

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 from the
United States Court of Appeals
for the Federal Circuit*

BRIEF FOR RESPONDENT

QUESTIONS PRESENTED

I. Whether the Trademark Trial and Appeal Board erred in rejecting the application to register the trademark DUMB BLONDE by a musical artist who speaks out against gender discrimination on the ground that it may be disparaging to women under Section 2(a) of the Lanham Act?

II. Whether Section 2(a) of the Lanham Act's prohibition on disparaging speech is an impermissible abridgment of the freedom of speech and a violation of the First Amendment?

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The opinion of the Trademark Trial and Appeal Board is unreported. The opinion of the United States Court of Appeals for the Federal Circuit is reported as *In re Kourtney Luhv*, 1337 F.3d 455 (Fed. Cir. 2015).

STATEMENT OF JURISDICTION

The Trademark Trial and Appeal Board had jurisdiction in this case pursuant to 15 U.S.C. § 1070 (2012). The Court of Appeals for the Federal Circuit had jurisdiction pursuant to 28 U.S.C. § 1295(a)(4)(B) (2012). This Court has jurisdiction over these claims pursuant to 28 U.S.C. § 1254(1) (2012).

CONSTITUTIONAL AND STATUTORY PROVISIONS

THE LANHAM ACT

Trademarks Registrable on Principal Register; Concurrent Registration
15 U.S.C. § 1052 (2012)

No trademark by which the goods of the applicant may be distinguished from the goods of others shall be refused registration on the principal register on account of its nature unless it--

(a) Consists of or comprises immoral, deceptive, or scandalous matter; or 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;

Construction and Definitions; Intent of Chapter
15 U.S.C. § 1127 (2012)

The terms “trade name” and “commercial name” mean any name used by a person to identify his or her business or vocation.

The term “trademark” includes any word, name, symbol, or device, or any combination thereof—

(1) used by a person, or

(2) which a person has a bona fide intention to use in commerce and applies to register on the principal register established by this chapter,

to identify and distinguish his or her goods, including a unique product, from those manufactured or sold by others and to indicate the source of the goods, even if that source is unknown.

...

The term “use in commerce” means the bona fide use of a mark in the ordinary course of trade, and not made merely to reserve a right in a mark.

...

The intent of this chapter is to regulate commerce within the control of Congress by making actionable the deceptive and misleading use of marks in such commerce; to protect registered marks used in such commerce from interference by State, or territorial legislation; to protect persons engaged in such commerce against unfair competition; to prevent fraud and deception in such commerce by the use of reproductions, copies, counterfeits, or colorable imitations of registered marks; and to provide rights and remedies stipulated by treaties and conventions respecting trademarks, trade names, and unfair competition entered into between the United States and foreign nations.

UNITED STATES CONSTITUTION

U.S. Const. amend. I.

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

U.S. Const. art. I, § 8, cl. 1.

The Congress shall have Power To lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States; but all Duties, Imposts and Excises shall be uniform throughout the United States

STATEMENT OF THE CASE

Material Facts

Kourtney Luhv (“Luhv”), the respondent here, is a vocalist and solo artist. *In re Kourtney Luhv*, 1337 F.3d 455, 455 (Fed. Cir. 2015). Luhv, a blonde woman, has performed under the stage name Dumb Blonde since 2012. *Id.* at 455, 457. Luhv creates music that incorporates elements of Grindcore, Neurofunk, and American Folk. *Id.* at 455. Her lyrics address cultural and political concerns about negative gender stereotypes that women face. *Id.* at 455-59.

Luhv has performed live in Southern California and various other states. *Id.* at 455. Hundreds of thousands of female fans in their twenties and thirties have attended Luhv’s concerts. *Id.* at 458. Additionally, Luhv has established a sizeable online presence. *Id.* at 456. She has garnered over one hundred thousand subscribers to her www.uTube.com (“uTube”) account, DumbBlondeMusic, where she posts videos to communicate with her fans. *Id.* Luhv also has over forty thousand “followers” on www.soundpuff.com (“Soundpuff”), a music streaming service. *Id.* Finally, she has a personal website where she features photographs of blonde women. *Id.* at 457.

Luhv’s performances and online presence have generated a positive public response. *Id.* Users of numerous social media sites have posted comments online praising Luhv and her message. *Id.* at 457-58. These positive 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.* at 458.

In June 2014, Luhv finished recording several pieces of music that she wished to sell as an extended play format record through a record label. *Id.* at 456. Subsequently, Luhv negotiated a deal with a label for a recording contract that included a \$2,000,000 advance upon execution of the agreement. *Id.* However, Luhv’s record deal and advance were contingent on the registration of her stage name, Dumb Blonde, as a trademark. *Id.* at 455-56.

Procedural History

Luhv filed Application No. 99/989,052 on July 9, 2014, with the United States Patent and Trademark Office (“PTO”). *Id.* at 456. Luhv sought to register the mark DUMB BLONDE under International Trademark Class 41 (“Class 41”) for “Entertainment, namely live performances by a musical band” and International Trademark Class 25 (“Class 25”) for “[C]lothing, namely, sweatshirts, t-shirts, tank tops, and headwear.” *Id.* The PTO refused to register the mark on the ground that it may be disparaging to women under Section 2(a) of the Lanham Act. *Id.*

Luhv appealed her application’s denial to the Trademark Trial and Appeal Board (“Board”). *Id.* Luhv argued that she uses the mark as a device to call attention to gender discrimination and to recast negative stereotypes all women face. *Id.* at 457. However, the Board affirmed the PTO’s refusal to register Luhv’s mark on the ground that it “may be disparaging to a substantial composite of the referenced group, namely women who have a blonde hair color.” *Id.* at 456. The

Board cited the images from Luhv's website, dictionary definitions, articles, and user comments on Luhv's uTube videos as evidence to support its finding. *Id.* at 457.

Luhv appealed the Board's decision to the United States Court of Appeals for the Federal Circuit. *Id.* On appeal, the Federal Circuit considered two issues. *Id.* First, the court considered whether the mark DUMB BLONDE may be disparaging to a substantial composite of women. *Id.* Second, it considered the constitutionality of Section 2(a) of the Lanham Act's prohibition on registering disparaging marks. *Id.* The court held that Luhv's mark was disparaging to a substantial composite of women under Section 2(a) of the Lanham Act. *Id.* at 459. However, the court determined that Section 2(a)'s prohibition on registering disparaging marks violates the First Amendment. *Id.* at 460. Therefore, the PTO could not rely on Section 2(a) as a basis for rejecting Luhv's mark. *Id.*

The PTO petitioned this Court to review the Federal Circuit's decision, and this Court granted certiorari. *In re Kourtney Luhv*, 1337 F.3d 455 (Fed. Cir. 2015), *cert. granted*, (No. 15-1007).

SUMMARY OF THE ARGUMENT

The Board incorrectly concluded that Luhv's mark may be disparaging under 15 U.S.C. § 1052(a) (2012). The evidence the Board relied on to reach its conclusion is insubstantial. However, even if this Court finds that the Board relied on substantial evidence, it erred in its application of the test laid out in *In re Geller*, 751 F.3d 1355, 1358 (Fed. Cir. 2014), *cert. denied*, 135 S. Ct. 944 (2015).

The Board misapplied the first prong of the *Geller* test because it only identified the likely meaning of the phrase "dumb blonde," and not the likely meaning of the mark DUMB BLONDE. There are additional non-disparaging likely meanings that are equally applicable to the mark as it is used in connection with Luhv's goods and services. The PTO's subjective determination that the likely meaning of the mark is a negative stereotype about women ignores the overwhelmingly positive response to Luhv's use of the mark in connection with her goods and services.

Additionally, the Board failed to consider whether Luhv's mark may be disparaging to a substantial composite of women in the context of her goods and entertainment services. Luhv's use of the mark assigns a meaning to DUMB BLONDE that is not disparaging, but rather, empowering.

Because the Board relied on insufficient evidence, inappropriately applied the first prong of the *Geller* test, and failed to consider Luhv's mark in connection with her goods and services, the Board erred in refusing to register DUMB BLONDE.

Even if Luv's mark is determined to be disparaging, Section 2(a)'s regulation of speech is a violation of the First Amendment. Trademarks are commercial speech, and are therefore protected by the First Amendment. Furthermore, the unconstitutional conditions doctrine applies because the PTO conditions the receipt of the benefits of trademark registration on an applicant's waiver of her freedom of speech.

Section 2(a)'s conditioning of benefits on the waiver of freedom of speech is a content-based restriction. Content-based restrictions on speech receive strict scrutiny. Because Section 2(a) is neither narrowly tailored nor the least restrictive means of furthering a compelling governmental interest, it fails strict scrutiny. However, if this Court declines to examine Section 2(a) under strict scrutiny, because trademarks are commercial speech, they can be analyzed under the *Central Hudson* test. *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of N.Y.*, 447 U.S. 557, 566 (1980). Section 2(a) does not satisfy the *Central Hudson* test because it is not the least restrictive means of directly furthering a substantial governmental interest. Therefore, Section 2(a)'s prohibition on disparaging trademarks is a violation of the First Amendment.

ARGUMENT

I. THE BOARD ERRED WHEN IT REJECTED LUHV'S APPLICATION TO REGISTER HER MARK ON THE GROUND THAT IT MAY BE DISPARAGING TO WOMEN UNDER SECTION 2(A) OF THE LANHAM ACT.

On appeal from the PTO's refusal to register a mark as disparaging under Section 2(a) of the Lanham Act, the Board applies the two-prong test outlined in *In re Geller*. 751 F.3d 1355, 1358 (Fed. Cir. 2014), *cert. denied*, 135 S. Ct. 944 (2015).

The Board must determine:

(1) what is 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 and services, and the manner in which the mark is used in the marketplace in connection with the goods and services; and

(2) 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.

Under the *Geller* test, the Board must determine the likely meaning of the applicant's mark in relation to how it is used. Once the likely meaning is determined in connection with the applicant's goods and services, the Board must then decide if that likely meaning refers to an identifiable group. Finally, the Board must ascertain whether the likely meaning may disparage a substantial composite of that identifiable group. If either prong of the *Geller* test is not satisfied, then the decision to register is decided in favor of the applicant and the mark passes for publication. Here, the *Geller* test is not met, and thus Luhv's mark should have been passed for publication.

The Board erred in its conclusion that Luhv's mark may be disparaging under Section 2(a) of the Lanham Act. The Board relied on insufficient evidence in reviewing Luhv's mark. It failed to consider any alternative likely meanings of her mark. Additionally, Luhv's mark is not disparaging to a substantial composite of any identifiable group. Moreover, Luhv has provided competent evidence to rebut the PTO's conclusion that her mark is disparaging. Finally, even if the Board properly identified the likely meaning of Luhv's mark, it is registrable because she has reappropriated the phrase "dumb blonde." Because Luhv's mark is not disparaging under Section 2(a), it should be registered by the PTO.

A. The Board relied on insufficient evidence in determining that Luhv's mark may be disparaging under Section 2(a) of the Lanham Act.

The evidence on which the Board relied in reaching its conclusion is not substantial. The Board failed to identify any alternative likely meanings of Luhv's mark. Additionally, unverified Internet comments provide minimal probative value in a Board proceeding. Moreover, at least one of the articles the Board relied on is unrelated to Luhv's use of the mark. Finally, the Board did not show that a substantial composite of blonde women, or women generally, find Luhv's use of the mark disparaging. Consequently, the Board did not rely on sufficient evidence in its finding that Luhv's mark may be disparaging under Section 2(a).

The Board did not rely on substantial evidence in its determination of whether the likely meaning of DUMB BLONDE is disparaging to a substantial composite of women. Courts will reverse the Board's findings if they are not supported by substantial evidence. *See Pro-Football, Inc. v. Harjo*, 284 F. Supp. 2d

96, 114 (D.D.C. 2003) (finding that testimony by an expert in linguistics, survey results of both the general population and the referenced group, and dictionary definitions were insubstantial). Here, the Board only relied on dictionary definitions, articles, and unauthenticated Internet comments to determine whether the mark may be disparaging. *Luhv*, 1337 F.3d at 457. Because the Board relied on insubstantial evidence to determine whether Luhv’s mark is disparaging, it erred in its review of DUMB BLONDE.

The Board relied on insufficient evidence in determining the likely meaning of the mark DUMB BLONDE. The Board should identify and analyze all likely meanings of a mark. *See, e.g., Geller*, 751 F.3d at 1358 (examining all likely meanings of “Islamisation”). The PTO only considered one meaning of DUMB BLONDE. *Luhv*, 1337 F.3d at 457. However, there are alternative meanings of Luhv’s mark. *See infra* Section I.B.2. Because the Board failed to identify and analyze any of the other possible meanings of DUMB BLONDE, it relied on insufficient evidence in its application of the first prong of the *Geller* test.

The unverified comments posted to Luhv’s uTube videos do not constitute substantial evidence. Unauthenticated Internet comments offer little probative value when determining whether a mark is disparaging. *See* TBMP¹ § 1208.03 (3d ed. Rev. 2, June 2013) (noting that the Board will determine the appropriate value of a comment posted to an Internet blog based on its “source of origin and

¹ The Trademark Trial and Appeal Board Manual of Procedure (TBMP) is a publication issued by the PTO that describes current practice and procedure for litigating before the Board.

relationship to the issue at hand”). Individuals who described the phrase “dumb blonde” as offensive posted their comments to Luhv’s uTube videos anonymously. *Luhv*, 1337 F.3d at 457. Because the Board gave no indication as to the source of origin of each comment and their probative value depends on whether each commenter is a woman, the comments are insufficient to support a finding that DUMB BLONDE may be disparaging.

The article discussing women’s negative perceptions of “dumb blonde” jokes is unrelated to Luhv’s use of the mark. When reviewing the mark in the context of its use in the marketplace, courts must consider only those goods and services listed in the application for registration. *See In re McGinley*, 660 F.2d 481, 485 (C.C.P.A. 1981). Luhv filed an application in July 2014 to register DUMB BLONDE in Class 41 for “Entertainment, namely live performances by a musical band” and Class 25 for “[C]lothing, namely, sweatshirts, t-shirts, tank tops, and headwear.” *Luhv*, 1337 at 456. Because the article on which the Board relied deals with women’s perceptions of “dumb blonde” jokes, and Luhv has only applied to register the mark in connection with her musical performances and clothing, this evidence is insufficient to support a finding that Luhv’s mark is disparaging under Section 2(a).

The Board relied on insufficient evidence to determine that blonde women find Luhv’s mark disparaging. In determining whether a mark is disparaging, the Board must consider the referenced group’s understanding of the mark. *See In re Heeb Media, LLC*, 89 U.S.P.Q.2d 1071, 2008 WL 5065114, at *5 (T.T.A.B. 2008). The Board determined that the readily identifiable group is blonde women, but only

indicated that it relied on evidence showing that women in general find the phrase offensive. *Luhv*, 1337 F.3d at 457. Because the Board only relied on evidence that women, not blonde women specifically, find the mark disparaging, its determination is not supported by substantial evidence.

If the referenced group here is all women, there is insufficient evidence to support a finding that Luhv's mark is disparaging to a substantial composite of that group. Although the PTO is not required to demonstrate that a majority of a referenced group is offended by the use of a mark, it must show that a substantial composite is offended. *See Heeb Media*, 89 U.S.P.Q.2d 1071 at *8; *see also Harjo v. Pro-Football, Inc.*, 50 U.S.P.Q.2d 1705, 1999 WL 375907, at *44 (T.T.A.B. 1999) (finding that 36.6% of the referenced group was substantial), *rev'd on other grounds, Pro-Football, Inc. v. Harjo*, 284 F. Supp. 2d 96 (D.D.C. 2003). The Board gave no indication as to the number of women who find the mark disparaging. *See Luhv*, 1337 F.3d at 457-59. Because the Board failed to quantify how many women consider the mark disparaging, it relied on insufficient evidence.

B. The Board erred in its application of the first prong of the *Geller* test when it neglected to consider any of the alternative likely meanings of Luhv's mark.

The Board misapplied the first prong of the *Geller* test for three reasons. First, Luhv's mark consists of words that could and should have been independently defined. Second, the words "dumb" and "blonde" offer other possible meanings of Luhv's mark. Finally, when viewed in connection with Luhv's goods and services, these alternatives are likely meanings of her mark under the *Geller* test.

1. The words in Luhv's mark should have been defined independently because DUMB BLONDE is a composite mark.

DUMB BLONDE is a composite mark. A composite mark consists of words that can be independently defined. *See* TMEP² § 1213.02 (8th ed. July 2015).

Luhv's mark is comprised of two words, "dumb" and "blonde," which have distinct definitions. *See infra* Section I.B.2. Because "dumb" and "blonde" can be defined individually, DUMB BLONDE is a composite mark.

The Board erred when it analyzed only the unitary meaning of the phrase "dumb blonde." A phrase has a unitary meaning if the elements of a mark are so integrated or merged together that they cannot be defined independently. *See* TMEP § 1213.05. Here, the words "dumb" and "blonde" have distinct, individual meanings aside from those associated with the phrase "dumb blonde." However, the Board only analyzed the likely meaning of the phrase as a whole. *Luhv*, 1337 F.3d at 457. Because the words in Luhv's mark can be regarded as independent of each other, the Board erred when it analyzed DUMB BLONDE only as a unitary phrase.

2. Dictionary definitions of the words "dumb" and "blonde" offer plausible likely meanings of Luhv's mark.

Blonde refers to hair color. When ascertaining a mark's likely meaning the Board should take dictionary definitions into account. *Geller*, 751 F.3d at 1358.

"Blonde" is defined as, (1) "Of a woman having fair hair and skin and usually light eyes;" or (2) "Of a flaxen or golden color or of any light shade of auburn or pale

² The Trademark Manual of Examining Procedure (TMEP) provides the procedures that examining attorneys are required or authorized to follow in the examination of trademark applications.

yellowish brown.” *Blonde*, New Oxford American Dictionary (3d ed. 2010); *accord* Webster’s Third New International Dictionary (1986). According to dictionaries, “blonde” refers to a woman’s hair color.

Dictionary definitions for the word “dumb” offer alternative plausible meanings for Luhv’s mark. When a word has multiple definitions, the Board is advised to consider each. *See Order Sons of Italy in Am. v. The Memphis Mafia*, 52 U.S.P.Q.2d 1364, 1999 WL 977231, at *4 (T.T.A.B. 1999) (considering six definitions of the word “mafia”). One definition of “dumb” is “stupid,” or “unintelligent.” *Dumb*, New Oxford American Dictionary (3d ed. 2010). Another definition of “dumb” is “incapable of using speech; mute.” *Id.* (stating that this definition of dumb was the word’s original meaning); *see also Dumb*, Black’s Law Dictionary (2d ed. 2014) (listing this definition as the only definition). A third definition of dumb is “taciturn” or “reserved in speech.” *Dumb*, New Oxford American Dictionary (3d ed. 2010). Because there are multiple meanings of “dumb,” the Board should have analyzed each independently.

Modern day slang offers additional likely meanings of Luhv’s mark. The Board may rely on slang definitions when determining the likely meaning of a mark. *See Heeb Media*, 89 U.S.P.Q.2d 1071 at *1; *see also In re Tam*, 108 U.S.P.Q.2d 1305, 2013 WL 5498164, at *1 (T.T.A.B. 2013) (evaluating the slang definition of the words “slant” and “slants”). The word “dumb” is slang for “extremely” or “emphatically.” *Dumb*, Urban Dictionary, <http://www.urbandictionary.com/define.php?term=DUMB> (last visited Oct. 19,

2015) (giving examples of “dumb cold” and “dumb long”). Modern day slang definitions provide additional meanings of the word “dumb” that the Board failed to consider.

3. Alternative definitions of the word “dumb,” when viewed in connection with Luhv’s goods and services, provide plausible likely meanings of her mark.

One likely meaning of DUMB BLONDE is “reserved blonde.” When determining the likely meaning of a mark, the PTO must consider its use in connection with the applicant’s goods and services. *See In re Lebanese Arak Corp.*, 94 U.S.P.Q.2d 1215, 2010 WL 766488, at *3 (T.T.A.B. 2010). Luhv records and performs her music and lyrics under the stage name Dumb Blonde while combating contemporary gender stereotypes. *Luhv*, 1137 F.3d at 456-57. One long-standing gender stereotype is that “women are quieter than men and not meant to speak out.” Holly Brewer, *List of Gender Stereotypes*, Health Guidance, <http://www.healthguidance.org/entry/15910/1/List-of-Gender-Stereotypes.html> (last visited Oct. 19, 2015). Because Luhv may be using her mark to speak out against the gender stereotype that women are quieter than men, “reserved blonde” is a likely meaning of her mark.

Another likely meaning of Luhv’s mark is “extremely blonde.” The Board must determine the likely meaning of the mark in the context of how it is used in the marketplace. *Geller*, 751 F.3d at 1358. Luhv, a blonde woman, features blonde women on her website, her uTube page, and in her performances. *Luhv*, 1337 F.3d at 456-58. Luhv’s consistent use of blonde hair in the promotion of her goods and services suggests that a likely meaning of her mark is “extremely blonde.”

The nature of Luhv's goods and services indicate that "extreme blonde" is another likely meaning of her mark. The meaning of a mark must be determined in connection with the applicant's product. See *In re Squaw Valley Dev. Co.*, 80 U.S.P.Q.2d 1264, 2006 WL 1546500, at *3 (T.T.A.B. 2006). The music Luhv creates incorporates elements from the genre Grindcore. *Luhv*, 1337 F.3d 455. Grindcore is an "extreme" sub-genre of metal featuring a heavier, more aggressive style. *Grindcore*, Metal Classifications, <http://metaldescent.com/grindcore/> (last visited Oct. 19, 2015). Luhv's incorporation of extreme metal in her music suggests that "extreme blonde" is another possible meaning of her mark.

Standard and slang dictionary definitions for the words "dumb" and "blonde" provide alternative likely meanings for Luhv's mark that the Board failed to consider. The Board must identify and analyze all likely meanings of a mark. See *Order Sons of Italy*, 52 U.S.P.Q.2d 1364 at *4. In connection with Luhv's goods and services, "dumb" can mean "reserved," "extremely," or "extreme." Under a composite mark analysis, there are multiple likely meanings for Luhv's mark, and therefore the Board erred in its application of the *Geller* test by only analyzing one likely meaning.

C. Luhv's mark is not disparaging to a substantial composite of any identifiable group.

The Board erred in its determination that a substantial composite of women would find Luhv's mark disparaging under Section 2(a) of the Lanham Act. Women should not constitute an identifiable group for the purposes of the second prong of the *Geller* test. However, even if this Court finds that women qualify as an

identifiable group, a substantial composite of women do not find Luhv's mark disparaging. Regardless of whether women are considered an identifiable group, Luhv's mark is not disparaging under Section 2(a).

1. The referenced group—women—is too broad to be considered an identifiable group for the purposes of the *Geller* test.

The referenced group—women—is too broad to be readily identifiable under the *Geller* test. The Board often analyzes whether a matter may disparage ethnic, religious, or minority groups that constitute a small portion of the United States population. *See, e.g., Tam*, 108 U.S.P.Q.2d 1305 (refusing the mark THE SLANTS because it may be disparaging to people of Asian descent); *Lebanese Arak*, 94 U.S.P.Q.2d 1215 (refusing the mark KHORAN because it may be disparaging to Muslims); *Heeb Media*, 89 U.S.P.Q.2d 1071 (refusing the mark HEEB for clothing because it may be disparaging to Jewish people). Women make up nearly fifty-one percent of the United States population. U.S. Dep't of Com., 2010 Census Brief: Age and Sex Composition: 2010 (May 2011) <http://www.census.gov/prod/cen2010/briefs/c2010br-03.pdf>. Because women are the majority of the United States population, the referenced group—women—is too broad to be analyzed under the *Geller* test.

2. Even if this Court considers women an identifiable group under the *Geller* test, none of the likely meanings of Luhv's mark, as used in connection with her goods and services, disparages a substantial composite of women.

If this Court adopts the likely meaning “reserved blonde,” Luhv's mark is not disparaging. A mark may disparage when it “dishonor[s] by comparison what is

inferior, slight[s], deprecate[s], degrade[s], or affect[s] or injure[s] by unjust comparison.” *Harjo*, 284 F. Supp. 2d at 124. Luhv performs live at venues across the United States and her lyrics directly challenge gender discrimination. *Luhv*, 1337 F.3d at 458. If this Court determines that “reserved blonde” is the likely meaning of DUMB BLONDE, this likely meaning is not disparaging because Luhv uses her mark to empower women and not to dishonor or degrade them.

If this Court adopts “extremely blonde” as the likely meaning of the mark, it is not disparaging. The Board finds that a mark may disparage a readily identifiable group when it injures or degrades by comparison. *See Harjo*, 284 F. Supp. 2d at 124. Luhv is a blonde-haired woman who performs live at her concerts and posts videos of herself on uTube. *Luhv*, 1337 F.3d at 456-57. If “extremely blonde” is the likely meaning of DUMB BLONDE, referring to Luhv’s consistent portrayal of her blonde hair and not to women generally, Luhv’s use of the mark is not disparaging.

“Extreme blonde,” another likely meaning of DUMB BLONDE, is also not disparaging to women. When determining whether a mark is disparaging, the Board must consider the mark in the context of the applicant’s goods and services. *See Blackhorse v. Pro-Football, Inc.*, 111 U.S.P.Q.2d 1080, 2014 WL 2757516, at *1 (T.T.A.B. 2015), *aff’d*, *Pro-Football, Inc. v. Blackhorse*, No. 1-14-CV-01043-GBL, 2015 WL 4096277 (E.D. Va. 2015), *appeal docketed*, *Pro-Football, Inc. v. Blackhorse*, 2015 WL 4096277 (4th Cir. Aug. 6, 2015). Luhv’s music incorporates elements of Grindcore, which is described as extreme metal. *Luhv*, 1337 F.3d at 455; *see*

Grindcore, Metal Classifications, <http://metaldescent.com/grindcore/> (last visited Oct. 19, 2015). If this Court adopts “extreme blonde” as the likely meaning of the mark, referring to Luhv’s extreme style of music and not to a readily identifiable group, Luhv’s use of the mark is not disparaging to women.

If this Court finds that the likely meaning of “dumb blonde” is a negative stereotype about women, Luhv’s use of the mark is still not disparaging. If the historically negative connotation associated with a phrase does not extend to its actual use, then it is not disparaging. *See Harjo*, 284 F. Supp. 2d at 133. Luhv uses her mark to identify herself as an artist, advertise her goods and entertainment services, and to speak out on behalf of women. *Luhv*, 1337 F.3d at 455. Because Luhv uses the mark to champion women, not in reference to its historically negative connotation, the mark is not disparaging.

Even if this Court determines that DUMB BLONDE is disparaging to a substantial composite of women in the context of apparel, it should pass for publication in the context of Luhv’s entertainment services. An application to register a mark under multiple classes may be simultaneously accepted and rejected. *See Squaw Valley*, 80 U.S.P.Q.2d at *23 (reversing the refusal to register applicant’s marks in Class 28 while affirming the refusal to register the same marks in Classes 25 and 35). Luhv applied to register her mark under Classes 25, apparel, and 41, entertainment services. *Luhv*, 1337 F.3d at 455. Luhv’s lyrics and concerts combat gender discrimination. *Id.* at 457. Luhv’s mark should be registered for entertainment services, because even if apparel does not sufficiently

contextualize the positive message behind Luhv's use of the mark, her entertainment services do.

D. Luhv has successfully rebutted the PTO's finding that the likely meaning of her mark may be disparaging to a substantial composite of women.

Luhv has successfully rebutted the PTO's findings. She has demonstrated that there are various characterizations of the phrase "dumb blonde." Luhv has presented evidence that she has used positive imagery to empower women. Moreover, Luhv has shown that the public has reacted positively to her use of the mark. Because Luhv has presented competent evidence that responds to each of the PTO's findings, she has successfully rebutted its determination that her mark may be disparaging to a substantial composite of women.

Luhv has shown that the phrase "dumb blonde" is not *per se* disparaging. Courts may rely solely on usage labels listed in dictionary definitions only if they are unanimous in their characterization of a term. *See In re Boulevard Entm't, Inc.*, 334 F.3d 1336, 1340-41 (Fed. Cir. 2003). Some dictionaries use the usage label "informal," as opposed to "derogatory" or "pejorative," to categorize "dumb blonde." *See, e.g., Dumb Blonde*, New Oxford American Dictionary (3d ed. 2010). Because dictionary definitions for "dumb blonde" do not unanimously characterize the phrase as disparaging, they are not dispositive in determining whether the mark may be disparaging.

Even if this Court gives weight to the user comments analyzed by the PTO, Luhv has still shown that the public does not find her use of the mark disparaging.

Courts must review the record as a whole and consider evidence that both supports and undermines the Board's decision. *See Harjo*, 284 F. Supp. 2d at 116. Luhv has offered additional comments posted to various social media sites such as "Your ability to bring attention to the challenges faced by women is inspiring," and "[A]s a blonde woman I totally support you" *Luhv*, 1337 F.3d at 458. Because Luhv has offered social media posts demonstrating that people react positively to her use of the mark, she has successfully rebutted the claim that her mark is disparaging.

DUMB BLONDE should pass for publication. Doubt as to whether a mark is disparaging weighs in favor of publication. *See In re Mavety Media Grp.*, 33 F.3d 1367, 1374 (Fed. Cir. 1994) (approving the Board's practice of resolving doubt in favor of publication); *see also In re Over Our Heads Inc.*, 16 U.S.P.Q.2d 1653, 1990 WL 354546, at *1 (T.T.A.B. 1990) (resolving doubt as to whether the mark MOONIES was disparaging by publishing it, concluding that a group that finds the mark disparaging could bring an opposition proceeding and establish a more complete record). Hundreds of thousands of women have attended Dumb Blonde concerts. *Luhv*, 1337 F.3d at 458. Women have posted positive comments on social media sites such as, "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!" *Id.* Because Luhv has shown that she has widespread support in her use of the mark, she has raised doubt as to whether it is disparaging. Therefore, the mark should pass for publication.

E. Even if this Court determines that the Board correctly identified the likely meaning of Luhv’s mark, it should be registered because Luhv has successfully reappropriated the phrase “dumb blonde.”

Luhv has demonstrated that she has successfully reclaimed the phrase “dumb blonde.” In the past, the Board has accepted reappropriation arguments for groups that receive lower-level scrutiny. Luhv’s mark implicates gender, which receives a lower level of scrutiny. Furthermore, Luhv has shown that she has used her mark to engage in a positive discussion about gender discrimination. Because Luhv has successfully reclaimed the gendered phrase “dumb blonde,” her mark is not disparaging under Section 2(a).

Stereotypes can be reappropriated. Reappropriation of a stereotype occurs when “a stigmatized group revalues an externally imposed negative label by self-consciously referring to itself in terms of that label.” Adam D. Galinsky, et al., *The Reappropriation of Stigmatizing Labels: Implications for Social Identity*, 5 *Research on Managing Groups and Teams* 221, 222 (2003), <http://faculty.wcas.northwestern.edu/bodenhausen/reapp.pdf>. For example, the use of “queer” to mean homosexual stems from the traditional definition, “strange or odd,” indicating that it is abnormal to be homosexual. *Queer*, New Oxford American Dictionary (3d ed. 2010). Today, however, the gay community has embraced the term “queer.” See, e.g., *LGBTQ Nation*, <http://www.lgbtqnation.com> (last visited Oct. 19, 2015) (labeling itself as “America’s Most Followed Lesbian, Gay, Bisexual, Transgender, Queer News Source”); see also *Doe v. Yates*, No. 08-CV-01219, 2009 WL 3837261, at *4 (E.D. Cal. Nov. 16, 2009) (using the acronym LGBTQ to refer to

plaintiffs). Because words can be redefined through their use, traditionally targeted groups can successfully reappropriate stigmatizing labels.

Luhv has successfully reappropriated the phrase “dumb blonde.” The PTO has reversed the refusal of a mark where an organization provided evidence showing a positive perception of its use of a historically offensive label. *See The Trademark*, San Francisco Dykes on Bikes, <http://www.dykesonbikes.org/index.php/about-dykes-on-bikes/history/the-trademark> (last visited Oct. 19, 2015). Prior to filing her application for registration, Luhv had already performed as Dumb Blonde at venues across the country, attracting hundreds of thousands of female fans. *Luhv*, 1337 F.3d at 455, 458. Additionally, Luhv uses her uTube channel, Soundpuff account, and concerts to communicate her message about gender discrimination. *Id.* at 456-57. Moreover, individuals have been quoted stating, “[Luhv’s] ability to bring attention to the challenges faced by women is inspiring.” *Id.* at 458. Because Luhv has successfully revalued “dumb blonde” by engaging a large audience in a positive discussion about gender discrimination, she has reappropriated the phrase.

Because Luhv’s mark implicates gender, the PTO should recognize that the phrase “dumb blonde” has been reclaimed. The majority of the instances in which the Board has rejected a reclamation argument involve race, national origin, or religion. *See, e.g.*, THE SLANTS, Serial No. 85/472,044, filed Nov. 14, 2011; THE BIG HEEB BREWING COMPANY, Serial No. 78/432,597, filed June 9, 2004; N.I.G.G.A. NATURALLY INTELLIGENT GOD GIFTED AFRICANS, Serial No.

75/002,364, filed Oct. 6, 1995 (ultimately abandoned). When these classes' rights are implicated, courts analyze the issue under the highest level of scrutiny. *See Hunter v. Erickson*, 393 U.S. 385, 391-92 (1969). "Dumb blonde," however, implicates gender, which traditionally receives a lower level of scrutiny than race, national origin, and religion. *See Craig v. Boren*, 429 U.S. 190, 197 (1976). Because "dumb blonde" implicates gender and not a class reviewed under heightened scrutiny, the mark should be registered as a reappropriated label.

Moreover, the PTO has allowed a reclamation argument brought by a legally lesser-protected class. The PTO registered the trademark DYKES ON BIKES after the San Francisco Women's Motorcycle Contingent provided evidence that the word "dyke" had been reappropriated. *See The Trademark*, San Francisco Dykes on Bikes, <http://www.dykesonbikes.org/index.php/about-dykes-on-bikes/history/the-trademark> (last visited Oct. 19, 2015). Gender and sexual orientation legally receive the same level of scrutiny. *Compare Craig*, 429 U.S. at 197 (adopting intermediate scrutiny to analyze gender discrimination), *with United States v. Windsor*, 133 S. Ct. 2675 (2013) (applying mid-level scrutiny to a regulation implicating sexual orientation). Because gender and sexual orientation receive a similar level of scrutiny and trademarks implicating sexual orientation have been registered, DUMB BLONDE should also be registered.

II. EVEN IF THIS COURT FINDS THAT DUMB BLONDE IS DISPARAGING UNDER SECTION 2(A) OF THE LANHAM ACT, SECTION 2(A)'S PROHIBITION ON DISPARAGING MARKS IS A VIOLATION OF THE FIRST AMENDMENT.

The First Amendment provides that “Congress shall make no law . . . abridging the freedom of speech.” U.S. Const. amend. I. To determine whether a restriction on speech is unconstitutional under the First Amendment, this Court must ask: (1) whether the speech is protected speech, *see Chaplinsky v. State of New Hampshire*, 315 U.S. 568, 571-72 (1942) (holding that “fighting words” are not protected under the First Amendment); (2) does the regulation violate the Constitution in a way that implicates the First Amendment, *see Texas v. Johnson*, 491 U.S. 397, 405 (1989) (holding that flag burning implicates the First Amendment); and (3) is the regulation unconstitutional under the appropriate framework, *see Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm’n of N.Y.*, 447 U.S. 557, 566 (1980) (establishing the test to determine whether a restriction on commercial speech violates the First Amendment). If the regulation satisfies these three inquiries, the restriction on speech is unconstitutional under the First Amendment.

Trademarks are protected speech because they are commercial speech. Commercial speech is defined as “speech that does no more than propose a commercial transaction.” *United States v. United Foods, Inc.*, 533 U.S. 405, 409 (2001). This Court has held that the First Amendment affords protection to commercial speech. *See Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748, 762 (1976). This Court analyzes commercial speech

restrictions under the *Central Hudson* test, which asks whether (1) the speech is lawful and not misleading; (2) “the asserted governmental interest is substantial;” (3) “the regulation directly advances the governmental interest asserted;” and (4) the regulation “is not more extensive than is necessary to serve that interest.” *Cent. Hudson*, 447 U.S. at 566. If the party seeking to enforce a commercial speech regulation fails to satisfy every prong of the *Central Hudson* test, the regulation is deemed a violation of the First Amendment.

Even if this Court finds that DUMB BLONDE is disparaging under Section 2(a) of the Lanham Act, the mark is still registrable because Section 2(a)’s restriction on disparaging marks violates the First Amendment. Section 2(a) fails the *Central Hudson* test because (1) trademarks are constitutionally protected commercial speech; (2) Section 2(a) implicates the First Amendment by imposing unconstitutional conditions on trademark registration; and (3) the government has failed to show that Section 2(a) is the least restrictive means of directly furthering a substantial governmental interest. Consequently, Section 2(a) violates the First Amendment.

A. Trademarks are protected speech under the First Amendment.

Because trademarks are commercial speech, they receive First Amendment protections. Trademarks satisfy all three prongs of this Court’s test in *Bolger v. Young Drug Products Corp.*, 463 U.S. 60 (1983), for determining what constitutes commercial speech. Additionally, even if this Court declines to follow *Bolger*, this Court has indirectly held that trademarks, because of their function in the

marketplace, are commercial speech. Accordingly, trademarks deserve First Amendment protection.

1. Trademarks are commercial speech under the *Bolger* test.

This Court should deem trademarks commercial speech. To determine what constitutes commercial speech, courts must determine whether the speech (1) is an advertisement; (2) refers to a specific product; and (3) is driven by an economic motivation. *See Bolger*, 463 U.S. at 66-67; *Facenda v. N.F.L. Films, Inc.*, 542 F.3d 1007, 1017 (3d Cir. 2008). If the speech satisfies all three inquires of *Bolger*, then there is strong support for a finding that the speech is commercial. *Bolger*, 463 U.S. at 67. Because trademarks are advertisements, refer to specific products, and are driven by an economic motivation, they are commercial speech.

Trademarks are advertisements. By indicating the source of a product, a trademark builds consumer trust and increases sales. *Compare Smith v. Chanel, Inc.*, 402 F.2d 562, 566 (9th Cir. 1968) (discussing the purpose of trademarks), *with Advertisement*, New Oxford American Dictionary (3d. ed. 2001) (defining an advertisement as “a notice or announcement in a public medium promoting a product, service, or event . . .”). Indeed, courts have held that trademarks are advertisements. *See Northam Warren Corp. v. Universal Cosmetic Co.*, 18 F.2d 774, 774 (7th Cir. 1927). Because trademarks are presented to the public to help sell and identify the sources of products, they are advertisements.

Trademarks refer to specific products. One of the purposes of trademarks is to distinguish one product from another. 15 U.S.C. § 1127 (2012); *see Park ‘N Fly*,

Inc. v. Dollar Park & Fly, Inc., 469 U.S. 189, 198 (1985). For example, the trademark MARLBORO refers only to Marlboro cigarettes, not another product. MARLBORO, Registration No. 4,171,817. Because trademarks are used to refer to specific products, the second element of the commercial speech analysis is satisfied.

Trademarks are used to increase products' sales. Trademark owners use their marks to convey the quality of their products and to create a "commercial magnetism" to their goods. *See Mishawaka Rubber & Woolen Mfg. Co. v. S.S. Kresge Co.*, 316 U.S. 203, 205 (1942). Because trademarks are used to increase the sales of the products to which they refer, they are driven by an economic motivation, thus satisfying the third prong of the *Bolger* test for commercial speech.

Specifically, Luhv's trademark is driven by an economic motivation. To register a mark, applicants must have the "bona fide intention to use [the mark] in commerce." 15 U.S.C. § 1127 (defining "use in commerce" as the "use of a mark in the ordinary course of trade, and not made merely to reserve a right in a mark"). Luhv's ability to sign with and sell her music under a record label is conditioned on her registration of DUMB BLONDE. *Luhv*, 1337 F.3d at 456. Because Luhv's record label requires her to register DUMB BLONDE before she can sign her contract and sell her music, her trademark is driven by an economic motivation.

2. Even if this Court declines to follow the *Bolger* test, trademarks should still be considered commercial speech.

This Court has intimated that trademarks are commercial speech. In *San Francisco Arts & Athletics, Inc. v. United States Olympic Committee*, this Court discussed how the United States Olympic Committee had "a limited property right

in the word ‘Olympic’” under the protection of trademark law. 483 U.S. 522, 534-35 (1987). Additionally, this Court stated that the word “Olympic” was commercial speech and within the bounds of the Constitution. *Id.* at 535, 540. Because words that have the same rights and protections as trademarks have been labeled commercial speech, trademarks should also be considered constitutionally-protected commercial speech.

Like trade names, trademarks should be considered commercial speech. This Court has held that trade names are commercial speech. *Friedman v. Rogers*, 440 U.S. 1, 11 (1979). Trade names are “symbols used to distinguish companies, partnerships and businesses,” and trade name holders can bring infringement actions analogous to those available to trademark owners. *Accuride Int’l, Inc. v. Accuride Corp.*, 871 F.2d 1531, 1534 (9th Cir. 1989); *see New W. Corp. v. NYM Co. of Cal., Inc.*, 595 F.2d 1194, 1201 (9th Cir. 1979) (explaining that “[t]rade name infringement . . . is based on considerations similar to trade-mark infringement”). Similarly, trademarks are used to distinguish products, services, and goods. *Accuride*, 871 F.2d at 1534 (stating that “[t]rade names often function as trademarks”). Because trademarks are functionally equivalent in purpose and legal remedies to trade names, trademarks should be considered commercial speech.

B. The unconstitutional conditions doctrine applies to Section 2(a) of the Lanham Act in a manner that implicates the First Amendment.

Section 2(a) implicates the First Amendment. Section 2(a) conditions the receipt of trademark benefits on the waiver of First Amendment rights.

Additionally, the PTO’s operations are outside the scope of Congress’ spending

powers. Because Section 2(a) is outside the scope of Congress' spending powers and conditions the receipt of trademark registration benefits on the waiver of First Amendment rights, the unconstitutional conditions doctrine applies to Section 2(a).

1. Because Section 2(a) conditions the receipt of trademark protections on the waiver of First Amendment rights, the unconstitutional conditions doctrine applies.

The court's focus in *McGinley* on the use of a mark, as opposed to the benefits of trademark registration, is misplaced. The court in *McGinley* held that Section 2(a) does not implicate the First Amendment because the refusal of a mark does not prevent its use, but only its registration. *McGinley*, 660 F.2d at 484. However, the unconstitutional conditions doctrine dictates that a government benefit cannot be conditioned on the waiver of a constitutional right. *See Koontz v. St. Johns River Water Mgmt. Dist.*, 133 S. Ct. 2586, 2594 (2013). Therefore, the analysis must focus on whether an applicant is waiving a constitutional right to receive the benefits of trademark registration.

Section 2(a) conditions the benefits of trademark registration on the waiver of First Amendment rights. The government may not condition the receipt of benefits on the waiver of a constitutional right. *Perry v. Sindermann*, 408 U.S. 593, 597 (1972) (concluding that the government cannot infringe upon a person's freedom of speech when establishing requirements for bestowing a benefit). Here, the PTO is conditioning the receipt of the benefits of trademark registration on whether Luvh uses the mark DUMB BLONDE. *Luvh*, 1337 F.3d at 455. Because the PTO

conditions the receipt of trademark registration on the waiver of First Amendment rights, the unconstitutional conditions doctrine applies.

The unconstitutional conditions doctrine also applies to benefits to which an individual does not have a guaranteed right. Even if a person is not entitled to the conveyance of a benefit, the government may not condition that benefit on the waiver of a constitutional right. *See Bd. of Cty. Comm'rs, Wabaunsee Cty., Kan. v. Umbehr*, 518 U.S. 668, 674 (1996). For example, although a person is not entitled to government employment, the government cannot fire someone because of her political affiliation. *Id.* Although a trademark applicant does not have an inherent right to the benefits of registration, the government may not condition the receipt of those benefits on the waiver of the applicant's First Amendment rights.

Registration provides valuable benefits to trademark owners. The government may not condition valuable benefits on the waiver of a constitutional right. *See Regan v. Tax'n With Representation of Wash.*, 461 U.S. 540, 545 (1983). Registration gives notice of ownership for a product, is prima facie evidence of an owner's exclusive right to use a trademark, and can make a trademark incontestable after five years of having been registered. *See B & B Hardware, Inc. v. Hargis Indus., Inc.*, 135 S. Ct. 1293, 1299-1300 (2015). Registration also allows an owner to put her mark into the PTO's database, to record her trademark with the United States Customs and Border Protection, to bring legal action regarding her mark in federal court, and to use her United States trademark registration as a basis when applying for trademark protection in a foreign country. *Should I*

Register, U.S. Pat. & Trademark Office, <http://www.uspto.gov/trademarks-getting-started/trademark-basics> (last visited Oct. 19, 2015). Registration of a trademark with the PTO provides valuable procedural and substantive benefits to trademark owners; therefore, the unconstitutional conditions doctrine applies.

2. PTO operations do not implicate Congress' spending powers.

The federal government does not subsidize First Amendment expression through trademark registration because Congress' spending powers under Article I, Section 8, Clause 1 of the United States Constitution are not applicable to Section 2(a). As of 1991, PTO operations have been funded solely by fee revenue. *Figueroa v. United States*, 466 F.3d 1023, 1028 (Fed. Cir. 2006). For fiscal year 2016, the net appropriations to the PTO from the federal government's budget will be zero dollars. See U.S. Pat. & Trademark Office, Fiscal Year 2016 President's Budget Submission/Congressional Justification 5 (2015), www.uspto.gov/sites/default/files/documents/fy16pbr.pdf. Because Congress' spending powers do not apply to Section 2(a), trademark registration is not a federal subsidy of First Amendment expression.

The only funds the PTO receives that are not from fee revenue are appropriated to and administered by intermediary federal agencies. The Office of Personnel Management ("OPM"), not Congress, administers PTO employee benefits, such as pensions, health insurance, and life insurance. See *Figueroa*, 466 F.3d at 1028; U.S. Pat. & Trademark Office, Performance and Accountability Report 99 (2014), www.uspto.gov/about/stratplan/ar/USPTOFY2014PAR.pdf. Congress has no

control over how the OPM allocates its budget to federal employees. *See* U.S. Office of Pers. Mgmt., Congressional Budget Justification Performance Budget Fiscal Year 2016 1 (2015), <http://www.opm.gov/about-us/budget-performance/budgets/congressional-budget-justification-fy2016.pdf>. Because Congress has no authority or control over how the OPM allocates money for employee benefits to the PTO, this funding is too attenuated from Congress for its spending powers to apply.

If this Court finds that the OPM funding of employee benefits implicates Congress' spending powers, Congress would have the ability to regulate any and all agency activity. The purpose of the unconstitutional conditions doctrine is to prevent the government from indirectly regulating something it could not regulate directly. *See Perry*, 408 U.S. at 597. The OPM provides services to all federal agencies. *Our Mission, Role & History*, U.S. Office of Pers. Mgmt., <http://www.opm.gov/about-us/our-mission-role-history/what-we-do/> (last visited Oct. 19, 2015). Because the OPM funds all federal agencies, a finding that OPM actions implicate Congress' spending powers would grant Congress unlimited direct and indirect power over agencies.

3. Section 2(a)'s restriction on disparaging marks is unrelated to the purposes of the Lanham Act.

Section 2(a) is an impermissible use of Congress' spending powers. One of the limitations on Congress' spending powers is that the conditions imposed must be related to the purpose of the government program at issue. *See Massachusetts v. United States*, 435 U.S. 444, 461 (1978); *S. Dakota v. Dole*, 483 U.S. 203, 207 (1987).

Section 2(a) conditions the registration of a mark on its content. 15 U.S.C. § 1052(a). Because Section 2(a) is unrelated to the purposes of the Lanham Act, it is outside the scope of Congress' spending powers.

Denying a mark on the ground that it is disparaging is unrelated to the Lanham Act's purpose of minimizing the use of misleading marks. The Lanham Act was enacted, in part, to restrict the use of trademarks that may deceive or mislead the public. *See Dastar Corp. v. Twentieth Century Fox Film Corp.*, 539 U.S. 23, 28 (2003); 15 U.S.C. § 1127. For example, Luhv uses her mark to identify herself as an artist, accumulate a significant fan base, and ultimately sell her music. *Luhv*, 1337 F.3d at 455-57. However, the Board rejected Luhv's mark on the ground that it may be disparaging. *Id.* at 457. Section 2(a)'s prohibition on disparaging marks is unrelated to this purpose of the Lanham Act because it is used to deny marks that are neither deceptive nor misleading.

C. Regardless of whether this Court analyzes Section 2(a) under a strict scrutiny analysis or the *Central Hudson* test, Section 2(a) violates the First Amendment.

Section 2(a)'s restriction on disparaging marks violates the First Amendment because it is a content-based restriction. Content-based restrictions receive strict scrutiny. Section 2(a) fails strict scrutiny because it is not motivated by a compelling governmental interest. Even if this Court determines that Section 2(a) should be analyzed under the *Central Hudson* test, it still violates the First Amendment. Regardless of whether Section 2(a) is considered content-based or is

analyzed under the *Central Hudson* test, its restriction on disparaging marks violates the First Amendment.

1. Section 2(a) is a content-based restriction, and therefore should be analyzed under a strict scrutiny analysis.

Section 2(a) violates the First Amendment because it is a content-based restriction that fails a strict scrutiny analysis. Content-based restrictions are presumptively invalid and receive strict scrutiny. Section 2(a) does not satisfy strict scrutiny because there are no compelling governmental interests justifying its restriction on disparaging marks. Because Section 2(a) fails strict scrutiny, it is a violation of the First Amendment.

Section 2(a) is a content-based restriction on free speech. Content-based laws are laws that regulate speech based on its subject matter. *See Reed v. Town of Gilbert, Ariz.*, 135 S. Ct. 2218, 2227 (2015); *Turner Broad. Sys., Inc. v. F.C.C.*, 512 U.S. 622, 643 (1994). Section 2(a) regulates trademarks based on whether they consist of “immoral,” “scandalous,” or “disparaging” material. 15 U.S.C. § 1052(a). Because Section 2(a) regulates trademarks based on their subject matter, it is a content-based restriction.

Section 2(a) should be considered presumptively invalid. This Court has stated that “[c]ontent-based regulations are presumptively invalid.” *R.A.V. v. City of St. Paul, Minn.*, 505 U.S. 377, 382 (1992); *see also Consol. Edison Co. of N.Y. v. Pub. Serv. Comm’n of N.Y.*, 447 U.S. 530, 536 (1980) (stating that content-based restrictions must be scrutinized more carefully to ensure that speech is not suppressed because the government disapproves of a speaker’s views). Section 2(a)

restricts speech based on whether the PTO finds a trademark to be “disparaging.” 15 U.S.C. § 1052(a). Because Section 2(a) runs the risk of suppressing a message solely based on its potential to be disagreeable to those who view it, Section 2(a) is presumptively invalid.

Section 2(a) should be reviewed under strict scrutiny. Regulations receive strict scrutiny when they restrict speech based on its potential to be disagreeable to those who are exposed to it. *See Sorrell v. IMS Health Inc.*, 131 S. Ct. 2653, 2664 (2011). Section 2(a) denies marks based on whether they contain offensive words or symbols. 15 U.S.C. § 1052(a). Because Section 2(a) restricts the registration of trademarks based on their content, it should be reviewed under strict scrutiny.

Section 2(a) fails strict scrutiny because it is not motivated by a compelling governmental interest. To uphold a content-based restriction on speech, the government must show that the regulation is narrowly tailored and the least restrictive means of furthering a compelling governmental interest. *See Sable Commc'ns of Cal., Inc. v. F.C.C.*, 492 U.S. 115, 126 (1989). The government must satisfy every aspect of strict scrutiny to uphold a regulation. *Id.* Here, the government cannot even show a substantial governmental interest to satisfy an intermediate scrutiny analysis. *See infra* Section II.C.2.b. Because the proposed governmental interests are not substantial, they are necessarily also not compelling, thus failing strict scrutiny.

2. Even if this Court declines to analyze Section 2(a) under strict scrutiny, it is unconstitutional under the *Central Hudson* test.

If this Court denies applying strict scrutiny, it should apply the *Central Hudson* test. Under the *Central Hudson* test, this Court must examine whether (1) the speech is lawful and not misleading; (2) “the asserted governmental interest is substantial;” (3) “the regulation directly advances the governmental interest asserted;” and (4) the regulation “is not more extensive than is necessary to serve that interest.” *Cent. Hudson*, 447 U.S. at 566. The government must satisfy all of the prongs of the *Central Hudson* test, because “[t]he party seeking to uphold a restriction on commercial speech carries the burden of justifying it.” *Bolger*, 463 U.S. at 71 n.20. Because Section 2(a) does not satisfy every prong of the *Central Hudson* test, its restriction on disparaging speech is unconstitutional.

a. Trademarks are neither unlawful nor misleading.

Trademarks satisfy prong one of the *Central Hudson* test. To satisfy the first prong of the *Central Hudson* test, speech must not be unlawful or misleading. *Cent. Hudson*, 447 U.S. at 566. Disparaging marks are not unlawful. *See McGinley*, 660 F.2d at 484 (holding that a disparaging mark can still be used lawfully in the marketplace even though it has been denied registration). Additionally, the purpose of trademarks is to prevent confusion about goods in the marketplace. 15 U.S.C. § 1127. Because disparaging trademarks are neither unlawful nor misleading, they satisfy the first prong of the *Central Hudson* test.

b. *There is no substantial governmental interest in denying a disparaging mark from being registered.*

There is no substantial governmental interest in suppressing a trademark on the ground that it is offensive or disparaging. Protecting people from speech, even commercial speech, which may offend those exposed to it, is never a substantial governmental interest. *See Carey v. Population Servs., Int'l*, 431 U.S. 678, 701 (1977). The purpose of Section 2(a) is to restrict potentially disparaging trademarks. 15 U.S.C. § 1052(a). Because Section 2(a) regulates trademarks on the basis of their potential to be offensive, there is no substantial governmental interest.

There is no substantial governmental interest in denying a mark on the ground that its registration may show an implicit endorsement of the mark's message. Trademark registration is not a government endorsement of a mark. *In re Old Glory Condom Corp.*, 26 U.S.P.Q.2d 1216, 1993 WL 114384, at *5 n.3 (T.T.A.B. 1993); *see* U.S. Pat. & Trademark Office, *Protecting Your Trademark: Enhancing Your Rights Through Federal Registration* 10 (2014), www.uspto.gov/sites/default/files/trademarks/basics/BasicFacts.pdf (stating that the PTO does not “[c]omment on the validity of registered marks”). In *Old Glory Condom*, the PTO explained that its duty “is nothing more and nothing less” than to register marks that function to distinguish goods in the marketplace. 26 U.S.P.Q.2d at *5 n.3. Because the PTO's function is to register trademarks that help distinguish goods in the marketplace and not to favor certain content over others,

denying a mark because of the potential for an implied government endorsement is not a substantial interest.

There would be a substantial interest in denying a mark if it were government speech; trademarks, however, are not government speech. Courts have held that speech is not government speech when the individual, not the government, “bears ultimate responsibility for the content of the speech.” *Ariz. Life Coal., Inc. v. Stanton*, 515 F.3d 956, 967-68 (9th Cir. 2008). The government does not create trademarks, only protects them. *See B&B Hardware*, 135 S. Ct. at 1299. For example, Starbucks Corporation DBA Starbucks Coffee Company, not the government, created the trademark STARBUCKS. STARBUCKS, Registration No. 4,664,181. Because an applicant chooses her trademark’s content, not the government, trademarks are not government speech, and therefore there is no substantial interest in their regulation.

The government is not communicating messages through trademarks. When individuals spend money to have certain speech published, “a reasonable observer” would recognize that the person is publishing her own message, not that of the government. *Roach v. Stouffer*, 560 F.3d 860, 868 (8th Cir. 2009). A trademark owner must voluntarily pay a trademark registration fee to have her trademark published in the registry. *USPTO Fee Schedule*, U.S. Pat. & Trademark Office, www.uspto.gov/learning-and-resources/fees-and-payment/uspto-fee-schedule (last visited Oct. 19, 2015). Because an applicant must pay to register a trademark, a

reasonable person would recognize that the applicant, not the government, is communicating a message about her product.

Additionally, the number of trademarks in the registry indicates that no reasonable person would believe that the government is communicating messages through registered trademarks. When there are a significant number of messages communicated through a government program, a reasonable person would not think that all of those messages are from the government. *See, e.g., Roach*, 560 F.3d at 868 (holding that a reasonable person could not believe that the government endorsed the messages communicated through over two hundred specialty license plates). In fiscal year 2014 alone, the PTO registered 168,057 trademarks to United States residents and 38,498 trademarks to residents of foreign countries. U.S. Pat. & Trademark Office, Performance & Accountability Report 160, 163 (2014), www.uspto.gov/about/stratplan/ar/USPTOFY2014PAR.pdf. Because the quantity of trademarks in the registry is so substantial, no reasonable person would believe that the government is endorsing the messages contained in every trademark.

c. Section 2(a) does not directly advance any alleged substantial governmental interests.

Section 2(a) of the Lanham Act does not protect consumers from offensive or disparaging materials. Courts cannot uphold regulations if they provide “ineffective or remote support” for the asserted governmental interests. *Cent. Hudson*, 447 U.S. at 564. A person can still use a mark even though it has not been registered. *See McGinley*, 660 F.2d at 484. For example, even without registration, Luhv and her mark DUMB BLONDE have gained a “devoted” following, with over forty thousand

followers on Soundpuff, over one hundred thousand active subscribers on uTube, and hundreds of thousands of fans at her concerts. *Luhv*, 1337 F.3d at 455-56, 458. Even though the Board denied the registration of DUMB BLONDE under Section 2(a), its refusal in no way shielded the public from the mark's exposure. Therefore, Section 2(a) is ineffective at advancing this governmental interest.

If this Court finds that there is a substantial interest in preventing perceived government endorsements of trademarks, Section 2(a) still fails the *Central Hudson* test because it does not advance that interest. Restrictions that are under-inclusive do not directly advance governmental interests. *See City of Ladue v. Gilleo*, 512 U.S. 43, 50-51 (1994); *see also Rubin v. Coors Brewing Co.*, 514 U.S. 476, 488-89 (1995) (holding that a regulation banning the display of alcohol content on beer, but not wine and spirits, did not directly advance the governmental interest in preventing alcohol "strength wars" because it was under-inclusive). ILC I LOVE COCAINE and MARIJUANA IS NOT A CRIME are both live registered trademarks. ILC I LOVE COCAINE, International Registration No. 1,243,723; MARIJUANA IS NOT A CRIME, Registration No. 86,369,923. The existence of trademarks that contradict government policy demonstrates that Section 2(a) is ineffective at preventing the registration of marks that the government would not want people to believe it endorsed.

d. Section 2(a)'s restriction on an applicant's freedom of speech is more extensive than necessary to serve that interest.

Section 2(a) is not the least restrictive means to prevent the public from believing the government endorses the content of trademarks. To uphold a

government restriction, the government must demonstrate that there is no way to achieve its interests without suppressing speech. *See Thompson v. W. States Med. Ctr.*, 535 U.S. 357, 371 (2002). The PTO could prevent the misunderstanding that the government endorses trademarks by posting disclaimers on its website, applications, and all publications explicitly stating that registered trademarks are not endorsed by the government. Because the PTO can prevent the public perception that the government endorses trademarks without suppressing speech, Section 2(a)'s prohibition on disparaging speech is a violation of the First Amendment.

CONCLUSION

This Court should find that Luv's mark, DUMB BLONDE, is not disparaging to women under Section 2(a). However, even if this Court finds that the mark may be disparaging, it should find that Section 2(a)'s prohibition on the registration of disparaging marks is unconstitutional as a violation of the First Amendment.

Respectfully Submitted,
/s/ Team Number 107
Team Number 107
Counsel for Respondent