

Case No. 15-1007

IN THE
Supreme Court of the United States

October Term 2015

UNITED STATES,
Petitioner,

v.

KOURTNEY LUHV,
Respondent.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

BRIEF FOR THE PETITIONER
UNITED STATES OF AMERICA

I.

QUESTIONS PRESENTED

- A. Whether the Patent and Trademark Office (“PTO”) and the Trademark Trial and Appeal Board (“TTAB”) should find that the mark DUMB BLONDE may be disparaging under Section 2(a) of the Lanham Act on the grounds that it is offensive to a substantial composite of blonde women.
- B. Whether Section 2(a) of the Lanham Act’s prohibition on registering marks that may be disparaging violates the right to the freedom of expression granted by the United States Constitution.

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IV.

STATEMENT OF JURISDICTION

The United States Court of Appeals, Federal Circuit, entered its judgment in favor of Respondent on June 6, 2015. *In re Kourtney Luhv*, 1337 F.3d 455 (2015). Petitioner timely filed the instant appeal, and this Court granted certiorari. *Id.* Respondent initially filed her application with the PTO under 15 U.S.C. § 1051 (2002), and the PTO found the mark disparaging pursuant 15 U.S.C. § 1052(a) (2006). Subsequently, Respondent timely appealed to the TTAB and invoked jurisdiction under 15 U.S.C. § 1070 (2015). The TTAB affirmed the denial of registration under 15 U.S.C. § 1052(a), and Respondent properly appealed to the Federal Circuit, adding a claim for violation of the First Amendment, which invoked jurisdiction pursuant to 15 U.S.C. § 1071(a) (2011) and 28 U.S.C. § 1295(4)(A) (2012). This Court has jurisdiction to hear the case under 28 U.S.C. § 1254(1) (2015).

V.

STATEMENT OF THE CASE

Respondent Kourtney Luhv (“Respondent”) submitted an application (Application No. 99/989,052) to the PTO pursuant to 15 U.S.C. § 1051 in her attempt to register the mark DUMB BLONDE. *In re Kourtney Luhv*, 1337 F.3d at 456. The examining attorney for the PTO denied Respondent’s application and refused to register the mark on the grounds that it was disparaging within the meaning of 15 U.S.C. § 1052(a) (“Lanham Act”). *Id.* Respondent brought an appeal before the TTAB under 15 U.S.C. § 1070. *Id.*

The TTAB affirmed the PTO examining attorney’s refusal to register the mark on the basis that the mark may be disparaging within the meaning of Section 2(a) of the Lanham Act. *Id.* Specifically, the TTAB found that dictionary definitions, articles, and user comments on Respondent’s uTube channel established that the mark was offensive and would disparage a substantial composite of women. *Id.* at 457. In furtherance of the application’s rejection, the TTAB also cited to photographic images from Respondent’s website, consisting of images such as a blonde woman attempting to eat plastic fruit and applying Wite-Out® to a computer screen. *Id.* at 456, 457. Despite these findings, Respondent contends that the decision of the TTAB and PTO was misguided because her intention in using this mark is to “reclaim” the meaning behind the offensive stereotype by using the term positively. *Id.* at 457. Nonetheless, the TTAB affirmed the PTO’s refusal to register the trademark. *Id.* at 456.

Thwarted by the TTAB's affirmation of the rejection of her application, Respondent appealed to the United States Court of Appeals for the Federal Circuit. *Id.* Before the Federal Circuit, Respondent claimed (1) that the TTAB erred in affirming the rejection of her application for registration, and (2) that Section 2(a) of the Lanham Act's prohibition on marks that may be disparaging violates the First Amendment of the United States Constitution. *Id.*

The Court of Appeals for the Federal Circuit reviewed the case de novo and upheld the decision of its preceding courts in establishing that Respondent's mark may be disparaging under Section 2(a) of the Lanham Act. *Id.* at 460. However, the court found that Section 2(a)'s prohibition on registering such marks violates the First Amendment of the United States Constitution and cannot be enforced. *Id.* Thus, the Federal Circuit reversed the judgment of the TTAB, and held in favor of Respondent. *Id.*

Petitioner United States of America ("Petitioner") has appealed the Federal Circuit's ruling and this Court has granted writ of certiorari.

VI.

STATEMENT OF FACTS

Respondent is a thriving vocalist and solo artist, and since 2012 has been known by her stage name, “Dumb Blonde.” *In re Kourtney Luhv*, 1337 F.3d at 455. She performs live concerts in various locations throughout the southern Calidonia region, and has developed quite a substantial following; roughly 140,000 people follow her online music channels. *Id.* at 455, 456. Respondent mainly posts her music on two websites: (1) www.soundpuff.com (“Soundpuff”), and (2) www.uTube.com (“uTube”). *Id.* at 456. Respondent’s followers and show-goers are generally women in their twenties and thirties with all different hair colors. *Id.* at 457, 458.

Respondent predominately uses the Internet to communicate with her fan base. *Id.* She communicates with her followers by streaming her music, sharing “music-production-related” tips to her fans, and posting pictures on her website. *Id.* at 456, 457. Two of these pictures include photographs of a blonde woman attempting to eat plastic fruit and applying Wite-Out® to a computer screen. *Id.* Additionally, Respondent’s fans and followers regularly communicate with her by commenting on different social media platforms. *Id.* at 458. Some of the comments include: “Your ability to bring attention to the challenges faced by women is inspiring,” “[A]s a blonde woman I totally support you even if the haters gon’ hate,” and “There need to be more women like you serving as positive role models for young girls rather than grinding on Robert Thin!” *Id.*

Respondent's conduct and music are both guided by wholesome intentions. *Id.* at 457. Respondent recognized the negative connotation associated with the name "Dumb Blonde." *Id.* However, her goal in choosing and using the term "Dumb Blonde" as her stage name was done in her attempt to "reclaim" the negative stereotype associated with the term. *Id.* Respondent's music is consistent with her good intentions. *Id.* She creates her music in a variety of genres and incorporates her own lyrics into the songs. *Id.* at 455. Respondent's lyrics represent and focus on the issues women currently face in our society. *Id.*

Respondent's music was generating momentum within the music industry, so she recorded several pieces for a recording studio. *Id.* at 456. On June 2014, Respondent negotiated a deal with a record label. *Id.* This deal stipulated that she would receive a monetary advance of \$2,000,000.00, provided that she could register her stage name, "Dumb Blonde." *Id.* Respondent applied to register the mark for entertainment purposes including live music performances and clothing sales. *Id.* at 456, 457. However, her application was rejected on the basis that the term "Dumb Blonde" is disparaging to women, particularly women with blonde hair. *Id.* at 457.

VII.

STANDARD OF REVIEW

Questions of law are reviewable de novo. *Highmark, Inc. v. Allcare Health Mgmt. Sys., Inc.*, 134 S.Ct. 1744, 1748 (2014) (citing *Pierce v. Underwood*, 487 U.S. 552, 558 (1988)). A “question of law” is defined as an issue “concerning the application or interpretation of the law.” Black’s Law Dictionary (10th ed. 2014), question of law, available at Westlaw Black's Law Dictionary.

This case offers a unique procedural posture due to the fact that the TTAB’s procedure differs from ordinary civil adjudication. *See B&B Hardware, Inc. v. Hargis Indus., Inc.*, 135 S.Ct. 1293, 1300 (2015). When the TTAB renders a judgment, and that judgment is appealed, the court reviews the Board’s factual findings for clear error and its legal conclusions de novo. *See B&B Hardware, Inc. v. Hargis Indus., Inc.*, 135 S.Ct. at 1300; *see also In re Mavety Media Grp. Ltd.*, 33 F.3d 1367, 1371 (Fed. Cir. 1994).

In light of this unique procedural posture, this Court will determine the first issue of disparagement by reviewing the Board’s factual findings for clear error and its legal conclusions de novo. For the second issue, this Court will review the question of law regarding the First Amendment issue de novo

VIII.

SUMMARY OF THE ARGUMENT

A. The Mark DUMB BLONDE is Not Eligible for Registration Because it May Be Disparaging Under Section 2(a) of the Lanham Act.

This Court should affirm the decision of the Federal Circuit in refusing to register the mark DUMB BLONDE and hold that the mark may be disparaging to a substantial composite of women. First, a plethora of dictionary definitions unanimously illustrate that the meaning of the mark's words are offensive. Moreover, the imagery associated with how Respondent's mark is used in the marketplace alludes to the fact that it conveys an offensive and derogatory meaning. Further, the plain language of the statute discredits any of Respondent's good intent, as it only looks to how the mark is perceived, irrespective of the trademark owner's intent. Additionally, rejecting the mark would comport with congressional intent because it would protect the rights of women with blonde hair to be "let alone" from contempt or ridicule. Lastly, registering an offensive mark would create a parade of horrors because it would require the PTO to register countless offensive marks in the future. Therefore, this Court should uphold the finding of its predecessor courts in concluding that the mark may be disparaging and therefore cannot be registered.

B. Section 2(a)'s Regulation on Registering Marks that May be Disparaging Does Not Violate the Freedom of Expression Granted by the First Amendment of the United States Constitution.

This Court should reverse the decision of the Federal Circuit on the issue of constitutionality and hold that Section 2(a) of the Lanham Act does not violate the First Amendment of the United States Constitution. First, the PTO's refusal to register a mark does not prevent any form of tangible expression of the mark; it only denies the applicant the statutory benefits of registration. Second, trademarks registered by the PTO are governmental speech within the governmental speech doctrine, and thus are not afforded protection under the First Amendment. Moreover, the unconstitutional conditions doctrine does not apply because the criteria for trademark registration set forth in Section 2(a) does not require the trademark owner to waive a constitutionally protected right. Lastly, even if Respondent's trademark is considered a form of commercial speech, Section 2(a) is still constitutional because the restrictions under Section 2(a) are reasonably proportionate to the government's substantial interest in disassociating itself from messages that are offensive to the public.

IX.

THE TRADEMARK DUMB BLONDE IS DISPARAGING TO BLONDE WOMEN WITHIN THE MEANING OF SECTION 2(A) OF THE LANHAM ACT.

A trademark includes any word, name, symbol or device used in commerce by a person for the purpose of distinguishing and identifying the source of the goods or services. Commerce and Trade, 15 U.S.C. § 1127 (2006). Under Section 2(a) of the Lanham Act, no trademark which may be distinguished from the goods of others shall be refused unless it consists of “matter which may disparage or falsely suggest a connection with persons, living, or dead, institutions, beliefs, or national symbols, or bring them into contempt, or disrepute.” *Id.* § 1052. This statutory provision is not “an attempt to legislate morality, but, rather, 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 481, 486 (C.C.P.A. 1981). Accordingly, Congress did not intend to grant disparaging and offensive marks the statutory benefits of registration. *Id.*

In determining whether a mark qualifies as disparaging under § 1052, the TTAB uses a two-prong test. First, the TTAB must determine “the likely meaning of the matter in question, taking into account not only dictionary definitions, but also the relationship of the matter to the other elements in the mark, the nature of the goods or services, and the manner in which the mark is used in the marketplace in connection with the goods and services.” *In re Geller*, 751 F.3d 1355, 1358 (Fed. Cir. 2014). Second, the TTAB must establish that “if the meaning is found to refer to

identifiable persons, whether that meaning may be disparaging to a substantial composite of the referenced group.” *Id.* Ultimately, the determination that a mark may be disparaging is a legal conclusion drawn from the underlying factual inquiries. *In re Mavety*, 33 F.3d at 1371.

This Court should affirm the refusal of the mark because the meaning of term “dumb blonde” is highly disparaging to women with blonde hair, it retains this meaning when used in connection with Respondent’s goods and services, and a substantial composite of the referenced group finds it to be disparaging.

A. Substantial Evidence Supports the Board’s Determination That the Sole Likely Meaning of DUMB BLONDE is Disparaging.

The TTAB’s conclusion that the trademark DUMB BLONDE is disparaging to women within the meaning of Section 2(a) of the Lanham Act is supported by ample evidence. In determining whether a mark is disparaging, the first prong of the disparagement test establishes “the likely meaning of the matter in question.” *In re Lebanese Arak Corp.*, 94 U.S.P.Q.2d 1215, 1217 (T.T.A.B. 2010). Dictionary definitions, the nature of the goods and services, and the manner in which the mark is used in the marketplace in connection with the goods and services establish that the sole likely meaning of the trademark DUMB BLONDE is disparaging.

1. *Dictionary evidence alone is sufficient to determine the meaning of the trademark DUMB BLONDE because the evidence shows that the mark has only one pertinent meaning.*

Dictionary evidence alone is sufficient for this Court to determine the meaning of the trademark DUMB BLONDE. In *In re Boulevard Entm’t, Inc.*, the trademark applicant applied to register the mark “1-800-JACK-OFF” for use in adult-oriented

entertainment. *In re Boulevard Entm't*, 334 F.3d 1339 (Fed. Cir. 2003). The TTAB refused to register the mark under Section 2(a) of the Lanham Act. *Id.* at 1338. Subsequently, the Federal Circuit affirmed this rejection holding that substantial evidence supported the finding that the term “jack-off” was scandalous matter statutorily barred from registration. *Id.* The court further noted that when evidence shows that a mark has only one pertinent meaning, dictionary evidence alone is sufficient to determine the meaning of the mark in question. *Id.* at 1340-41. The court based its reasoning on four dictionaries that were consulted in determining the meaning of the mark, all of which indicated that the term “jack-off” was offensive when used to refer to masturbation. *Id.* at 1340.

The dictionary definitions in this case uniformly characterize the term “dumb blonde” as an offensive term when applied to women. The word “dumb” is defined as “lacking intelligence.” *Merriam-Webster’s Collegiate Dictionary* 386 (11th Ed. 2003). When the term “dumb” is then linked with the term “blonde” it creates a negative association, targeted at a specific class of people; women with blonde hair color.

Further, the term “dumb blonde” has *only* been used in the public domain in a habitually degrading manner. Contemporary references apply negative definitions to the term “dumb blonde,” implying a stereotypical and disparaging view of blonde women. The *MacMillian Dictionary* defines the term “dumb blonde” as “an insulting word for a woman with blonde hair who is considered to be sexually attractive but not very intelligent.” *Dumb Blonde*, [macmillandictionary.com](http://www.macmillandictionary.com), <http://www.macmillandictionary.com/us/dictionary/british/dumb-blonde> (last visited

Oct. 18, 2015). Dictionary.com defines the term as “a pretty but rather stupid blonde young woman; bimbo; dumb bunny.” *Dumb Blonde*, dictionary.com, <http://dictionary.reference.com/browse/dumb-blonde?s=t> (last visited Oct. 18, 2015). These dictionary definitions unanimously underscore the derogatory nature of the mark DUMB BLONDE.

Where multiple dictionaries, including at least one standard dictionary, uniformly indicate that the term “dumb blonde” is disparaging, this Court can determine the meaning of this term by reference to dictionary definitions alone.

2. The meaning of the trademark DUMB BLONDE is disparaging as used in the marketplace in connection with the nature of the goods and services.

Even if this Court were to find that dictionary evidence alone is not sufficient to determine the meaning of the mark in question, contextual evidence also supports the Board’s determination that the mark DUMB BLONDE is disparaging. When there is more than one possible meaning of a mark, the likely meaning is determined by “taking into account not only dictionary definitions, but also... the manner in which the mark is used in the marketplace.” *In re Geller*, 751 F.3d at 1358-60. In making this determination, courts must look to the “likely meaning” in the context of the goods and services as identified. *Id.*

As used in connection with Respondent’s goods and services, the term “dumb blonde” carries a derogatory allusion to blonde women which is inherent within the original definition of the word. In the eyes of the consumers Respondent’s imagery and themes both exploit and reinforce the correlation between blonde women and idiocy. The nature of Respondent’s goods and services is namely live performances

by a solo artist and clothing, namely sweatshirts, t-shirts, tank tops, and headwear. *In re Kourtney Luhv*, 1337 F.3d. at 456. Focusing on the manner in which the trademark is actually used in the marketplace, Respondent uses imagery of blonde women throughout her logos and website. *Id.* at 457. On Respondent's website, she displays photographic images of women including an image which features a blonde woman eating plastic fruit and applying Wite-Out® to text displayed on her computer screen. *Id.* at 456-57. The offensive correlation between such imagery and the mark DUMB BLONDE conveys the idea that blonde women are intellectually inferior individuals. Thus, it would be factually incomplete to ignore the substantial evidence of blonde imagery used by Respondent in connection with Respondent's goods and entertainment services.

Further, Respondent has blonde hair. Therefore, the mark is plainly intended to refer to women with blonde hair color. Even more telling is Respondent's own statements in regards to the mark. Respondent herself has indicated that she recognized that the mark DUMB BLONDE is a direct reference to the discriminating meaning of the term, and chose to embrace the derogatory and stereotypical nature of the mark. *Id.* at 458. The totality of the evidence thus supports the TTAB's conclusions that "the mark, as it appears in the marketplace, on Respondent's website, in connection with her musical performances, and on banners displayed during her musical performances indeed refers to women, in particular women who have a blonde hair color." *Id.* at 457. It is indisputable that

the mark DUMB BLONDE means a blonde woman who is intellectually inferior.

Thus, the mark is disparaging.

B. Considerable Evidence Supports the Board's Finding That the Mark DUMB BLONDE May Be Disparaging to A Substantial Composite of Blonde Women.

The Board's determination that the mark DUMB BLONDE "may be disparaging to a substantial composite of the referenced group" is also supported by considerable evidence. To determine the "referenced group" the TTAB must look to the "perceptions of those referred to, identified or implicated in some recognizable manner by the involved mark." *Pro-Football Inc. v. Harjo*, 284 F.Supp.2d 96, 124 (D.C. Circ. 2003). Here, the record is replete with evidence indicating that the referenced group is women with blonde hair color. Respondent, herself, has blonde hair and all the imagery that is used in association with Respondent's goods and services depicts women with blonde hair. Thus, the mark DUMB BLONDE refers to women with blonde hair color.

1. *The mark DUMB BLONDE is disparaging from the standpoint of a substantial composite of blonde women in the context of contemporary attitudes.*

Sufficient evidence demonstrates that women with blonde hair find the mark DUMB BLONDE to be disparaging. A mark is disparaging when it "dishonor[s] by comparison with what is inferior, slight[s], deprecate[s], degrade[s], or affect[s] or injure[s] by unjust comparison." *Id.* at 124. Here, the definitions unanimously characterize the term "dumb blonde" as disparaging. Dictionary definitions are granted deference because "[d]ictionary definitions represent an effort to distill the collective understanding of the community with respect to language and thus

constitute more than a reflection of . . . individual views.” *In re Boulevard Entm’t, Inc*, 334 F.3d at 1340. Therefore, the numerous dictionary definitions, all of which describe the term as disparaging, show contemporary attitudes of the general public concerning the term and, without evidence to the contrary, can be interpolated to show the attitudes of blonde women.

Furthermore, literary and media references also confirm that a substantial composite of blonde women believe that the term “dumb blonde” carries an offensive and degrading connotation. First, the Board established that significant evidence suggests that women view “dumb blonde” jokes negatively. *In re Kourtney Luhv*, 1337 F.3d at 457 (citing Karen Ross, *The Handbook of Gender, Sex, and Media* 88 (John Wiley & Sons, Sep. 7, 2011)). Second, in generating a simple Google search, the results reveal that society inherently views the term “dumb blonde” negatively. *See* Laura Koran, *Backlash against Turkish mayor who posted tweet calling U.S. official a ‘dumb blonde,’* CNN Politics (May 1, 2015, 9:20 PM), <http://www.cnn.com/2015/05/01/politics/ankara-mayor-marie-harf-dumb-blonde/> (confirming that society had a backlash against a Turkish mayor who posted tweets calling a U.S. official a “dumb blonde”); *see also Blonde Stereotype*, wikipedia.com, https://en.wikipedia.org/wiki/Blonde_stereotype (last visited Oct. 18, 2015) (finding that the term “dumb blonde” has been a topic of academic research, which found that “many people hold to the perception that light-haired women are less intelligent than women with dark hair”); *see also Dumb Blonde*, urbandictionary.com, <http://www.urbandictionary.com/define?term=Dumb+Blonde>

(last visited Oct. 18, 2015) (defining the term “dumb blonde” as “a person (usually female) with blonde hair who is slow to learn or understand; lacking intellectual acuity.”). Therefore, contemporary society as a whole, including blonde women, solely interprets the term “dumb blonde” in a demeaning and offensive manner.

2. *Respondent has not presented sufficient evidence to refute the TTAB’s conclusion that the mark is disparaging.*

While Respondent has presented evidence of positive reactions to the mark, such evidence cannot refute the TTAB’s conclusion that the mark is disparaging. In *In re Heeb Media, LLC*, the applicant filed an application to register the mark HEEB for clothing and entertainment purposes. *In re Heeb Media, LLC*, No. 78558043, 89 U.S.P.Q. 2d 1071, at *1 (TTAB 2008). The registration was refused pursuant to 15 U.S.C. § 1052, on the ground that applicant’s mark “is disparaging to a substantial composite of the referenced group, namely, Jewish people.” *Id.* The applicant appealed the decision arguing that the term “Heeb” was not disparaging. *Id.* In support of this argument, the applicant presented evidence including various comments made by students who did not find the term to be disparaging, and records showing that the applicant’s magazine had approximately 100,000 subscribers. *Id.* at *3-4. However, the TTAB found that the examining attorney had met her burden in refusing to register the mark. *Id.* at *9. The court reasoned that while the applicant provided evidence supporting the position that many individuals view the mark as positive, such views were not indicative of a substantial composite of the Jewish public and thus did not discount contrary evidence. *Id.* at *8.

Here, Respondent argues that the views of women cited by the examining attorney do not accurately represent the views held by a substantial composite of women. *In re Kourtney Luhv*, 1337 F.3d at 457-58. First, Respondent indicates that the composition of her fan base is typically women in their twenties and thirties with an assortment of different hair colors. *Id.* This argument is without merit however, because the statute requires the court to determine if the mark is disparaging to the “referenced group.” 15 U.S.C. § 1052. As previously explained, the referenced group in this case is women with blonde hair. Therefore, the ideals of women with other hair colors are not relevant in this Court’s analysis. Second, Respondent presents evidence of positive comments made on various social media sites. For example such comments include, “your ability to bring attention to the challenges faced by women is inspiring,” and “there need to be more women like you serving as positive role models for young girls rather than grinding on Robert Thin!” *In re Kourtney Luhv*, 1337 F.3d at 458.

However, these comments made on various social media sites are not indicative of a substantial composite of consumers of the mark, but rather a biased selection of people who leave comments on uTube. The determination of disparagement cannot be based on isolated comments made by a few vocal individuals whose opinions do not represent female popular thought or the cultural mainstream. This Court’s consideration of whether the term is disparaging must not be restricted to the perception of Respondent’s uTube subscribers who have no objection to DUMB BLONDE as Respondent’s stage name. Rather, this Court is charged with taking

into account the views of the entire referenced group who may encounter Respondent's entertainment services in any ordinary course of trade for the identified goods and services. Thus, all members of the female general public may encounter the DUMB BLONDE mark in advertising, billboards, magazines, on a websites, or in stores that may sell apparel relating to the mark. Because the determination of "[w]hether a mark is disparaging "is to be ascertained from the standpoint of not necessarily a majority, but a substantial composite of the general public," this Court should find that the mark DUMB BLONDE is disparaging to a substantial composite of women. *Id.*

3. The plain language of the statute discredits Respondent's good intentions behind the use of her mark.

Respondent is not entitled to registration because the plain language of the statute merely requires a finding that the general public perceives the mark as disparaging. 15 U.S.C. § 1052. Respondent claims that she intends to use the mark positively in order to reclaim the term. *In re Kourtney Luhv*, 1337 F.3d at 458. She aims to recast the phrase in a more positive light by displaying the mark alongside herself, a woman with a successful career, and through her lyrics that expose critical issues faced by women. *Id.* Although Respondent has good intentions in her use of the term, this does not preclude the fact that a substantial composite of the referenced group finds the term offensive. The court in *Pro-Football Inc. v. Harjo* held that the addition in the term "may" before the word "disparaging" in Section 2(a) of the Lanham Act was to avoid an interpretation of this provision which would require an intent to disparage." *Pro-Football Inc. v. Harjo*, 284 F.Supp.2d at 125.

Thus, the plain language of the statute indicates that there need not be a finding of *intent* to disparage. Rather, the court need only determine whether the mark may be *perceived* as disparaging. See *In re Heeb Media, LLC*, No. 78558043, 89 U.S.P.Q.2d at *8 (holding that the court’s “focus must be on the perception of the referenced group and not the applicant’s intentions.”). The evidence in this case demonstrates that the mark DUMB BLONDE disgraces a sense of decency and is shocking to the moral sense of members of the referenced group. Therefore, under the plain language of the statute, the voices of those who find the mark to be offensive should not be discounted because of Respondent’s good intentions.

4. *Congress did not intend to grant disparaging marks such as DUMB BLONDE the benefit of registration and to do so would lead to a parade of horrors.*

The legislative history of the Lanham Act indicates that Section 2(a) was intended to preclude registration of a mark, which conflicted with another’s rights, such as the right of privacy or the right of publicity. *University of Notre Dame Du Lac v. J.C. Gourmet Food Imports Co., Inc.*, 703 F.2d 1372, 217 (Fed. Cir. 1983). In *Greyhound Corp. v. Both Worlds, Inc.*, the Board concluded that disparagement is essentially a violation of the right to be “let alone” from contempt or ridicule. *Greyhound Corp. v. Both Worlds, Inc.*, No. 75,652, 6 U.S.P.Q.2d 1635, at *5 (TTAB 1988). Evidently, one’s right to be “let alone” from contempt or ridicule outweighs one’s right to benefit from registration of a trademark.

Here, the mark DUMB BLONDE dishonors women with blonde hair by making a comparison with what is inferior and slight. Such stigma should not be attached

to an entire composite of the general public, i.e. blonde women, for the mere advantage that one individual seeks to gain through trademark registration. The Lanham Act indirectly purports to protect the public morals by withholding registration of trademarks that would offend members of the public.

Allowing Respondent's mark DUMB BLONDE the benefit of registration would lead to a parade of horrors. This Court should refrain from registering Respondent's mark because doing so will require the TTAB to allow many more disparaging marks to be registered and subsequently enter the marketplace. Moreover, registration of an offensive mark would speak volumes to society. Specifically, registration of an offensive and disparaging mark would indicate that our society is of the kind that utilizes mockery and ridicule for a commercial benefit. Congress intended to avoid the moral taint from registering marks that may be disparaging and, as a matter of fundamental human dignity, this Court should uphold Congress' intent.

X.

PROHIBITING REGISTRATION OF TRADEMARKS UNDER SECTION 2(A) OF THE LANHAM ACT DOES NOT VIOLATE THE FREEDOM OF EXPRESSION GRANTED BY THE FIRST AMENDMENT OF THE UNITED STATES CONSTITUTION.

The Lanham Act was enacted by Congress to provide trademark owners with a protective mechanism over their trademarks. *B&B Hardware, Inc.*, 135 S.Ct. at 1299. In order for a trademark owner to ascertain this protection, Congress requires federal registration through the PTO. *Id.* Rights to a trademark do not arise from congressional action, but rather from the use of a distinct mark in commerce. *Id.* at

130l. Registration of a mark confers important “procedural and substantive legal advantages” on trademark owners. *Id.* These benefits include, but are not limited to, constructive notice of claim of ownership, exclusive right to use the mark, and incontestability of the mark after five years of registration. 15 U.S.C. § 1065 (2010). In order for an owner to obtain the benefits of registration, she must file an application with the PTO. *Id.* § 1051. However, the statute explicitly states that the PTO may refuse to register a trademark that is in violation of Section 2(a) of the Lanham Act. *Id.* § 1052(a).

Although the Lanham Act grants the PTO the right to refuse registration of a trademark that is in violation of Section 2(a), it does not preclude the trademark owner’s use of the mark or its enforceability. *In re McGinley*, 660 F.2d at 484. Section 2(a) solely concerns the registration of a trademark and does not inhibit any tangible form of expression. *Id.* Furthermore, non-eligible trademark owners are not left without a remedy for enforcing their trademark rights. 15 U.S.C. § 1125(a) (2012). The Lanham Act does not impede a non-eligible trademark owner’s ability to bring suit in federal court to enforce their trademark rights. *Id.* Under Section 43 of the Lanham Act, unregistered trademark owners are given the right to bring a claim for infringement, which if successful, provides injunctive relief or other damages. *Id.*

Under the First Amendment of the United States Constitution, all person are afforded the right to freedom of speech, free from government interference. U.S. Const. amend. I. In order for there to be a finding of a First Amendment violation in

connection with the PTO's refusal to register a trademark, Respondent must meet the following standard. First, Respondent must establish that her trademark is "within the area of protected speech and press." *Roth v. U.S.*, 354 U.S. 476, 481 (1957) ("[I]t is apparent that the unconditional phrasing of the First Amendment was not intended to protect every utterance."). Second, Respondent must show that the Lanham Act authorizes the government to act in a manner that abridges her protected speech, therefore implicating the First Amendment. *In re McGinley*, 660 F.2d at 484. Lastly, Respondent must allege sufficient evidence that the violation is unconstitutional by demonstrating that the regulation does not directly advance a governmental interest. *Central Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of N. Y.*, 447 U.S. 557, 566 (1980). If the regulation is found to advance a government interest, Respondent must show that the regulation is "more extensive than is necessary to serve that interest." *Id.*

Applying this standard, this Court will find that Respondent's trademark is not protected speech under the Free Speech Clause, Section 2(a) does not implicate the First Amendment, and the government is directly advancing a governmental interest through a comparable regulation. Accordingly, this Court should reverse the decision of the Court of Appeals for the Federal Circuit and hold that Section 2(a)'s prohibition on registering marks that may be disparaging is constitutional.

A. Respondent's Trademark is a Form of Government Speech and Thus Not Subject to the Scrutiny of the First Amendment.

The Supreme Court has held that speech that falls within the protection of the government speech doctrine is not subject to the scrutiny of the First Amendment.

Pleasant Grove City, Utah v. Summum, 55 U.S. 460, 461 (2009). Speech is considered government speech within the government speech doctrine if the government “effectively control[s]” the content of the speech by exercising “final approval authority over it.” *Id.* Under the government speech doctrine, the government is entitled to regulate content promulgated by governmental forums. *Rust v. Sullivan*, 500 U.S. 173, 192 (1991). Federal regulation will be appropriate when the content is influential to public law and policy, and is commonly perceived by the public as content associated with the government. *See id.* (“[T]here is a basic difference between direct state interference with a protected activity and state encouragement of an alternative activity consonant with legislative policy.”); *see also In re Fox*, 702 F.3d 633, 640 (2012) (“Congress has empowered the PTO to serve as the first line of defense against [disparaging] marks.”). Speech that is registered and published by the PTO is subject to the protection of the government speech doctrine. Accordingly, this Court should hold that Respondent’s trademark is a form of government speech.

1. *Trademarks are government speech because the PTO exclusively administers the registration of trademarks and effectively controls the content of Respondent’s trademark.*

The Supreme Court has held that the government’s effective control over the content and dissemination of a message that may be attributable to the government is encompassed by the government speech doctrine. *Johanns v. Livestock Mktg. Ass’n*, 544 U.S. 550, 560 (2005). In *Johanns*, two cattle breeding associations contended that the Beef Act and Order abridged their First Amendment rights because the Secretary of Agriculture did not have the right to regulate the content

of ads that were controlled by nongovernmental entities, or to compel the associations to support the messages conveyed in the ads. *Id.* at 550. The Court held that the ads were “established” government speech because Congress and the Secretary of Agriculture determined the “overarching message” and elements of the campaign. *Id.* The Court reasoned that the government “effectively controlled” the content of the ads by mandating that all campaign development, programs, and promotional ads receive final approval by the Secretary. *Id.* at 560. Thus, the Court found that the government’s regulation of the content of the ads was constitutional under the government speech doctrine. *Id.*

Here, the PTO’s regulation of the content of registered trademarks is analogous to the regulation of the content of promotional ads by the Secretary of Agriculture. First, the PTO disseminates established government speech by determining whether or not trademarks meet the statutory and administrative requirements for registration. 15 U.S.C. § 1052. Second, the PTO “effectively controls” the content of marks by mandating that all registration applications and certificates issued are signed, and receive final approval by the PTO. *Id.* § 1057(a). Once a mark is registered by the PTO it is deemed a form of government speech. *Id.* Therefore, the PTO must regulate what content would be eligible for registration, and would qualify as government speech. Here, the PTO has the final authority to approve registration of the mark DUMB BLONDE. Because the PTO possesses “final approval authority” over registered marks, this Court should find that Respondent’s trademark, if registered, would constitute a form of government

speech subject to the regulations of the PTO, including the restrictions set forth in Section 2(a) of the Lanham Act.

2. *A trademark is government speech regardless of its origin.*

Respondent's contribution to the creation of her mark does not refute the fact that her mark is government speech. The Supreme Court has recognized that the government is not precluded from relying on the government speech doctrine merely because it receives assistance from nongovernmental or private sources in designing and creating the content of a message. *Johanns*, 544 U.S. at 560; *see Sumnum*, 555 U.S. at 461 (holding that the government is entitled to express the views it wishes to express, and that "it may exercise the same freedom when it receives private assistance for the purpose of delivering a government controlled message."); *see also Walker v. Tex. Div., Sons of Confederate Veterans, Inc.*, 135 S.Ct. 2239, 2251 (2015) ("The fact that private parties take part in the design and propagation of a message does not extinguish the governmental nature of the message or transform the government's role into that of a mere forum-provider."). Thus, Respondent's independent creation of her trademark does not preclude the content of the mark from becoming government speech if registered.

3. *A trademark is a form of government speech because the public perceives trademarks to be endorsed by the federal government.*

Trademark rights are obtained through a federally regulated process. Section 2(a) of the Lanham Act grants the PTO the authority to register marks that communicate messages to the public that the government views as appropriate. In *Walker*, the state of Texas refused to approve a nonprofit organization's application

for a specialty license plate depicting the Confederate battle flag. *Id.* at 2245-46. The statute at issue granted a state agency the authority to deny an application for a specialty license plate “if the design might be offensive to any member of the public.” *Id.* The Court held that the state’s refusal to register the license plate was a form of government speech, and therefore was not subject to the scrutiny of the First Amendment. *Id.* at 252. The Court reasoned that license plates are commonly associated with the government and therefore, “when the government speaks, it is not barred by the Free Speech Clause from determining the content of what it says.” *Id.* at 2241. *See WV Ass’n of Club Owners & Fraternal Servs., Inc. v. Musgrave*, 553 F.3d 292, 299 (2009) (“The fact that the state is conveying a message for which it is politically accountable suggests that the speech at issue is governmental speech.”). Additionally, the Court recognized that government speech is not a form of expression that normally implicates the First Amendment’s “rules designed to protect the marketplace of ideas.” *Id.* at 2246.; *see Sumnum*, 555 U.S. at 460 (holding that the Free Speech Clause solely restricts “the government’s regulation of private speech; it does not regulate government speech.”).

In this case, the content of Respondent’s trademark is similar to the content of a specialty license plate, as illustrated in *Walker*. First, trademarks and the federal trademark registry are ways in which the government communicates to the public that a mark is valid and that the owner has an exclusive right to the mark. 15 U.S.C. § 1057(b). Second, a trademark registration certificate is stamped with the PTO seal and is published in the PTO’s Official Gazette. *Id.* § 1057(a). Finally,

the process of trademark registration, in its entirety, is managed by the federal government. Specifically, when a party seeks to oppose or cancel the registration of a similar mark, the party must first petition the TTAB. *See id.* §§ 1063-64 (2006). A trademark owner must petition the TTAB because, once a mark is approved, the registration certificate is a government document, stored within the PTO's Principal Register government database. *Id.* The message within a registered mark is a governmental message because the process of trademark registration and the issuance of a government document is intrinsically tied to the Federal Government. Therefore, because Respondent's mark would be a registered trademark, and a registered mark constitutes government speech, this Court should hold that Respondent's trademark is not subject to the scrutiny of the First Amendment.

B. Precedent Authority Stipulates that Section 2(a) of the Lanham Act Does Not Implicate Respondent's Rights Under the First Amendment.

A majority of courts have held that Section 2(a)'s prohibition on the registration of trademarks that may be disparaging does not violate the First Amendment. In *In re McGinley*, a trademark applicant sought registration of a mark comprised of graphic sexual images that would be used on the cover of a newsletter which discussed sexual topics. *In re McGinley*, 660 F.2d at 482. The PTO examiner refused registration of the mark under Section 2(a) on the basis that it was offensive, immoral, and scandalous. *Id.* The court held that the PTO's refusal to register the trademark did not violate the applicant's First Amendment rights. *Id.* at 484. The court reasoned that the PTO's refusal to register the mark did not

prevent the use of the trademark or the applicant's ability to engage in any form of tangible expression. *Id.*

The reasoning of *McGinley* has been universally accepted by a majority of courts, and has yet to be criticized. *See In re Mavety Grp. Ltd.*, 33 F.3d 1367, 1374 (1994) (citing *McGinley*, stating that, “[o]ur precedent forecloses Mavety’s challenges to § 1052(a) as unconstitutional on its face or as applied.”); *see In re Boulevard Entm’t, Inc.*, 334 F.3d at 1343 (relying on *McGinley* and its predecessor courts in holding “that the refusal to register a mark does not proscribe any conduct or suppress any form of expression because it does not affect the applicant’s right to use the mark in question.”); *see also Nat’l A-1 Adver., Inc. v. Network Solutions, Inc.*, 121 F. Supp.2d 156, 176 (2000) (applying *McGinley* in rejecting a First Amendment challenge to the PTO’s refusal to register a vulgar and offensive domain name). Therefore, this Court should adopt the reasoning set forth by these precedent cases, and hold that because Respondent may continue to express herself through the use of her mark, without registration, Section 2(a) does not implicate the First Amendment.

1. *Section 2(a) of the Lanham Act is a limited statutory authority that does not inhibit any form of speech protected under the First Amendment.*

Section 2(a) is a limited statutory authority because it applies exclusively to the registration of trademarks. In *In re McGinley*, the court recognized that Congress’ right to refuse the registration of offensive trademarks is not a mechanism to suppress any form of expression or to burden the trademark owner.

In re McGinley, 660 F.2d at 486. Rather, the benefits of the statute solely concern a trademark owner's ability to enjoin others from the use of the words or symbols. *Id.* Applying similar reasoning, several courts have agreed with the holding set forth in *McGinley*.

In *Pro-Football, Inc. v. Blackhorse*, the court cited *McGinley* as its foundation for holding that the cancellation of the registration of the applicants trademark did not implicate the First Amendment "as the cancellations [did] not burden, restrict, or prohibit [Pro-Football's] ability to use the marks." *Pro-Football, Inc. v. Blackhorse*, F.Supp.3d 1, 9 (2015). Furthermore, the court reasoned that under Section 2(a), speech itself remains uninhibited and therefore cannot restrict any public debate surrounding the mark. *Id.*

Although the PTO's refusal to register a trademark may be interpreted as a burden or a prohibition on the trademark owner's speech, case law in support of this contention is distinct from the case at bar. As the court in *Pro-Football* discerns, the majority of cases addressing the violation of First Amendment rights are founded solely on issues that concern speech that is prohibited or burdened. *Id.* Employing the same reasoning as set forth by the court in *Pro-Football*, the statute at issue here does not prohibit or burden protected speech. *Id.* Section 2(a) of the Lanham Act is unable to restrict any form of speech of the trademark owner. *Id.* The PTO's refusal to register a mark merely inhibits the trademark owner's conferral of registration benefits. Denial of such benefits is not an abridgment of the owner's First Amendment rights. Moreover, Respondent's ability to communicate with her

fan base is unaffected by the registration of her mark. *In re Kourtney Luhv*, 1337 F.3d at 456. Prior to and during her application for trademark registration, Respondent used “Dumb Blonde” as her stage name and maintained an active following on social media platforms of over 140,000 “followers.” *Id.* Additionally, there is no evidence that rejection of Respondent’s registration has had any effect on the status of her following. *Id.* Therefore, Section 2(a) is constitutional as it does not prohibit or burden Respondent’s use of her mark.

2. *A trademark owner’s intent in registering a mark is not a factor to be considered when determining the constitutionality of Section 2(a).*

A court must not consider a trademark owner’s intent in analyzing the constitutionality of Section 2(a). In *Lee v. Superior Court*, the applicant sought to change his name to a racial epithet that he believed would eliminate any degradation or negative connotations associated with the term. *Lee v. Superior Court*, 9 Cal.App.4th 510, 513 (1992). The court held that although it did not question the sincerity of the applicant’s intention in changing his name, “no person has a statutory right to officially change his or her name to a name universally recognized as being offensive.” *Id.* The court reasoned that despite the intent of the trademark applicant, the government has a right to refuse the registration of an offensive name, as the person’s use of the name remains unaffected. *See Petition of Variable for Change of Name v. Nash*, 190 P.3d 354, 356 (2008) (“[O]ne has a common law right to assume any name, and a right to engage in a social experiment, but one does not have a right to require the state to participate in the experiment.”).

Similarly, Respondent's sincere intent behind the registration of the trademark DUMB BLONDE is not a factor to be considered in determining the constitutionality of Section 2(a) of the Lanham Act. Thus, although Respondent contends that her use of the mark DUMB BLONDE is an attempt to convey a positive meaning associated with the term, this Court should hold that Respondent cannot have a right to own a mark that is recognized as offensive.

C. The Unconstitutional Conditions Doctrine is Inapplicable Because the PTO Sets Permissible Statutory and Administrative Restrictions on Trademark Registration That Do Not Infringe a Trademark Owner's Constitutionally Protected Rights.

The unconstitutional conditions doctrine will apply under circumstances where a person is denied a benefit “[o]n a basis that infringes his constitutionally protected interests.” *Perry v. Sindermann*, 408 U.S. 593, 597 (1972). However, federal trademark registration does not require waiver of a constitutionally protected right as a condition to receive the benefits of trademark registration, and thus the unconstitutional conditions doctrine does not apply. In *Rust v. Sullivan*, the Court upheld a regulation that did not allow federally funded family planning programs to provide information, referrals, or counseling supporting abortion. *Rust*, 500 U.S. at 173. The Court relied upon the Patent Clause of the United States Constitution in holding that when the government creates, funds, and manages a program, it is entitled to limit the content and scope of the messages it disseminates. *Id.* at 193.

Similarly, here, the government is not denying a benefit to an individual, but is instead mandating that public funds be spent on messages that are within its

scope, and in accordance with a purpose that the government is authorized to support. *Id.* at 196. It is constitutional and nondiscriminatory for the government to selectively fund programs that are in the best interest of the public. *Id.* at 193. See *Regan v. Taxation with Representation of Washington*, 461 U.S. 540, 549 (1983) (“[A] legislature’s decision not to subsidize the exercise of a fundamental right does not infringe the right.”). Thus, following the reasoning set forth in *Rust*, the criteria for registration under Section 2(a) of the Lanham Act are restrictions used to define the scope of a government program, and do not violate Respondent’s freedom of expression under the First Amendment.

1. *The Patent Clause of the United States Constitution grants the government the authority to set conditions for achieving the objectives of trademark registration, irrespective of the federal funds allocated to the PTO.*

Respondent contends that the trademark registration program does not implicate Congress’ power to spend, and therefore the unconstitutional conditions doctrine applies. *In re Kourtney Luvh*, 1337 F.3d at 460. Under the Patent Clause, Congress has the power “[t]o promote the progress of science and useful arts....” U.S. Const. art. 1, §8, cl. 8. In order to uphold this purpose, the Patent Clause granted the government the authority to set conditions for patentability, including funding for the patent system, such as the PTO, and the power to allocate patent fees. *Figueroa v. U.S.*, 466 F.3d 1023, 1031 (2006). However, the patent system established by the government is not limited to the PTO, and the Patent Clause does not mandate that the government directly provide funds for operating the PTO. *Id.*

Trademark registration fees are a condition of trademark patentability, and it is within the authority of the government to use registration fees to fund the patent system. *Id.* So long as the government is effectuating the constitutional aim of the Patent Clause, the government is not required to directly fund the federal trademark registry. *Id.* at 1032. For instance, the government may achieve the constitutional objective of the PTO by funding additional patent programs which adhere to the same constitutional purpose of the PTO. *Id.* Although the general treasury primarily funds PTO employee benefits, the Patent Clause grants Congress the authority to fund the operations of the PTO through applicant registration fees, while concurrently maintaining the government's power to regulate trademark registration. *Id.* at 1028-32. Therefore, because the Patent Clause does not require that trademark registration implicate Congress' power to directly fund the PTO, the unconstitutional conditions doctrine does not apply.

2. *The restrictions set forth in Section 2(a) are permissible because registration restrictions are exclusive to the PTO, such that they do not inhibit the owner's speech outside of the federal trademark registry.*

The government does not use the criteria of trademark registration as a means of restricting a person's use of the mark outside of the trademark registry. The government only imposes appropriate speech restrictions on trademark owners who participate in government programs. *See Agency for In'l Dev. v. Alliance for Open Soc'y Int'l, Inc.*, 133 S.Ct. 2321, 2328 (2013) (“[T]he relevant distinction...is between conditions that define the limits of the government spending program – and conditions that seek to leverage funding to regulate speech outside the contours of the program itself.”). The federal trademark registration conditions qualify as

permissible restrictions of speech because Section 2(a) does not in anyway compel or forbear the speech of a trademark owner. *Id.* Respondent may continue to use the disparaging and offensive mark without losing the right to register marks that fulfill the federal statutory and administrative requirements of trademark registration. Thus, the PTO's decision to grant, refuse or cancel a registration are restrictions that are permissible within a government program.

D. Even if the Lanham Act is Analyzed as a Regulation of Commercial Speech, Section 2(a) is Valid Under the Central Hudson Test.

In the lower courts, Respondent argued that her trademark was a form of commercial speech, and that when analyzed under the *Central Hudson* standard of review, Section 2(a) was unconstitutional because the refusal to register her trademark did not directly advance a governmental interest. *In re Kourtney Luhu*, 1337 F.3d at 460. As previously discussed, trademarks are a form of government speech. However, even if this Court were to review Section 2(a) under the commercial speech standard of review, this Court will find that Section 2(a) is constitutional. When interpreting whether an abridgement of a trademark owner's right to free speech is unconstitutional, courts will apply the appropriate standards of review that are established by precedent. *Id.* at 459. Under the framework set forth in *Central Hudson*, the regulation of commercial speech is dependent on the "nature both of the expression and of the governmental interests served by its regulation." *Central Hudson Gas & Elec. Corp.*, 447 U.S. at 563. The *Central Hudson* test uses a four-prong analysis in determining whether commercial speech is protected by the First Amendment. *Id.* First, courts must determine whether the

protected speech concerns unlawful or misleading activity. *Id.* at 566. Second, the government must demonstrate that it has asserted a substantial interest in regulating the protected speech. *Id.* Third, if the government has asserted a substantial interest, the court must determine whether the statute directly advances that interest. *Id.* Lastly, the court must find that the regulation is proportionate to serving the government’s interest. *Id.*

Regulations of content are presumptively invalid, however, the heightened scrutiny of the First Amendment will not apply to commercial speech when the statute directly advances a substantial government interest, and the “regulatory technique” employed is proportionate to that interest. *Id.* at 564. Addressing the matter of whether the government is directly advancing a substantial government interest, this Court shall find that Section 2(a) of the Lanham satisfies this test.

1. Section 2(a)’s prohibition on registering marks that may be disparaging directly advances a substantial governmental interest.

Petitioner has asserted a substantial interest in restricting commercial speech because it directly advances the government’s interest. Section 2(a) of the Lanham Act is constitutional because the government has a substantial interest in ensuring that the government and its federal programs are not associated with disparaging trademarks that are offensive to fellow American citizens. The government’s substantial interest in regulating trademarks, such as DUMB BLONDE, is founded upon the fact that trademarks are valuable to our national discourse. Accordingly, the PTO has an interest in disassociating itself from speech

that influences social and political attitudes, especially when the mark is based on ethnicity or race.

When a government is granted authority by the people to exercise legislative power, the government has the responsibility of enacting legislation that provides sufficient safeguards against speech that may be offensive to the public. *See Bd. of Trs. of the Emps' Retirement Sys. of Balt. v. Mayor & City Council of Balt.*, 562 A.2d 720, 731 (1980). Unlike the individual trademark owner, the government and its federal registries are held accountable to the general public for the dissemination of a registered trademark. *Id.* In *Bd. of Trs. of the Emps' Retirement Sys. of Balt.*, the court upheld a Baltimore ordinance requiring companies that were operating in South Africa during the apartheid to divest their interests with such businesses. *Id.* The court reasoned that the ordinance properly upheld the moral integrity of the government, which was to express sensitivity towards citizens of South Africa as a “matter of fundamental human dignity.” *Id.* at 142. The court relied on the holding of a Supreme Court case in deciding that the ordinance effectuated legitimate state interest by disassociating the government and the public from the “moral taint” of conducting business with companies that maintained the system of racial discrimination in South Africa. *Id.*; *see Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970) (“Where the statute regulates even-handedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits.”).

In this case, congressional regulation of trademark registration is an expression of the government's desire to disassociate itself from disparaging and offensive marks that are indicative of "moral taint." Although the Baltimore ordinance was analyzed under the Commerce Clause, such rulings indicate that the government has a substantial interest in ensuring the public that it does not affiliate itself with disparaging messages. Section 2(a) of the Lanham Act is directly advancing a substantial government interest that significantly outweighs the limited constitutional value of registering marks that are offensive to the majority of American citizens, and thus is valid under the *Central Hudson* test.

2. *The prohibition on registration of disparaging marks under Section 2(a) is proportionate to the government's interest of avoiding association with disparaging trademarks.*

The alleged burden on trademark owners as a result of the PTO's refusal to register offensive marks does not outweigh the profound governmental responsibility and public concern of registering disparaging trademarks. The PTO's refusal to register such marks is an exercise of congressional judgment that ensures that "such marks not occupy the time, services, and use of funds of the federal government." *In re McGinley*, 660 F.2d at 486. Moreover, the interests of the government are adequately served without restricting a trademark owner's use of their mark or reducing the common law protections granted to that owner. *Id.* Therefore, Section 2(a)'s refusal to register marks that "may disparage" certain individuals, is reasonably proportionate to the government's interest of disassociating itself from messages that harm the public, such as the mark DUMB BLONDE.

XI.

CONCLUSION

For the foregoing reasons, this Court should hold that the mark DUMB BLONDE is disparaging within the meaning of Section 2(a) of the Lanham Act, and the prohibition on registration of disparaging marks under Section 2(a) of the Lanham Act does not violate the First Amendment of the United States Constitution.