

Case No. 15-1007

IN THE
Supreme Court of the United States
October Term 2015

UNITED STATES OF AMERICA,
PETITIONER,
v.
KOURTNEY LUHV,
RESPONDENT.

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

BRIEF FOR PETITIONER
UNITED STATES

QUESTIONS PRESENTED

- I.** Under section 2(a) of the Lanham Act, did the Trademark Trial and appeal Board err in rejecting a solo music artist's application to register the trademark DUMB BLONDE as her stage name on the ground that the mark may be disparaging to women?

- II.** Under the Free Speech Clause of the First Amendment of the United States Constitution, is section 2(a)'s prohibition on registering marks that may be disparaging facially invalid when the applicant is not barred from using the mark, only from registering it, and the government has the authority and a substantial interest not to register such marks?

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STATEMENT OF THE CASE

The Appellant, Kourtney Luhv (“Appellant”), is a vocalist and solo musician who is more commonly known by her stage name, Dumb Blonde. The Appellant’s musical genre can best be described as a blend of Grindcore, Neurofunk, and American Folk music. Appellant has been performing under the name “Dumb Blonde” since 2012 and has recently made an attempt at trademarking her stage name. Under this stage name, Appellant has an online streaming account with Soundpuff (www.soundpuff.com) and uTube (www.utube.com). Both of these accounts are registered under the name “DumbBlondeMusic”. Appellant’s Soundpuff account has roughly 40,000 followers and her uTube channel has approximately 100,000 subscribers.

In June of 2014, Appellant entered into a contract with a record label. One requirement of the contract between the Appellant and the record label was that the Appellant’s stage name, Dumb Blonde, be a registered trademark. In return, the Appellant would be awarded a \$2,000,000 advance for the new record that she recorded in an extended-play format.

On July 9, 2014, Appellant filed with the Patent and Trademark Office (“PTO”) her trademark registration in an attempt to register the name Dumb Blonde for “entertainment, namely live performances by a musical band” as well as for “clothing, namely, sweatshirts, t-shirts, tank tops, and headwear.” (Application No. 99/989,052, hereafter, “052 application”). The PTO examining attorney found that the mark may be disparaging to a substantial composite of women under 15

U.S.C. § 1052(a) of the Lanham Act. The mark was therefore denied to Appellant. In the examining attorney's decision, he cited materials which Appellant submitted with her '052 application. Appellant subsequently contested the application's denial and an appeal was brought before the Trademark Trial and Appeal Board ("TTAB").

On appeal, the TTAB affirmed the PTO examining attorney's finding that the mark Dumb Blonde was disparaging to a substantial composite of the referenced group, namely women who have blonde hair. The TTAB cited in its decision photographs from the Appellant's own website which depicted blonde haired women performing unintelligent acts, such as attempting to eat plastic fruit (under the assumed premise that she believed the fruit to be edible) and applying Wite-Out® to her computer screen in an attempt to correct a mistake made in a document on her computer. The TTAB also cited numerous dictionary definitions, articles, and user comments on Appellant's uTube videos which all demonstrate the finding that women are offended by the term Dumb Blonde.

Appellant appealed the TTAB's decision, under the belief that the views of the women cited by the examining attorney do not accurately represent the views held by Appellant's fans and do not total a substantial composite of women. Appellant also argued that the Lanham Act's prohibition on registering mark that may be found to be disparaging is unconstitutional under the First Amendment right to free speech. The United States Court of Appeals, Federal Circuit found the mark to be disparaging to a substantial composite of women and cited, once again, the numerous dictionary definitions, articles, user comments on Appellant's uTube

videos, and the Appellant's website, which all adequately support the court's finding. However, when reviewing the constitutionality of the Lanham Act, the court found the Act to be unconstitutional, and as such, the Appellant could register her name as Dumb Blonde.

As a result, the United States files this appeal in a timely manner.

STATEMENT OF JURISDICTION

Pursuant to the United States Constitution, “the Supreme Court shall have appellate Jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make.” U.S. Const. art. III, § 2, cl. 2.

Furthermore, the Supreme Court has jurisdiction for appellate review when the petitioner receives a writ of certiorari. 28 U.S.C. §1254 (1) (2014). The circuit court had jurisdiction under 28 U.S.C. 1331 (2012). The court of appeals had jurisdiction subject to 28 U.S.C. §1291 (2012). The United States Court of Appeals, Federal Circuit entered judgment on June 6, 2015. The government then petitioned the Supreme Court for writ of certiorari to determine whether the Patent and Trademark Office (PTO) and the Trademark Trial and Appeal Board (TTAB) correctly determined whether the mark may disparage a substantial composite of women and whether section 2(a) is constitutional. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STANDARD OF REVIEW

“The determination that a mark may be disparaging is a conclusion of law based upon underlying factual inquires. The Board’s factual findings are reviewed for substantial evidence, while its ultimate conclusion as to registrability 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)); *see also Mazzari v. Rogan*, 323 F.3d 1000, 1005 (Fed. Cir. 2005).

Substantial evidence is more than a mere scintilla and is such relevant evidence as a reasonable mind would accept as adequate to support a conclusion.” *In re Viterra Inc.*, 671 F.3d 1358, 1361 (Fed. Cir. 2012); *see also In re Gurtside*, 203 F.3d 1305, 1312 (Fed. Cir. 2000). “The possibility of drawing two inconsistent conclusions from the evidence does not prevent an administrative agency’s finding from being supported by substantial evidence.” *Consolo v. Federal Maritime Comm’n*, 383 U.S. 607, 620 (1966).

To prove disparagement before the Trademark Trial and Appeal Board, a petitioner must meet a preponderance of the evidence, not a clear and convincing evidence burden of proof. *West Florida Seafood, Inc. v. Jet Restaurants, Inc.*, 31 F.3d 1122, 1128 (Fed. Cir. 1994). The preponderance of the evidence standard only requires the fact-finder to show the greater weight of the evidence supports the plaintiff’s account.” *See Secretary of Labor v. Keystone Coal Mining Corp.*, 151 F.3d 1096, 1103 (D.C. Cir. 1998). In this case, *de novo* review involves a review of the

TTAB decision to determine whether the denied registration was based upon substantial evidence. If this Court concludes that the TTAB's decision passes the substantial evidence test, it should reverse the District Court's decision.

SUMMARY OF THE ARGUMENT

I. PURSUANT TO THE LANHAM ACT, 15 U.S. CODE § 1052(A), THE GOVERNMENT HAS AUTHORITY TO PROHIBIT MARKS FROM BEING REGISTERED THAT MAY BE DISPARAGING TO A SUBSTANTIAL COMPOSITE OF AN IDENTIFIABLE GROUP.

This Court should find that the mark appellant seeks to register is in fact disparaging to a substantial composite of the identified group. The term “Dumb Blonde” clearly refers to women with blonde hair, as evidenced through the Appellant’s website, and is a derogatory term. This term has been proven to be highly offensive and disparaging to women, particularly those with blonde hair, as evidenced through dictionary definitions, news articles, and testimonials. As such, this Court should affirm the Trademark Trials and Appeals Board’s decision to deny the registration of the trademark name “Dumb Blonde.”

II. PURSUANT TO 15 U.S. CODE § 1052(A), THE GOVERNMENT HAS AUTHORITY TO PROHIBIT MARKS THAT MAY BE DISPARAGING FROM BEING REGISTERED, AND THIS ACTION IS CONSTITUTIONAL SINCE THE APPLICANT’S FIRST AMENDMENT TO FREE SPEECH IS NOT BEING VIOLATED.

In the case at bar, the Court should find that Section 2(a)’s prohibition on registering marks that may be disparaging is constitutional because the government is not violating the applicant’s First Amendment to Free Speech. When an applicant is being denied from registering their mark, because it may be found disparaging, they are ultimately not barred from using their mark. Therefore, the First Amendment to Free Speech is not violated. Furthermore, regulation on marks have existed since 1946, and this type of regulation is well within the government’s

authority because the registration of a trademark is a federally granted benefit rather than a constitutional right. In the alternative, should a section 2(a) bar be found to violate an applicant's First Amendment to Free Speech, this Court should find that the government has a substantial interest not to register a mark found to be disparaging due to public welfare.

ARGUMENT

I. THE TRADEMARK TRIAL AND APPEAL BOARD DID NOT ERR IN REJECTING A SOLO MUSIC ARTIST'S APPLICATION TO REGISTER THE TRADEMARK "DUMB BLONDE" AS HER STAGE NAME ON THE GROUND THAT THE MARK MAY BE DISPARAGING TO WOMEN WITHIN THE MEANING OF SECTION 2(A) OF THE LANHAM

Substantial evidence supports the Board's factual findings that the term "Dumb Blonde" is disparaging to women, specifically those with blonde hair, given the context of the musician's acts and her marketing. Additionally, this finding is supported by several dictionary definitions, the musician's own marketing of the term through her website, and the reaction of numerous consumers who have encountered the mark, "Dumb Blonde."

According to section 2(a) of the Lanham Act, disparaging trademarks cannot be approved and consequently registered by the United States Patent and Trade Office (USPTO). Lanham Act, 15 U.S.C. § 1052(a)(LEXIS through 2014 legislation). The Lanham act states that any mark which "consist of or comprises immoral, deceptive or scandalous matter; or matter which may disparage or falsely suggest a connect with persons, living or dead, institutions, beliefs, or national symbols or bring them into contempt, or disrepute" may not be approved by the Patent and

Trademark Office (“PTO”). *Id.* To determine whether a trademark is disparaging, a two-prong test is applied to the proposed trademark. The first prong of this test asks what the most likely meaning of the mark is, taking into account extrinsic evidence, such as dictionary definitions, the context of the mark, and the nature of the good or services. *In re Geller*, 751 F.3d 1355, 1358 (Fed. Cir. 2014). The second prong of the test asks whether the mark refers to identifiable persons or groups, and whether the “substantial composite” of the group would find the mark to be disparaging. *Id.* Additionally, a mark may be considered “disparaging” if it “dishonor[s] by comparison with what is inferior, slight[s], deprecate[s], or affect[s] or injure[s] by unjust comparison.” *Pro-Football, Inc. v. Harjo*, 284 F. Supp 2d 96, 124 (D.D.C. 2003)(quoting *Harjo v. Pro-Football, Inc.*, 50 U.S.P.Q.2d (BNA) 1705, 1737 n.98 (T.T.A.B. 1999).

The Board’s ruling that the Mark “Dumb Blonde” disparages women with blonde hair is supported by considerable sources of evidence. The TTAB inspected Appellant’s website, which depicted numerous blonde women across the site in its entirety. One image portrayed a blonde woman eating a plastic fruit, while another image showed a blonde woman applying Wite-Out® to her computer monitor in an apparent effort to correct a mistake. These images and ideas which are projected throughout the Appellant’s website and are viewed by over 400,000 consumers are highly disparaging to any woman with blonde hair. The images show that women with blonde hair are not intelligent enough to perform routine, mundane tasks. In addition, the TTAB assessed dictionary definitions of the term “Dumb Blonde” and

found such definitions to support the argument that the term is disparaging to women with blonde hair. The TTAB then reviewed numerous articles, comments, and letters from fans and consumers. Once the evidence was reviewed in its totality, the TTAB correctly determined that the mark is in fact disparaging to blonde haired women. Additionally, when blonde haired women were presented with the opportunity to speak regarding Dumb Blonde, there was a loud outcry against this offensive mark.

A. The Board's Determination Of The Mark's Likely Meaning Is Supported By Substantial Evidence Including Dictionary Definitions, And The Manner The Mark Is Used In The Musician's Own Website

The TTAB correctly concluded that the term “Dumb Blonde” disparages women with Blonde Hair. This conclusion was made after researching the dictionary meanings of “dumb blonde,” and examining the musician’s website. TTAB carefully reviewed and weighed each piece of evidence presented from both sides, and accurately determined that the term “dumb blonde” is in fact disparaging to women with blonde hair.

To determine if the mark is disparaging, the likely meaning of the mark must be determined. *In re Tam*, 785 F.3d 567, 569 (Fed. Cir. 2015). Dictionary definitions accurately reflect community ideas and meanings associated with terms and jargon and thus “clearly constitute more than a reflection of ... individual views.” *In re Boulevard Entm't*, 334 F.3d 1336, 1340 (Fed. Cir. 2003). Secondary or alternative definitions of a word carry considerable weight, as the statute requires that a trademark be denied if it may be disparaging. *Boswell v. Mavety Media Group Ltd.*, 52 U.S.P.Q.2d (BNA) 1600, 1608 (T.T.A.B. 1999). One must also take into account

the manner in which the mark, including the goods and services associated with it, are used in the marketplace. *In re Heeb Media, LLC*, 2008 TTAB LEXIS 65, at *13 (T.T.A.B. 2008). The meaning of a word is most clearly exemplified in the manner in which a mark's applicant uses the term in the marketplace. *See Geller*, 751 F.3d at 1358-60. The good intention of an applicant to change the community's understanding and meaning of a term does not hold up against disparagement test. *Id.* At *22-23. The existence of innocuous meanings does not prevent a mark from being ruled as disparaging. *In re Tam*, 785 F.3d at 570. Despite other evidence presented, dictionary evidence alone can be sufficient to satisfy the USPTO's burden in rejecting a trademark, when there is only one pertinent meaning of a term. *Boulevard*, 67 U.S.P.Q.2d at 1478.

Few dictionaries have the exact term "dumb blonde" delineated. However, the few that do, all define the term in a disparaging manner. Oxford Dictionary defines the term as "a blond-haired woman perceived in a stereotypical way as being attractive but unintelligent." The Oxford Dictionary, http://www.oxforddictionaries.com/us/definition/american_english/dumb-blonde?q=dumb+blonde (last visited October 19, 2015). Urban Dictionary defines "dumb blonde" as "essentially blonde, with the addition of 'dumb' for clarification." Urban Dictionary, <http://www.urbandictionary.com/define.php?term=Dumb+Blonde>, (last visited October 19, 2015). The secondary definition of "dumb blonde" is "a person who can't really do anything right." *Id.* The tertiary definition is "A blonde who is dumb (in

other words, a blonde). Also see: ‘Redundant.’” *Id.* The remaining definitions listed on Urban Dictionary for this pejorative term are too derogatory and crude to exhibit here. Urban Dictionary has nineteen definitions listed for dumb blonde and every single definition is derogatory. *Id.* These definitions are supported by widely known community jokes that insult women with blonde hair. Each definition posted on Urban Dictionary that designates a gender associated with dumb blondes with women. *Id.* Webster’s Dictionary defines “dumb” as “lacking the ability to speak. *Of a person often offensive*” an alternative definition is “lacking intelligence” or “requiring no intelligence.” Merriam-Webster’s Dictionary, <http://www.merriam-webster.com/dictionary/dumb>, (last visited October 19, 2015). Each and every dictionary term defined relating to dumb blonde was derogatory, disparaging and demeaning. Counsel did not find one definition that relayed the term in a positive or uplifting manner. Thus, under the meaning derived from the community at large, the term dumb blonde is disparaging to women with blonde hair. Even if Appellant were able to find an obscure and positive definition of the term, an innocent definition does not discredit the offensive definitions. *Heeb Media*, 2008 TTAB LEXIS at *13. One definition does not undue the damage caused by many derogatory definitions. This would only further promote the fact that a substantial composite of women find the term to be disparaging.

The Court should then look at the manner in which the mark is presented in the marketplace, as the meaning of a word is most clearly exemplified in the manner in which a mark’s applicant uses the term in the marketplace. *See Geller*,

751 F.3d at 1358-60. The Appellant has presented the term Dumb Blonde to consumers coupled with the stereotypical meaning of society (women with blonde hair, and potentially women are not intelligent). The Appellant has not portrayed a different meaning to the masses. The Appellant here is only further perpetrating the derogatory and disparaging meaning of this term. The Appellant's own website depicts blonde women throughout the entirety of the site, showing that the term dumb blonde in fact applies to blonde haired women. The blonde women portrayed on the Appellant's site are performing acts which are disparaging in nature: pictures showing blonde women attempting to eat plastic fruit and applying Wite Out® to her computer screen. These acts are furthering the notion that women with blonde hair are stupid and inept.

Appellant does not contend that the term "dumb blonde" has a positive meaning, nor does she contend that the term has a neutral meaning. She admittedly states that the term is derogatory; however she claims that she alone uses it in a non-derogatory manner. This creates a confusing proposition, at best. The musician's website blatantly disparages blonde women as being dumb, unintelligent, and something to be made fun of. Juxtapositions such as this can never be meant to uplift the identified group, nor can they be thought of as encouraging to young women with blonde hair. Appellant's good intentions when using the term does not obviate the fact that the term is offensive to a substantial composite of women. *Heeb Media*, 2008 TTAB LEXIS at *13. Appellant's good intentions do not erase the pain and embarrassment the term causes many women

today. The examination of this term should be whether the term is disparaging to women, not what the term means to the Appellant. *Heeb Media*, 2008 TTAB LEXIS at *22. Thus, the intentions of the Appellant are irrelevant to the issue at hand, and this Court should affirm the decision of the TTAB, as the marks are disparaging to women.

B. Substantial Evidence Supports The Board's Finding That The Mark May Be Disparaging To A Substantial Composite Of Women, Particularly Those With Blonde Hair, Despite The Applicant's Intentions.

If the likely meaning of the mark is found to refer to an identifiable group of people, the next consideration is whether that mark may be disparaging to a substantial composite of the aforementioned group. *Geller*, 751 F.3d at 1360. The Board is not required to expend its resources on a marketing survey to determine whether a term is disparaging. *In re Loew's Theatres, Inc.*, 769 F.2d 764, 768 (Fed. Cir. 1985). There is no set percentage of a population which constitutes a "substantial composite," but it is implied that "substantial" requires a degree of unanimity among the identified group. *Pro-Football, Inc. v. Harjo*, 284 F. Supp. 2d 96, 128 (D.D.C. 2003). The substantial composite of a group does not necessarily have to equal the majority opinion of that group. *In re McGinley*, 211 U.S.P.Q. at 673.

First, the definitions found in multiple dictionaries universally characterize "dumb blonde" as offensive, derogatory and disparaging. As dictionaries reflect and define the meaning of words within the views of our social culture, this is highly dispositive of the views of the characterized group. *Tam*, 785 F.3d at 571. Second, case law and news articles that relate to prominent women being called "dumb

blondes” reflect a view that this term is increasingly sexist, offensive and disrespectful. See *A.L.P. Inc. v. Bureau of Labor & Indus.*, 984 P.2d 883, 884 (1999)(finding an employer who called his female employee a “dumb blond” and a “dumb fucking blond bitch” among other things, liable for discriminating based upon sex); *Speedway SuperAmerica, LLC v. Dupont*, 933 So. 2d 75, 81 (Fla. Dist. Ct. App. 2006) (wherein an employee was so offended after employer called her a “dumb blonde” and repeatedly told her blonde jokes that she attempted to sue him for abuse); see also Laura Koran, *Backlash Against Turkish Mayor Who Posted Tween Calling U.S. Official A “Dumb Blonde”*, CNN Politics, <http://www.cnn.com/2015/05/01/politics/ankara-mayor-marie-harf-dumb-blonde/> (May 1, 2015)(in which a Turkish mayor was highly criticized after calling a U.S. Official a dumb blonde). Third, a significant amount of women find the term “dumb blonde” to be highly offensive. See Karen Ross, *The Handbook of Gender, Sex, and Media* 88 (John Wiley & Sons, Sep. 7, 2011)(asserting that references to dumb blondes not only denigrate blonde women, but all women since the stereotype centers around stupidity and promiscuity of women).

Appellant attempts to establish that her followers support her use of the term Dumb Blonde and do not find it disparaging. However, because the Lanham Act states that any mark which *may* disparage an identifiable group should not be registered, the fact that some women find the term acceptable bears no weight. Similarly, in *Heeb*, Appellant presented evidence that many young Americans found the term Heeb to be socially acceptable, however, because a substantial composite of

Jewish people found the term offensive it was not registered. *See generally In re Heeb Media, LLC*, 2008 TTAB LEXIS 65. The court ruled that a substantial composite does not have to be a majority of the group. *Heeb Media*, 2008 TTAB LEXIS at *23 (*citing In re McGinley*, 211 U.S.P.Q. at 673). As such, the opinions of those who do not find Dumb Blonde to be offensive do not overcome the opinions of those who do find the term offensive.

The standard which has been set forth by the court is one which protects anyone within an identifiable group which *may* be disparaged by a specific mark. *Heeb Media*, 2009 TTAB LEXIS at *23. The goods and services associated with the term must be deemed to have been encountered by all who are a part of the identified group, despite whether they actively follow the musician Dumb Blonde or not. As a trademark, it is widely publicized and available for unsuspecting consumers to view—as opposed to graphic images, which are contained within the covers of a magazine or book. *McGinley*, 211 U.S.P.Q. at 486. As such, it is clear that the group does contain a substantial composite which is offended by this disparaging term.

II. THE COURT SHOULD FIND THAT SECTION 2(A)'S PROHIBITION ON REGISTERING MARKS THAT MAY BE DISPARAGING IS CONSTITUTIONAL BECAUSE GOVERNMENT IS NOT VIOLATING AN APPLICANT'S FIRST AMENDMENT TO FREE SPEECH.

The Appellate Court did err in finding that section 2(a)'s prohibition on registering marks that may be disparaging violates the United States Constitution

because the majority disregarded controlling precedent, limiting any potential arguments that the government may present. Section 2(a)'s specific prohibition on registration of disparaging trademarks has existed since 1946, *see* Act of July 5, 1946, Pub. L. No. 79-489, §2(a), 60 Stat. 427, 428. The First Amendment provides in pertinent part that "Congress shall make no law...abridging the freedom of speech." U.S. CONST. Amend. I. Notwithstanding the issues with the disparagement analysis discussed above, if the government is, in effect, attempting to suppress speech through the denial of trademark registration, then that portion of Section 2(a) may very well be unconstitutional; an argument presented by the respondent. The three requirements for finding a violation of the First Amendment are as follows: (a) a protected form of speech is implicated, *R.A.V. v. City of St. Paul*, 505 U.S. 377, 382-83 (1992), (b) the government abridged that speech in a manner that implicates the First Amendment, and (c) the abridgement is unconstitutional under the appropriate framework, such as the test for determining the constitutionality of restrictions on commercial speech. *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n*, 447 U.S. 557, 566 (1989).

The Court's focus should be whether or not a First Amendment issue is even implicated. The opinion here should be short and straightforward because of earlier precedent, *In re Robert L. McGinley*, 660 F.2d 481 (C.C.P.A. 1981), and subsequent court analysis. Refusal to register a disparaging mark does not violate First Amendment because ultimately the decision does not affect the applicant's right to use the mark. *Id.* at 481. Furthermore, the federal trademark registration program

is government speech, making the “unconstitutional conditions” doctrine inapplicable, and ultimately not implicating a First Amendment issue. *Pro-Football, Inc. v. Amanda Blackhorse, et al.*, No. 1:14-cv-01043-GBL-IDD at 13 (E.D. Va. July 8, 2015). Even if action under section 2(a) is found to implicate First Amendment, allowing publication in the Trademark Principle Register would ignite a substantial government interest not to endorse a disparaging Trademark, satisfying the *Central Hudson Test*. Precedent law should not be taken lightly, and in doing so, the Court should ultimately determine that First Amendment is not an issue when prohibiting an applicant’s mark, that may be disparaging, from being registered, and that there is substantial government concern if disparaging marks are allowed to be registered. For these reasons, the Court should ultimately find that section 2(a) bar is constitutional.

A. Section 2(a) Bar Does Not Abridge Speech In A Manner That Implicates First Amendment Since The Applicant Is Not Barred From Using Her Stage Name “Dumb Blonde”, Only From Registering It.

Prohibiting the stage name “Dumb Blonde” from being registered as a trademark because it is found to be disparaging does not keep the solo artist from using that name, and therefore, her First Amendment right to Free Speech is not being violated. The First Amendment proscribes only laws that abridge the freedom to speak. U.S. CONST. Amend. I. This Court has already spoken on the issue; the Court explained that denial of trademark registration is not such an abridgment. *In re McGinley*, 660 F.2d at 481. The Court recognized that because the denial of registration of the applicant’s mark will not affect its use there could be no First Amendment violation. In other words, there is no actual harm suffered by

preventing registration of disparaging marks because applicants remain free to utilize the mark in commerce, albeit without the protection of federal law. *Id.* at 486. Since its holding, lower federal courts have found *McGinley* controlling and, in following, have refused to entertain First Amendment challenges to the denial of registration for disparaging trademarks.

In *McGinley*, the refused mark in question, two naked people embracing, was used to represent “social club” services helping swingers to connect. *Id.* at 482. The court dismissed First Amendment concerns out of hand, holding that since “no conduct is proscribed, and no tangible form of expression is suppressed,” there was no effect on the trademark owner’s speech rights. *Id.* at 484.

It has been more than thirty years and courts are still following the reasoning in *McGinley*’s First Amendment challenge. In *In re Tam*, 785 F.3d 567, 569 (Fed. Cir. 2015), the term at issue was “Slants” and the music artist chose that name because he wanted to “reclaim” and “take ownership of” the Asian stereotype. Here, the applicant’s argument was that trademark registration by the government confers concrete benefits on the registrant, so the denial of registrations curtails speech. *Id.* at 571. The court’s First Amendment discussion was short and straightforward, holding that refusal to register a disparaging mark does not violate the First Amendment because ultimately the decision does not affect the applicant’s right to use the mark. *Id.* at 573; *see also In re Boulevard Entm’t, Inc.*, 334 F.3d 1336, 1343 (Fed Cir. 2003) (showing that appellant, Boulevard, arguing that “federal trademark registration confers benefits that are not available to a

trademark owner who is denied registration”, and this argument presented was rejected by the court). Another court dealing with the term “Redskins” decided that Section 2(a) does not implicate the First Amendment for the same reason that it did not in *McGinley*; that is because no tangible form of expression is suppressed. *Pro-Football, Inc.*, No. 1:14-cv-01043-GBL-IDD at 13.

Aside from respecting the standard of its predecessor court, this court should see that the reasoning in *McGinley* is applicable in the present case. Similar to dismissing a First Amendment challenge in *McGinley*, *In re Tam*, and *Pro-Football, Inc.*, because the applicants were seen as not being denied from using their marks, the court here should see that the solo artist is also not denied to use her stage name “Dumb Blonde”. The solo artist here is still free to perform under the Dumb Blonde name, appear at various venues with that name, continue growing a fan base with concerts under that name, and continue her registered “uTube” account under that name. Similar to *McGinley*, where no tangible form of expression was seen to be suppressed, the solo artist here is still able to effectively communicate and reclaim the stereotype associated with blonde women and raise awareness. Furthermore, a reasonable person would see that government is not censoring the solo artist’s speech here since she is still able to carry out such conduct with the name Dumb Blonde.

The respondent will likely argue that *McGinley*’s First Amendment reasoning is insufficient due to its narrow interpretation that to “abridge” free speech in the trademark context, it must directly ban, prohibit or forbid the use of an owner’s

trademark. *In re McGinley*, 660 F.2d at 484. First Amendment jurisprudence reveals that an “abridgement” may result from regulations that do not “ban,” “forbid,” or “prohibit,” and therefore limiting benefits in the present case may result in abridging free speech. *See Keene v. Meese*, 619 F Supp 1111, 1124 (ED Calif 1985) (stating that an abridgment within the meaning of the First Amendment occurs whenever there is a suppression of or substantial interference with speech, regardless of the modus operandi). This argument should not be entertained because as already stated, the solo artist here is not being limited from using her stage name or communicating her message under her stage name. Although respondent will argue that denied benefits from registration is a substantial interference, she will not be able to point to a “form of expression” that has been proscribed or suppressed by section 2(a). *See Boulevard*, 334 F.3d at 1343. Furthermore, a reasonable person would not see this as a “substantial interference” since ultimately the solo artist still has a voice and her message to her fans and the public is not being censored. In addition, the facts in this case state a single issue of not executing a record label deal without a registered trademark for Dumb Blonde, which suggests that the benefits denied from a Section 2a bar here, are more financially and procedurally burdensome as oppose to creating a substantive burden on speech.

A Section 2a bar does not prohibit, limit, or burden speech in a way that would implicate a First Amendment issue, since the solo artist is till free to use her name Dumb Blonde and communicate her desired message. Thus, the Court should

find that Sections 2(a)'s prohibition on registering marks that are found to be disparaging is constitutional.

B. Regulation Of Marks Is Well Within Government's Authority Because Registration Of A Trademark Is A Federally Granted Benefit Rather Than A Constitutional Right

The doctrine of unconstitutional conditions subjects governmental allocations to scrutiny when they are conditioned on the surrender of constitutional rights. *See* Kathleen M. Sullivan, *Unconstitutional Conditions*, 102 Harv. L. Rev. 1413, 1427 (1989). In essence, the doctrine holds that the government is not allowed to require that an individual surrender a constitutionally guaranteed right in exchange for a government benefit. *Perry v. Sindermann*, 408 U.S. 593, 597 (1972). Typically, courts deny unconstitutional conditions challenges by characterizing the selective government allocation as a "non-subsidy." *See generally* Kathleen M. Sullivan, 102 Harv. L. Rev. at 1428. However, the question of whether denial of a benefit constitutes a "non-subsidy" generally depends on how the baseline regime of government allocations is defined, and it has been difficult to discern a sensible basis for the Supreme Court's characterizations. *See Id.* at 1428-42 (noting the lack of a coherent rationale for determining when an offer amounts to coercion).

Stephen Baird's analysis of sections 2(a) as an unconstitutional conditions problem, Stephen R. Baird, *Moral Intervention in the Trademark Arena: Banning the Registration of Scandalous and Immoral Trademarks*, 83 Trademark Rep. 661, 693-96(1993), essentially argues that the unconstitutional conditions doctrine is dead, relying primarily on *Rust v. Sullivan*, which upheld restrictions on advocating

abortion in federally funded health programs. 500 U.S. 173 (1991) (discussing that the unconstitutional conditions doctrine, as the recent Supreme Court precedent indicates ... has been all but completely repudiated). In other words, the principle contains exceptions relating to how funds are allocated. Thus, the Supreme Court in *Rust* reaffirmed that government has authority to make value judgments through selective funding. *Id.* at 196. Although, presently, registration fees generally cover the costs of the PTO's operations, some federal funds are used to cover employee benefits for PTO staff members. See *Figueroa v. United States*, 466 F.3d 1023, 1028 (Fed. Cir. 2006). Given that the registration process is still in part funded federally, it should not appear that the unconstitutional conditions doctrine applies.

Furthermore, similarly, in the present case, although the government keeps a register and offers certain benefits from registration, Congress's determination that disparaging marks should "not occupy [the USPTO's] time, services, and use of funds," *McGinley*, 660 F.2d at 486, does not amount to a First Amendment violation because again "no conduct is proscribed, and no tangible form of expression suppressed," *Id.* at 484.

The respondent will argue that the unconstitutional conditions doctrine applies because while some federal funds may inevitably be used for the enforcement of trademarks, enforcement related spending is attenuated from the benefits provided to applicants through trademark registration, and therefore, not implicating Congress's power to spend. This should not uphold since realistically, the PTO and the Federal Circuit Court of Appeals have not yet seen fit to apply the

unconstitutional conditions doctrine to trademark law. See Kristian D. Stout, *Terrifying Trademarks and A Scandalous Disregard for the First Amendment: Section 2(a)'s Unconstitutional Prohibition on Scandalous, Immoral, and Disparaging Trademarks*, 25 Alb. L.J. Sci & Tech. 213, 230-31 (2015). See also *In re McGinley*, 660 F.2d at 484 (refusing to entertain the notion that trademarks may be a protected form of speech). An unconstitutional conditions doctrine analysis here will ultimately consist of a never ending debate on whether the speech at issue is a protected speech or not and whether Congress's spending power applies. For the interest of avoiding confusion and wasting time, this Court should not meddle with the unconstitutional conditions doctrine.

As discussed, there is not a clear set framework to determine if an unconstitutional conditions doctrine applies within trademark law. Thus, this court should not entertain an analysis under this doctrine and conclude that the speech at issue does not implicate First Amendment, ultimately making a Section 2(a) constitutional.

C. In The Alternative, Section 2(a) Bar Would Survive Constitutional Scrutiny Because The Government Has A Substantial Interest Not Being Publicly Viewed As Endorsing A Disparaging Mark

In the event that this Court should find a First Amendment issue, it will first likely reason that trademarks fall squarely within the definition of commercial speech. A trademark is the most important commercial asset that a possessor has in terms of promoting itself to customers. *Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council*, 425 U.S. 748, 765 (1976). Furthermore, in *Friedman v. Rogers*,

440 U.S. 1, 11 (1979), the Court officially recognized this, finding that trade names are a form of commercial speech which is entitled to limited protection under the First Amendment. Therefore, the *Central Hudson Test* is applied to determine if the offensive and disparaging provision of section 2(a) violates the First Amendment protections to which trademarks would be entitled. *Central Hudson* lays down a four-pronged test that remains the formal framework by which courts assess the constitutionality of a regulation on commercial speech: (a) to qualify for any First Amendment protection, the commercial speech must concern lawful activity and not be misleading, (b) the government interest served by restricting commercial speech must be substantial, (c) the regulation must directly advance the asserted government interest, and (d) the regulation should not be more extensive than is necessary to serve that interest. *Cent. Hudson Gas & Elec. Corp.*, 447 U.S. at 557. This Court's focus would turn to the second prong.

Stephen Baird, who represented the Native Americans seeking cancellation of the Redskins' trademark, identified certain substantial government interests served by denial of registration to disparaging remarks, which supports finding section 2(a) constitutional under the *Central Hudson Test*. These are preventing the marks from: (1) carrying the imprimatur of the federal government, (2) receiving the support of public funds, (3) and interfering with the public's health and welfare. Stephen Baird, 83 Trademark Rep. at 699. The rationale is in line with the concern discussed within the Court of Appeal's dissenting opinion in the present case. In essence, the harm originating from "government imprimatur" is that members of

the public may be encouraged to use disparaging terms if they perceive them to have received a government stamp of approval. Furthermore, encouraging the use of racial slurs, insults, and epithets may in turn damage public welfare. *Id.* at 675.

In the present case, the solo artist's stage name dumb blonde is the sort of disparaging speech the government does not want to be viewed as endorsing, and for substantial reasons. Endorsing such names will certainly open the door and encourage other disparaging terms, some of which could be far more controversial and/or more harmful insults, which would then place public welfare in jeopardy. In other words, not regulating such disparaging terms will create a snow ball effect that will render uncontrollable.

The respondent will argue that these are not significant governmental interests. The real government interest in withholding government imprimatur appears to be discouraging scandalous and disparaging terms in non-commercial use, and suppression of offensive terms is a content-based government interest that is presumptively invalid; the Supreme Court has explicitly rejected the suppression of offensive advertising as a legitimate justification for the regulation of commercial speech. *See Bolger v. Youngs Drug Prods. Corp.*, 463 U.S. 60, 71 (1983). This argument is weak because initially it might be seen this way, but it doesn't fully articulate a government's alarming concern that allowing disparaging terms, such as dumb blonde, will open the door to other applicants constantly pushing the limits on disparaging terms. This in turn will create disorder and could potentially jeopardize public welfare.

Aside from following the established precedent that denial of registration under section 2(a) of the Lanham Act does not implicate First Amendment concerns, the Court here should also identify, in the alternative, substantial government interests advanced by denial. Thus, in the alternative, this Court should find that a section 2(a) bar towards marks that may be disparaging is constitutional because of identified substantial government interests.

CONCLUSION

Based upon the arguments presented and the authorities cited, the undersigned Counsels respectfully request that the Supreme Court rule in favor of the petitioner, the United States of America, by finding that the Trademark Trial and Appeal Board did not err in rejecting a solo music artist's application to register the trademark "Dumb Blonde" as her stage name on the ground that the mark may be disparaging to women within the meaning of section 2(a) of the Lanham Act, and further, finding that the Lanham Act section 2(a) bar is constitutional since the government is not violating an applicant's First Amendment right to free speech, as well as any other relief the Court deems appropriate.

Respectfully Submitted,

Team No. 106
Attorneys for Petitioner, United States

CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that the foregoing has been prepared in accordance with the Rules of the Competition and that it represents the work product solely of the competing members. A copy of the foregoing has been delivered by overnight mail via the United States Postal Service to Patty Hayes/Moot Court Board, Pepperdine University School of Law, 24255 Pacific Coast Highway, Malibu, California 90263 as well as via email to patty.hayes@pepperdine.edu.

Dated: October 20, 2015

By:

Team No. 106
Attorneys for Petitioner, United States

CERTIFICATE OF WORD COUNT

We hereby certify that the foregoing memorandum complies with the word limitation specified in Local Rule 14 of the Rules of Procedure for the U.S. Supreme Court and in accordance with Rules of the Competition. The memorandum is set in Century Schoolhouse 12-point type and, according to the word-count facility of the word processing system used to produce the memorandum, contains 7624 words.

Dated: October 20, 2015

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