Furthermore, Section (a) is requiring Ms. Luhv to capitulate her First Amendment rights in exchange for a trademark. In essence, the government is forcing Ms. Luhv to cater her politically driven speech to what the government deems morally acceptable. This is a clear violation of the unconstitutional conditions doctrine and is also viewpoint discrimination. It has uniformly been held

that offensive speech is deserving of First Amendment protection, especially when it conveys a socio-political message.

Section (a) has become a mechanism for the government to manipulate an applicant's speech in order to further its paternalistic goals. DUMB BLONDE is intertwined commercial speech deserving of full protection because it is aimed at raising important women's issues in our society. Further, the subjective language has resulted in a denial of Ms. Luhv's property rights because she has lost \$2,000,000 and the ability to enforce her mark against competitors as a direct result of the rejection.

In conclusion, this Court should reverse the Federal Circuit Court of Appeals' decision and hold the mark DUMB BLONDE is not disparaging to women. Even if this Court finds the mark disparaging, Section (a) is a violation of Ms. Luhv's rights under the First and Fifth Amendments.

ARGUMENT

I. THE FEDERAL CIRCUIT COURT OF APPEALS ERRED BY REJECTING MS. LUHV'S APPLICATION TO REGISTER THE MARK "DUMB BLONDE" BECAUSE THE MARK IS NOT DISPARAGING TO WOMEN UNDER 15 U.S.C. §1052(a) OF THE LANHAM ACT.

A trademark is defined as “any word, name, symbol, or device or any combination thereof used by any person to identify and distinguish his or her goods.” 15 U.S.C. § 1127. A trademark owner can file an application to register the mark with the PTO under the Lanham Act (“Act”). *See* 15 U.S.C. § 1052(a)(1). Under the Act, an examining attorney may refuse registration if he/she decides the mark disparages “persons, living, or dead, institutions, beliefs, or national symbols, or brings them into contempt or disrepute.” 15 U.S.C. §1052 (a). A phrase is disparaging “when it dishonors by comparison with what is inferior, slights, deprecates, degrades, or affects or injured by unjust comparison.” *In Re Geller*, 751 F.3d at 1358 (quoting *Pro-Football, Inc. v. Harjo*, 284 F. Supp. 2d 96, 124 (D.D.C. 2003)).

Courts use a two-prong test to determine whether a mark is disparaging and can be refused registration under the Act. *In Re Geller*, 751 F.3d at 1358. “The first prong of the disparagement test determines ‘the likely meaning of the matter in question.’” *Id.* (quoting *In re Lebanese Arak Corp.*, 94 U.S.P.Q.2d 1215, 1217 (T.T.A.B. 2010)). The second prong asks, “whether that meaning may be disparaging to a substantial composite of the referenced group.” *In Re Geller*, 751 F.3d at 1358. Courts have acknowledged that a disparagement analysis is both vague and subjective. *In re In Over Our Heads, Inc.*, 16 U.S.P.Q.2d 1653 (T.T.A.B. 1990)

(holding the phrase MOONIES was not disparaging to members of the Unification Church because it did not clearly disparage followers of the Church) (emphasis added). Because the disparagement analysis is vague, courts resolve doubts in favor of the applicant. *Id.*

Historically, courts have struggled to consistently analyze whether marks are disparaging. *See In re Heeb Media, LLC*, 89 U.S.P.Q.2d 1071 (T.T.A.B. 2008) (holding the phrase HEEB disparages people of Jewish faith, even though the applicant was a Jewish man who owned a magazine promoting Jewish culture) (emphasis added); *but see In re Condas S.A.*, 188 U.S.P.Q. 544 (T.T.A.B. 1975) (holding the phrase JAP to not be disparaging to Japanese-Americans because the applicant himself was Japanese and thus would not disparage his own people) (emphasis added).

A. The Likely Meaning Of The Phrase DUMB BLONDE Is Not Disparaging To Women.

The first prong of the disparagement analysis focuses on the likely meaning behind the proposed mark. *In Re Geller*, 751 F.3d at 1358. Courts determine the likely meaning by looking at dictionary definitions, the nature of the goods or services, and the manner in which the goods or services are used in the marketplace. *Id.* The Oxford Dictionary defines the phrase DUMB BLONDE as a “blonde haired woman perceived in a stereotypical way as being attractive but unintelligent.” Elizabeth J. Jewell & Frank Abate, *New Oxford American Dictionary*, 537, Angus Stevenson & Christine A. Lindberg eds., 3rd ed. (2010).

A dictionary definition may be sufficient to meet the PTO's burden for the scandalous and immoral analysis under the Act; however it is not enough for purposes of a disparagement analysis. *See In re Blvd. Entertainment*, 334 F.3d 1336, 1341 (Fed. Cir. 2003) (holding that dictionary definitions alone will meet the PTO's burden under a scandalous analysis); *see also Order Sons of Italy in America v. The Memphis Mafia, Inc.*, 52 U.S.P.Q.2d 1364 (T.T.A.B. 1999) (In its disparagement analysis, the court looked beyond the dictionary definition of the mark MEMPHIS MAFIA and focused more on who the applicants were and the context of their goods or services) (emphasis added).

Here, the dictionary definition defines a stereotype that has a nominally negative connotation. It does not rise to the level of offensiveness found in racial, ethnic, or religious slurs, which are traditionally barred under a disparagement analysis. Without more, the mark DUMB BLONDE cannot be barred from registration under the Act.

1. The phrase DUMB BLONDE is not disparaging because Ms. Luhv is a member of the referenced group.

Several cases allow registration of a trademark when the applicant is a member of the "disparaged" group. *See In re Condas S.A.*, 188 U.S.P.Q. at 544 (where an applicant of Japanese ancestry was allowed to register the term JAP as a trademark); *see also McDermott v. San Francisco Women's Motorcycle Contingent*, 81 U.S.P.Q.2d 1212 (T.T.A.B. 2006) (where a gay rights group, whose members were mostly gay or lesbian, were allowed to register the mark DYKES ON BIKES) (emphasis added).

Both applicants in *In re Condas* and *San Francisco Women's Motorcycle Contingent* were members of the supposed disparaged group. Although the registered words or phrases were facially offensive to some, the disparagement analysis takes more into account than just the examining attorney's dictionary definition. In both of these cases, the offensive meaning was minimized because the parties were members of the referenced group.

Ms. Luhv is a member of the group the TTAB and PTO claim is being disparaged. She is a blonde woman and is subject to the offensive marks herself. *Luhv*, 1337 F.3d 455, 457 (Fed. Cir. 2015). In *San Francisco Women's Motorcycle Contingent*, a gay rights group was attempting to reclaim the word "Dykes" to promote gay rights issues. Here, Ms. Luhv is attempting to reclaim the phrase DUMB BLONDE as a way of empowering woman. *Id.* at 458. On her website, Ms. Luhv posted a picture of a blonde woman sitting in the Oval Office of the White House. *Id.* Further, Ms. Luhv's lyrics serve to promote an awareness of women's issues and she has been actively promoting these issues for the past three years through social satire. *Id.*; *Id.* at 455. Overall, Ms. Luhv's fan base consists of thousands of women who do not find her stage name disparaging. *Id.*

The phrase DUMB BLONDE is not disparaging to women because Ms. Luhv is a blonde-haired woman herself and it is unlikely that she would be attempting to offend a group she is a member of.

2. The manner in which the mark is used in the marketplace – in connection with the good or services – demonstrates the meaning is not disparaging.

In determining the likely meaning of a mark, courts look at the nature of the services or goods as well as how they are used in the marketplace. *See In re Geller*, 751 F.3d at 1358. The nature of how the mark is used in the marketplace is more significant than the dictionary definition. *See In re Over Our Heads, Inc.*, 16 U.S.P.Q. at 1653 (holding the mark MOONIES was not disparaging to members of the Unification Church because the mark was used to market dolls, rather than target the religious group in any derogatory way); *see also Order Sons of Italy v. Memphis Mafia, Inc.*, 52 U.S.P.Q.2d 1364 (T.T.A.B. 1999) (Affirming registry status for MEMPHIS MAFIA because the mark was used to promote Elvis Presley for entertainment purposes and not to target people of Italian-American descent).

Ms. Luhv’s “goods or services” are (1) music lyrics, which promote women’s issues and (2) clothing, which serves as a vehicle to reclaim the phrase DUMB BLONDE. *Luhv*, 1337 F.3d at 456; *See Id.* at 458. Ms. Luhv has used her stage name for the past three years to “successfully address women’s issues in a positive way.” *Id.* at 461 (J. McCartney dissenting). Ms. Luhv’s stage name does not reinforce the stereotype associated with the phrase DUMB BLONDE. Her fan base consists of mostly young women who find her music inspiring. *Id.* at 458. One blogger commented, “there needs to be more woman like [Ms. Luhv] serving as positive role models for women.” *Id.* Another blogger posted, “As a blonde woman, I totally support you.” *Id.* Ms. Luhv’s stage name makes no attempt to target women in a derogatory manner. Similarly to *In re Over Our Heads, Inc.*, Ms. Luhv’s music lyrics

do not disparage women, but rather are intended to promote women's issues and inspire young women. *Id.* at 456. Ms. Luhv has no desire to hold women in disrepute, but rather to reclaim the phrase for the empowerment of women.

In conclusion, the likely meaning of DUMB BLONDE is anything but disparaging to women.

B. The DUMB BLONDE Mark Is Not Offensive To A Substantial Composite Of The Referenced Group.

The second prong of the disparagement test asks, "whether the likely meaning disparages a substantial composite of the referenced group." *In Re Geller*, 751 F.3d at 1358. PTO officials may not assume they know the views of a substantial composite of the public. *Ritchie v. Simpson*, 170 F.3d 1092, 1094 (Fed. Cir. 1999) (citing *In re Mavety Media Group Ltd.*, 33 F.3d 1367, 1371 (Fed. Cir. 1994) (referring to the scandalous exception under the Lanham Act, which closely resembles a disparagement analysis). Both the PTO and TTAB have the burden to prove the mark is disparaging to the referenced group in connection with the goods or services. *See In re Squaw Valley Development Co.*, 80 U.S.P.Q.2d 1264 (T.T.A.B. 2006) (holding the ultimate inquiry is not whether the mark is pejorative, but whether the mark disparages the referenced group in connection with the goods or services).

1. The court's decision was not based on substantial evidence.

The substantial evidence standard requires the reviewing court to ask whether a "reasonable mind might accept" a particular evidentiary record as "adequate to support a conclusion." *Consolidated Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938). This Court has stated that substantial evidence requires more than "a mere scintilla" of evidence. *Id.* at 229-230. "A review for substantial evidence involves examination of the record as a whole, taking into account evidence that both justifies and *detracts* from an agency's decision." *See Pro-Football, Inc. v. Harjo*, 284 F. Supp. 2d at 116 (emphasis added).

The Federal Circuit Court of Appeals based their refusal on the *In re Heeb* case. *Luhv*, 1337 F.3d at 459 (referencing *In re Heeb*, 89 U.S.P.Q.2d at 1071). In that case, the TTAB found the mark "Heeb" disparaging to Jewish people because it was a derogatory slang term. *Id.* The applicant argued it was not disparaging because (1) he already registered the mark "Heeb" for a magazine focusing on Jewish culture and (2) most of applicant's consumers were Jewish themselves. *Id.* However, the court examined numerous essays written by prominent experts detailing how the mark disparaged people of the Jewish faith. *Id.*

Here, the TTAB failed to balance competing evidence that Ms. Luhv's mark was not disparaging to women. The TTAB focused on three things: (1) one or two blog posts of people that were offended by Ms. Luhv's stage name; (2) one satirical photograph playing to the stereotype associated with DUMB BLONDE; and (3) a book describing how women view "dumb blonde jokes negatively." *See Luhv*, 1337

F.3d at 456-457. Contrary to precedent, the TTAB and the Federal Circuit Court of Appeals based their decision on an outcome driven analysis that failed to account for both sides of the argument.

Unlike *In re Heeb*, the Federal Circuit Court of Appeals did not address the second prong of the disparagement analysis with equal fervor. The examining attorney's only outside expert dealt with a book describing dumb blonde jokes. *Id.* at 457. Ms. Luhv's stage name is not a joke and she has spent the last three years attempting to reclaim DUMB BLONDE for the empowerment of women. *Id.* at 455. Unlike *In re Heeb*, DUMB BLONDE does not address a racial, ethnic, or religious minority; rather it deals solely with a nominally offensive stereotype. While the disparagement analysis tends to refuse registration for racial, ethnic, or religious slurs, it keeps an open mind to everything else. *See In re Lebanese Arak Corp.*, 94 U.S.P.Q. at 1215 (holding the mark KHORAN for a brand of alcohol was disparaging to Muslims); *see also McDermott v. San Francisco Women's Motorcycle Contingent*, 81 U.S.P.Q.2d 1212 (T.T.A.B. 2006) (holding the mark DYKES ON BIKES was not disparaging to the gay and lesbian community).

There is substantial evidence that women are not offended by the DUMB BLONDE mark because they view it in a positive light. *Luhv*, 1337 F.3d at 458. Ms. Luhv's fan base – numbering in the hundreds of thousands – consists mostly of women in their twenties and thirties. *Id.* at 456. Ms. Luhv highlighted several positive blog posts that described her work as “inspiring” and thanked her for being a positive “role model for young girls.” *Id.* Ms. Luhv intended to “recast the phrase

[DUMB BLONDE] in a positive light by displaying it prominently alongside a woman with a successful career.” *Id.* She further cited a photograph on her webpage that displayed a woman sitting in the White House. *Id.* These numerous examples provide substantial evidence that Ms. Luhv’s mark is not disparaging to women in the referenced group. The PTO failed to produce sufficient evidence to show the mark DUMB BLONDE was disparaging to women. After all, if the PTO cannot assume to know the views of the public, how can they assume to know the views of a minority they are not a part of?

The Federal Circuit Court of Appeals erred by affirming the TTAB’s decision based on overlooked rebuttal evidence that was contrary to their outcome driven analysis.

2. The mark should be passed for publication because there are disparate views on whether the mark is disparaging.

Although the factors under the disparagement analysis are objective in nature, courts recognize a conclusion is “necessarily a highly subjective one.” *See In re Over our Heads, Inc.*, 16 U.S.P.Q.2d at 1654 (quoting *In re Hershey*, 6 U.S.P.Q.2d 1470, 1471 (T.T.A.B. 1988)). Due to the conclusions highly subjective nature, doubt should resolve in favor of the applicant. *See In re Over our Heads*, 16 U.S.P.Q.2d at 1654. If the TTAB grants publication in error because of doubt, an interested party can bring an opposition proceeding where more evidence can be presented to the reviewing court. *Id.*

The Federal Circuit Court of Appeals relied on less than a scintilla of evidence suggesting that a mere handful of people were disparaged by Ms. Luhv’s

proposed mark. Ms. Luhv provided more than enough evidence to rebut the TTAB's decision. The court expressly acknowledged the disparate views at issue, but still chose to affirm the TTAB's decision relying on an outcome driven analysis. *See Luhv*, 1337 F.3d at 458-459. Ms. Luhv provided ample evidence to bring doubt to the TTAB's decision and rebut their previous conclusion. The court relied on their subjective beliefs, rather than the objective nature of case precedent to form their opinion.

The doubt at issue becomes even more pronounced when searching through past registrations made by the PTO. For example, the applicants in *San Francisco Women's Motorcycle Contingent* successfully argued that because the PTO published other similar slurs in the past, the PTO should publish DYKES ON BIKES¹. The mark DUMB BLONDE has been registered by the PTO on at least three different occasions. U.S. Pat. & Trademark Off., *Trademark Electronic Search System*, (Last updated: Oct. 16, 2015, 2:42 PM), <http://www.tmsearch.USPTO.gov> (Search starting point field for "Dumb Blonde"). Currently, there are two "live" trademarks under the mark "Dumb Blonde". *Dumb Blonde*, Registration No. 3983953; *see also Dumb Blonde*, Registration No. 2601964. If the PTO did not find the mark DUMB BLONDE disparaging in the past, it should not now. No changes in popular culture have evinced a change in the meaning behind the phrase dumb blonde to provide any basis to reject Ms. Luhv's mark.

¹ *See Jessica M. Kiser, How Dykes on Bikes Got It Right: Procedural Inequities Inherent in the Trademark Office's Review of Disparaging Trademarks*, 46 U.S.F. L. Rev. 1, 2-3 (2011) (citing U.S. Trademark Application Serial No. 78/281,746)

Ms. Luhv is an artist with a message that speaks to thousands of women. She has a devoted fan base that looks up to her as a role model. The mark DUMB BLONDE is not disparaging to blonde-haired women because the mark's context displays Ms. Luhv's powerful message of gender empowerment. Furthermore, the PTO has passed identical marks in the past. The Federal Circuit Court of Appeals erred by affirming the lower court's decision because their decision was not based on relevant precedent, nor was it based on substantial evidence.

II. EVEN IF THIS COURT FINDS THE MARK "DUMB BLONDE" DISPARAGING, THE RESTRICTIONS IMPOSED BY 15 U.S.C. §1052(a) OF THE LANHAM ACT VIOLATE MS. LUHV'S CONSTITUTIONAL RIGHTS.

"Congress shall make no law . . . [that] abridg[es] the freedom of speech."

U.S. Const. amend. I. This Court has consistently held with a few exceptions that the right to free speech should not be inhibited. This is true even when the language is viewed to be inherently offensive. *See Virginia v. Black*, 538 U.S. 343 (2003) (Court upheld cross burning by the Ku Klux Klan); *see also Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46 (1988) (Court upheld pornographic material portraying a religious leader in sexually explicit positions). Offensive speech has value in the market place of ideas and for the last fifty-years this policy has permeated modern First Amendment jurisprudence.

A. Section (a) Violated Ms. Luhv's Right to Free Speech Because It Fails to Comply With Modern First Amendment Jurisprudence.

15 U.S.C. §1052(a) of the Act fails to comply with the First Amendment. The passage of the Act is over sixty-five years old and predates modern First Amendment jurisprudence. Two cases decided prior to 1946 indicate the limitations

on free speech that were widely accepted at that time. *Valentine v. Chrestensen*, 316 U.S. 52, 54 (1942) (government regulation on commercial speech was valid because the Constitution did not protect this type of speech); *Near v. Minnesota*, 283 U.S. 697, 733 (1931) (J. Butler dissenting) (finding that the right to free expression is limited to the extent “that every man shall be at liberty to publish what is true, with good motives and for justifiable ends.”). Congress was influenced by these legal theories when drafting the disparaging language of the Act. However, constitutional interpretation has changed drastically in the last sixty-years, thereby making Section (a) unconstitutional.

1. Barring disparaging marks is viewpoint discrimination of private speech subject to strict scrutiny.

Content-based regulations are presumptively invalid. *See R.A.V. v. City of St. Paul, Minn.*, 505 U.S. 377, 382 (1992); *see also Sorrel v. IMS Health Inc.*, 131 S.Ct. 2653, 2664 (2011). Heightened judicial scrutiny is warranted when a regulation imposes a specific content-based burden on protected speech. *R.A.V. v. City of St. Paul*, 505 U.S. at 382; *IMS Health Inc.*, 131 S.Ct. at 2664. Regulations involving viewpoint discrimination require the court to apply strict scrutiny. *Reed v. Town of Gilbert, Ariz.*, 135 S. Ct. 2218, 2227 (2015). In order to survive strict scrutiny, a regulation must serve a compelling interest that cannot be served by employing a less restrictive and alternative regulation. *Reno v. American Civil Liberties Union*, 521 U.S. 844, 874 (1997). Lastly, a State is forbidden to exercise viewpoint discrimination, even when it creates the limited-public forum. *Rosenburger v. Rector and Visitors of Univ. of Va.*, 515 U.S. 819, 829 (1995).

However, the Government can discriminate its *own* speech based on viewpoint. *Legal Serv. Corp. v. Velasquez*, 531 U.S. 533, 541 (2001) (“Viewpoint-based funding decisions can be sustained in instances in which the government is itself the speaker...” (emphasis added)). For example, the government is not required to fund a program that would encourage communism or fascism. *Rust v. Sullivan*, 500 U.S. 173, 194 (1991).

It is essential for courts to determine whether the speech at issue is private or government speech. The Fourth Circuit Court of Appeals has created a test to help it determine whether speech is private or government based. *Sons of Confederate Veterans, Inc. v. Comm’r of Va. Dep’t of Motor Vehicles*, 288 F.3d 610, 618 (4th Cir. 2002). The test considers:

(1) the central “purpose of the program in which the speech in question occurs”; (2) the degree of “editorial control” exercised by the government or private entities over the content of the speech; (3) the identity of the “literal speaker”; and (4) whether the government or the private entity bears the “ultimate responsibility” for the content of the speech. *Id.*; see also *Wells v. City and County of Denver*, 257 F.3d 1132, 1141 (10th Cir. 2001).

The first factor to consider is the central purpose of the program in which the speech occurs. *Id.* The sole purpose of the Act is to protect legitimate business and consumers. *S. Rep. No. 1333*, 79th Cong., 2d Sess., 3 (1946). The Act was created to ensure that trademark owners were provided with uniform legal rights and remedies in an ever-changing national economy. *Two Pesos, Inc. v. Taco Cabana, Inc.*, 505 U.S. 763, 782 (1992).

Second, the court looks to the degree of “editorial control” exercised by the government or private entities over the content of the speech. *Sons of Confederate Veterans*, 288 F.3d at 618. Section (a) is a control mechanism utilized by the government to prevent disparaging speech. However, the trademark system is no longer supported through Congressional funds, but rather through private fees. *Figueroa v. U.S.*, 466 F.3d 1023, 1028 (Fed. Cir. 2006). Congress has recently passed legislation that has given the PTO greater flexibility in adjusting its fee schedule. *See Leahy-Smith America Invents Act, amending 35 U.S.C. §292* (2011). This has further removed power away from Congress. Congress is prohibited from viewpoint discrimination because it is no longer supporting the trademark registration system.

Third, courts look to the identity of the speaker. *Sons of Confederate Veterans*, 288 F.3d at 618. In regards to trademarks, applicants are the only speakers involved. *See 15 U.S.C. §1052 (d)*. A trademark applicant is a private speaker.

Fourth, courts look to whether the government or the private speaker bears the responsibility for the content of the speech. The Federal Circuit Court of Appeals has articulated two government interest in barring disparaging material. *See In re McGinley*, 660 F.2d 481 (C.C.P.A. 1981). First, the government does not want to give the public the impression that it is supporting the disparaging marks. *Id.* at 486. Second, the government does not want to waste its “time, services, and use of funds” on this type of material. *Id.* However, both of these concerns are

unjustified. The TTAB has indicated that registration of a mark does not indicate government support for the mark. *In re Old Glory Condom Corporation*, 26 U.S.P.Q.2d 1216 at n.3 (T.T.A.B. 1993). Further, the government is no longer supporting the trademark registration system. *See* 15 U.S.C. §1113. Private speakers bear ultimate responsibility because their mark is attached to their product. *See* 15 U.S.C. §1127. The public associates a person's trademark with their product. Section (a) is impermissible viewpoint discrimination because trademarks are private speech and the government's concerns are overly broad and unjustified.

However, this Court has affirmed governmental viewpoint discrimination when the government is providing a direct subsidy to the applicants. *See National Endowment for the Arts v. Finley*, 524 U.S. 569 (1998). In this case, Congress established the National Endowment of the Arts ("NEA") to support art throughout the United States. *Id.* at 573. The program used subsidies to fund art that was both decent and possessed a respect for diverse beliefs. *Id.* at 572. Respondents sued the government for viewpoint discrimination because it restricted artistic expression to a specific type of speech that fit within the guidelines of the NEA. *Id.* at 580.

This Court found the NEA to be constitutional because Congress had limited funds to allocate to artists through this program. *Id.* at 585. Congress has the power to "selectively fund a program to encourage certain activities it believes to be in the public interest." *Id.* at 588 (quoting *Rust v. Sullivan*, 500 U.S. 173, 192 (1991)).

Here, the government is engaging in viewpoint discrimination by rejecting disparaging marks, while at the same time accepting marks that meet their moral guidelines. *See* 15 U.S.C. §1052(a). The Act is distinguishable from the *National Endowment of the Arts* because Congress is not providing a direct subsidy to trademark applicants. The registration process is impermissible viewpoint discrimination because it lacks a nexus between funding and trademark registration. As indicated in *Figueroa* and the *Leahy-Act*, Congress lacks sufficient control over the system because it is not supported through appropriations.

A limited-public forum is subject to impermissible viewpoint discrimination, even when the government creates the forum. *Rosenburger*, 515 U.S. at 829. Eugene Volokh² found that, “[Trademark registration] should be seen as a form of ‘limited public forum,’ in which the government may impose content-based limits *but not viewpoint-based ones.*” Eugene Volokh, *Federal Appellate Court Rejects “Stop the Islamization of America” Trademark*, WASH. POST, May 13, 2014 (emphasis added). A bar on disparaging marks allows the government to pick and choose what offensive speech it deems acceptable based on the applicant’s own viewpoint.

In conclusion, Section (a) is viewpoint discrimination against private speech. Even though the government created the limited-public forum through the registration process, Section (a) is subject to strict scrutiny. The government has failed to assert a compelling interest in the trademark registration process and will therefore not survive a strict scrutiny analysis.

² An esteemed First Amendment professor at the University of California-Los Angeles, who has been cited by Justice Antonin Scalia.

2. The DUMB BLONDE mark is not subject to commercial restraints because it is a form of intertwined commercial speech.

Although protected, commercial speech does not have the same protection as political speech, which is afforded the highest protection. *See Virginia St. Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 765 (1976); *see also Bd. of Trustees of the St. U. of N.Y. v. Fox*, 492 U.S. 469, 482 (1989). This Court looks to three factors to determine whether speech is purely commercial. *Bolger v. Youngs Drug Products Corp.*, 463 U.S. 60, 66-67 (1983) ((1) whether the speech is a proposal to engage in a commercial transaction; (2) whether the speech is a reference to a specific product; and (3) whether the individual engaging in the speech has an economic motivation for engaging in the speech).

Looking to these factors, a trademark is commercial speech. First, trademarks are an invitation by the mark holder to engage in commercial transactions. *See* 15 U.S.C. §1072 (A trademark is listed in both the Trademark Registrar's database and the Official Gazette). Second, the speech refers to a specific product because a trademark helps to distinguish commercial products from others. *B&B Hardware, Inc. v. Hargis Indus.* 135 S. Ct. 1293, 1299 (2015) (citing to *Restatement (Third) of Unfair Competition §9, Comment b* (1993)). Lastly, an owner has an economic motivation for the speech because it gives them the exclusive right to use the registered mark in commerce. 15 U.S.C. §1057(b). Therefore, a trademark is commercial speech.

This Court has created a four-pronged test to determine whether a government regulation of commercial speech is constitutional. *Cent. Hudson Gas &*

Elec. Corp. v. Pub. Serv. Comm'n of N.Y., 447 U.S. 557, 563-64 (1980) ((1) Does the speech concern illegal activity or is it misleading?; (2) Is the asserted government interest substantial?; (3) If so, does the regulation directly advance the interest; and (4) If so, is the regulation more extensive than necessary to serve that interest?).

The first factor to consider is whether the speech concerns an illegal activity or if it is misleading. *Id.* at 563-64. The Act itself prohibits marks that are deceptive, confusing, or likely to deceive. 15 U.S.C. §1052 (d). Further, the Act requires that an applicant's mark be distinct from other marks in commerce. *Id.* at §1052(e). The Act prevents marks from promoting illegal activity and being misleading; therefore the first factor does not apply.

The second factor to consider is whether the government has a substantial interest in banning the commercial speech in question. *Central Hudson*, 447 U.S. at 563-64. As noted above, Congress no longer supports the trademark system and the registration of the mark does not display the government's support of the mark. The government may have an interest in promoting morality, but it "does not have . . . broad discretion to suppress truthful, non-misleading information for paternalistic purposes." *44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 510 (1996).

Applying "Central Hudson" to the DUMB BLONDE mark, the regulation is an unconstitutional restriction on commercial speech. First, the mark itself may be offensive to some, but it is neither promoting illegal activity, nor is it misleading. This Court has held that merely offensive speech is not subject to government restriction. *Texas v. Johnson*, 491 U.S. 397, 414 (1989); *Chaplinsky v. State of New*

Hampshire, 315 U.S. 568, 572 (1942). The government lacks a substantial interest in barring disparaging speech and therefore the third and fourth factors do not apply. The DUMB BLONDE mark is protected commercial speech.

Moreover, political speech that is intertwined with commercial speech deserves full protection and is subject to strict scrutiny by the courts. *See Village of Schaumburg v. Citizens for a Better Environment*, 444 U.S. 620, 622-24 (1980) (finding strict scrutiny should be applied to speech that not only provides information about goods and services, but is also used in support of economic, political, and social issues). Applying this reasoning, the PTO recently registered “I Love Boobies” because it was intended as a way to raise awareness for breast cancer. *I Love Boobies*, Registration No. 4322785. Although the Third Circuit Court of Appeals found the trademark to be vulgar, it was used for a social purpose and was therefore fully protected. *B.H. ex rel. Hawk v. Easton Area Sch. Dist.* 725 F.3d 293, 324 (3d Cir. 2013).

However, in order to receive this full protection, the commercial and non-commercial elements of the speech “must be of one piece”. *Bd. of Trustees of the St. U. of N.Y. v. Fox*, 492 U.S. at 485 (finding that a Tupperware party that involved either a prayer or Pledge of Allegiance, along with political discussions, was subject to commercial restraints because the speech “was not of the same piece;” therefore it was not intertwined commercial speech).

The DUMB BLONDE mark is intertwined commercial speech because it is aimed at conveying a socio-political message to the public. As a vocalist, Ms. Luhv

has used her talent to focus on issues faced by women in today's society. *Luhv*, 1337 F.3d at 455. This has resulted in over 140,000 followers in both her Soundpuff and UTube accounts. *Id.* at 456. This large fan base consists mostly of women in their twenties and thirties with an assortment of hair colors. *Id.* at 457-58. These users have made positive comments about her message, such as, “[A]s a blonde woman I totally support you,” and “There need to be more women like you serving as positive role models for young girls...” *Id.* at 458. She is re-appropriating the phrase DUMB BLONDE in order to portray the term in a positive light. *Id.* at 461 (J. McCartney dissenting). She intends to use DUMB BLONDE in order to place women's issues at the forefront of public discourse. *Id.* at 458.

The DUMB BLONDE mark is intended as both an advertisement for her music group and as a socio-political message. Therefore, it is intertwined commercial speech and is subject to strict scrutiny.

3. Barring disparaging marks placed a condition on Ms. Luhv's protected right to free speech and is thus a violation of the unconstitutional conditions doctrine.

Section (a) requires trademark applicants to forego their constitutional rights in exchange for the benefits of a trademark. The government is prohibited from requiring an individual to surrender a constitutional right in exchange for a government benefit. *Koontz v. St. Johns River Water Mgmt. Dist.* 133 S. Ct. 2586, 2594 (2013) (referring to *Regan v. Taxation With Representation of Wash.*, 461 U.S. 540, 545 (1997)). In this case, the government gave a landowner a permit in exchange for an easement over his property. *Koontz*, 133 S.Ct. at 2592. This Court

found this act unconstitutional because the government was able to evade its obligation to pay just compensation for private property under the Fifth Amendment. *Id.* at 2604.

This Court in *Perry v. Sinderman* held that a refusal to renew a teaching contract over protected speech was unconstitutional. 408 U.S. 593, 597-98 (1972). The professor's teaching contract was not renewed because he publicly criticized the policies of the college administration. *Id.* at 595-96. This act was considered a violation of the unconstitutional conditions doctrine because the government conditioned employment on an employee's surrender of his/her constitutional rights. In its reasoning, the Court stated:

The government] may not deny a benefit to a person on a basis that infringes his constitutionally protected interests – especially, his interest in freedom of speech. For if the government could deny a benefit to a person because of his constitutionally protected speech or associations, his exercise of those freedoms would in effect be penalized and inhibited. This would allow the government to “produce a result which (it) could not command directly. *Id.* at 597 (quoting *Speiser v. Randall*, 357 U.S. 516, 526 (1958)).

Although this Court has held that the unconstitutional conditions doctrine applies to the First Amendment, courts have been unwilling to apply the doctrine to trademarks. See *In re McGinley*, 660 F.2d at 484. In *McGinley*, the court held that “because no conduct is proscribed and no tangible form of expression suppressed, an applicant's First Amendment rights are not violated by a refusal to register a mark.” *Id.* This same court held that rights given to a trademark holder are procedural and not substantive. *Id.*

However, rights given to a trademark holder are substantive. For example, a mark holder – who does business in multiple jurisdictions – has the ability to enforce his/her mark across state lines by bringing actions in federal court. 15 U.S.C. §1071. Federally registered marks are listed both in the Trademark Registrar’s database and Official Gazette – giving the world notice of the mark. *Id.* at §1072. Trademark owners may use the system to obtain registration in foreign countries. U.S. Pat. & Trademark Off., *Why Should I Obtain a Trademark*, (Last updated: Feb. 25, 2015, 10:29 AM), <http://www.uspto.gov/learning-and-resources/trademarks-faqs>. They are also able to use the Customs and Border Protection Service to prevent importation of foreign goods that infringe on the mark. *Id.* Rights given to a trademark holder are extensive and go beyond the procedural benefits outlined in *McGinley*.

The Federal Circuit Court of Appeals is currently reconsidering the unconstitutional conditions doctrine as applied to Section (a). *In re Tam*, 785 F.3d 567, 574-75 (Fed. Cir. 2015), *reh’g en banc granted* (April 27, 2015). In an aside, Judge Moore found it time for the court to revisit the constitutionality of Section (a). *Id.* (J. Moore, *add’l views*). Moore concluded that although *McGinley* rejected the First Amendment argument, it offered no legal authority for its conclusion. *Id.* It has been over thirty-years since *McGinley*; the unconstitutional conditions doctrine and the protection accorded to commercial speech has evolved significantly. *Id.*

The DUMB BLONDE rejection is unconstitutional because the unconstitutional conditions doctrine applies to trademark registration. The government is regulating otherwise permissible speech by rejecting Ms. Luhv's mark as disparaging. Further, the rights given to Ms. Luhv are not purely procedural, but rather substantive. Without a trademark, Ms. Luhv is left without a mechanism by which to enforce her exclusive right to use the mark. She will be unable to utilize the Trademark Registrar's database and the Official Gazette to give notice to others throughout the world.

By restricting the DUMB BLONDE mark, the PTO is forcing Ms. Luhv to forego her First Amendment rights in exchange for the benefits of a trademark. In order to preserve the policy behind the unconstitutional conditions doctrine, this Court must apply the doctrine to Section (a) and find the provision unconstitutional.

B. Section (a) Is Unconstitutional Because It Violated Ms. Luhv's Right To Due Process Protected By The Fifth Amendment.

An individual shall not be "deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation." *U.S. Const. amend. V*. The Due Process Clause requires laws to be crafted with enough clarity to "give the person of ordinary intelligence a reasonable opportunity to know what is prohibited" and to "provide explicit standards for those who apply them." *Grayned v. City of Rockford*, 408 U.S. 104, 108-09 (1972). In addition, a regulation that goes too far will be recognized as a taking, thereby requiring the government to pay just compensation for the private property. *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 415 (1922); *amend. V*.

1. Section (a) is void for vagueness because the government used subjective guidelines to deny Ms. Luhv her right to free speech.

Section (a) is void for vagueness and should be struck down by the Fifth Amendment. *McGinley* made clear that rights to a trademark “cannot be denied without compliance with Fifth Amendment [D]ue [P]rocess requirements.”

McGinley, 660 F.2d at 484. Section (a) is void for vagueness because it fails to satisfy the standards set forth by this Court in *Grayned*; they are as follows:

Vague laws offend several important values. *First*, because we assume that man is free to steer between lawful and unlawful conduct, we insist that laws give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly . . . *Second*, if arbitrary and discriminatory enforcement is to be prevented, laws must provide explicit standards for those who apply them. *Grayned*, 408 U.S. at 108-09 (emphasis added).

First, an individual lacks a reasonable opportunity to know the standard for trademark registration because the analysis itself is highly subjective. *See In re Hershey*, 6 U.S.P.Q.2d at 1471. For example, the PTO found the mark “Redneck Army” to not be disparaging to southern whites. *Redneck Army*, Registration No. 4813949. However, the dictionary definition says otherwise. It states redneck is an “informal, derogatory” term referring to a “politically reactionary one from a rural area. Elizabeth J. Jewell & Frank Abate, *New Oxford American Dictionary*, 1432, Angus Stevenson & Christine A. Lindberg eds., 3rd ed. (2010). Further, the Third Circuit Court of Appeals found the term to be disparaging to white southerners. *Sypniewski v. Warren Hills Reg’l Bd. of Educ.*, 307 F.3d 243, 257 n.13 (3d Cir. 2002). In addition, the TTAB found the term JAP to not be disparaging, even though it

was used in World War II as propaganda to encourage distrust and hatred towards Japanese-Americans. *In re Condas S.A.*, 188 U.S.P.Q. at 544; *How to Tell Japs from the Chinese*, Life Magazine, December 22, 1941, 81. The term has been tied with internment camps and the overall racism that existed towards Japanese-Americans during World War II.

The marks were registered even though these two terms are disparaging to a substantial composite of both groups. This anomaly begs the question: how is someone supposed to know the standard by which trademarks are approved? A reasonable person is left in the dark as to what terms would be given trademark status. This pick and choose standard is inherently vague and fails to provide proper notice to an individual regarding what marks may be accepted.

Secondly, the language of Section (a) allows for arbitrary and discriminatory enforcement. The TTAB itself has stated the “guidelines for determining whether a mark is scandalous or disparaging are ‘somewhat vague’ and the ‘determination [of whether] a mark is scandalous [or disparaging] is necessarily a *highly subjective one*.” *In re in Over Our Heads Inc.*, 16 U.S.P.Q.2d at 1653 (quoting *In re Hershey*, 6 U.S.P.Q.2d at 1471 (emphasis added)). The PTO lacks published precedent to guide its inquiry as to whether a mark is disparaging. *See In re in Over Our Heads*, 16 U.S.P.Q.2d at 1653. The subjective language has resulted in the court having

difficulty in establishing a set pattern in its decision making. *In re Old Glory Condom Corp.*, 26 U.S.P.Q.2d at 1216.

In conclusion, there is no precedent or standards by which the PTO, TTAB, or the Federal Circuit Court of Appeals can apply to trademark registration. These decisions lack objectivity and the language gives the government the unilateral power to determine what is moral. Trademark applicants are forced to yield to the subjective standards of the TTAB or Federal Circuit Court of Appeals in the hopes that their own viewpoints match what the government deems acceptable.

2. The government's denial of DUMB BLONDE constituted a regulatory taking of Ms. Luhv's property without just compensation.

A trademark is a property right that gives a holder the exclusive right to use their mark. *In re Trade-Mark Cases*, 100 U.S. 82, 92 (1879). The court concluded Section (a) did not violate an applicant's property rights because the applicant was still able to seek relief in state court. *In re McGinley*, 660 F.2d at 486 n.12.

However, Section (a) has allowed the government to eliminate a large portion of value given to disparaging marks, while at the same time appreciating the value of non-disparaging marks. According to "Penn Central," this is deemed a regulatory taking. *Penn Cent. Transp. Co. v. City of New York*, 438 U.S. 104, 124 (1978). "Penn Central" considers: (1) the economic impact on the property owner; (2) the extent to which the regulation has interfered with distinct investment-backed expectations; and (3) the character of the government action. *Id.*

Courts first consider the economic impact on the property owner. *Id.* An applicant suffers severe economic harm – through rejection of a mark – because there is an inability to record conveyances, mortgages, and grant security interests. *See* 35 U.S.C. §261.³ Further, an applicant lacks the benefit of having one’s mark protected across state lines. *Id.* Potential investors would be left open to considerable risk because of the possibility that subsequent bona fide purchasers may claim an interest in the subject mark.

Here, Ms. Luhv has suffered severe economic harm as a result of the DUMB BLONDE rejection. Ms. Luhv negotiated a deal in which she would receive \$2,000,000 if she was able to register DUMB BLONDE. *Luhv*, 1337 F.3d at 456. Without the ability to trademark DUMB BLONDE, a record company would be disincentivized to sign a record deal with Ms. Luhv. Imposters could use DUMB BLONDE – whether on music labels or merchandise – and neither Ms. Luhv nor the record labels would have the ability to enforce her mark. This potential loss of funds would far exceed the initial \$2,000,000 loss. Assuming that her 140,000 followers would end up buying her album at \$13.00, her loss would far exceed \$3,500,000. *The Same Old Song, At A Better Price*, Recording Industry Association of America, July 2, 2010 (found the average price of an album to be \$13.02). Without registration, Ms. Luhv has suffered severe economic harm.

³ “An interest that constitutes an assignment, grant or conveyance shall be void as against any subsequent purchaser or mortgagee for a valuable consideration, without notice, unless it is recorded in the Patent and Trademark Office within three months from its date or prior to the date of such subsequent purchase or mortgage.”

Courts also consider the extent to which the regulation has interfered with distinct investment-backed expectations (“DIBE”). *Penn Cent.*, 438 U.S. at 124. A DIBE is an interest that is sufficiently tied to reasonable expectations of the claimant to constitute property under the Fifth Amendment. *Id.* at 125. As noted above, Ms. Luhv had an expectation that she would be able to collect \$2,000,000 and be able to utilize her property rights through album sales. *Luhv*, 1337 F.3d at 456. The rejection has resulted in Ms. Luhv being denied DIBE’s in both her time and finances invested towards the completion of her album. These countless hours spent working on the album are lost because a label will be unlikely to risk marketing Ms. Luhv’s stage name.

Lastly, courts will consider the character of the government action. *Penn Cent.*, 438 U.S. at 124. This Court will consider whether a regulation “amounts to [a] physical invasion or instead merely affects property interests through ‘some public program adjusting the benefits and burdens of economic life to promote the common good.’” *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 539 (2005) (quoting *Penn Central*, 438 U.S. at 124). As noted above, the government does have an interest in promoting morality, but cannot deny an individual’s rights based on paternalistic desires. *44 Liquormart, Inc.*, 517 U.S. at 510. In addition, Congress made clear that the Act is solely for commercial purposes. *S. Rep. No. 1333*, 79th Cong., 2d Sess., 3 (1946) (purpose of the Act is to protect legitimate business and the consumers).

The rejection of disparaging marks constituted a violation of Ms. Luhv's Fifth Amendment rights. Ms. Luhv has suffered severe economic harm by not being able to market her album. She has lost both her time and finances invested in the album, and the government has gone beyond the commercial objectives of the Act in its attempt to promote morality.

In conclusion, 15 U.S.C. §1052(a) of the Lanham Act is a violation of Ms. Luhv's protected rights under both the First and Fifth Amendments. Therefore she respectfully requests this Court to affirm the Federal Circuit Court of Appeal's decision and declare Section (a) unconstitutional.

CONCLUSION

This Court should reverse the Federal Circuit Court of Appeals' decision and find the DUMB BLONDE mark is not disparaging under 15 U.S.C. §1052(a) of the Lanham Act. Even if this Court deems DUMB BLONDE to be disparaging, a bar on disparaging content is a violation of Ms. Luhv's rights under the First and Fifth Amendments.

CERTIFICATE OF COMPLIANCE

Pursuant to Pepperdine University School of Law Eighteenth Annual National Entertainment Law Moot Court Competition rules and the Rules of the United States Supreme Court, We certify that the attached brief is proportionately spaced, has a font size of 12-point Century Schoolbook, and contains **8,682** words.

Dated: By: Team 104
 Attorneys for Respondent