

No. 15-1007

In the Supreme Court of the United States

UNITED STATES, PETITIONER

v.

KOURTNEY LUHV, RESPONDENT

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

**BRIEF OF RESPONDENT IN SUPPORT OF REVERSAL FOR
TRADEMARK ISSUE AND AFFIRMANCE FOR THE CONSTITUTIONAL
ISSUE**

QUESTION PRESENTED

1. 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 within the meaning of section 2(a) of the Lanham Act?
2. Does section 2(a)'s prohibition on registering marks that may be disparaging violate the United States Constitution?

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15 U.S.C. § 1052(a)

STATEMENT OF THE CASE

1. Section 2(a) of the Lanham Act states that the Patent and Trademark Office (PTO) may reject an application to register a mark on the grounds that it “[c]onsists of or comprises immoral, deceptive, or scandalous matter; or matter which may disparage or false suggest a connection with persons, living or dead, institutions, beliefs, national symbols, or bring them into contempt, or disrepute.” 15 U.S.C. Section 1052(a). In determining what constitutes a disparaging mark, the Trademark Trial and Appeal Board (TTAB) and the Federal Circuit traditionally apply a two-prong test taking into consideration the meaning of the mark and whether a substantial composite of the referenced group would feel disparaged. *See In re Lebanese Arak Corp.*, 94 U.S.P.Q.2d 1215, 2010 WL 766488 (T.T.A.B. 2010). The Federal Circuit held that Section 2(a)’s prohibition on registering disparaging marks is unconstitutional under the First Amendment, as it protects commercial free speech. *In re Kourtney Luhv*, 1337 F.3d 455, 460 (Fed. Cir. 2015). As such, neither the PTO nor the TTAB can rely on Section 2(a)’s disparagement provision as grounds for refusing registration of mark. *Id.*

2. This action arose when Ms. Kourtney Luhv, a vocalist and solo artist, filed an application to register the mark DUMB BLONDE for purposes of entertainment, namely live performances, and for clothing. *Id.* at 455–56. Ms. Luhv has been known by and performing under the stage name Dumb Blonde for over three years. *Id.* at 455. At the time of her application, she had a devoted fan base attending her concerts, over 40,000 online “followers” on her “Soundpuff” channel, and over

100,000 subscribers to her “uTube” channel DumbBlondeMusic. *Id.* at 455–56. Also at the time of her registration application, Ms. Luhv had negotiated a deal with a record label to release several new pieces of music for \$2,000,000, contingent upon her successful registration of the DUMB BLONDE mark. *Id.* at 456.

3. The examining attorney found that Ms. Luhv’s mark, DUMB BLONDE, may be disparaging to women under Section 2(a) of the Lanham Act, and refused registration. *Id.* Ms. Luhv contested the application’s denial, and the appeal was brought before the TTAB, which affirmed the examining attorney’s refusal to register the mark. *Id.* In affirming the examining attorney’s refusal, the TTAB relied on its belief that the mark may be disparaging to a substantial composite of the referenced group, namely women who have a blonde hair color. *Id.* at 457. Specifically, the TTAB pointed to pictures from Ms. Luhv’s website, depicting a blonde woman eating plastic fruit and applying Wite-Out to a computer screen. *Id.* at 456–57. The TTAB also cited dictionary definitions, articles, and uTube user comments in support of its conclusion that the phrase “dumb blonde” is offensive. *Id.* at 457.

4. Ms. Luhv further appealed the TTAB’s refusal of her registration, now to the Federal Circuit, which considered two questions. *Id.* at 455. First, whether the TTAB erred in affirming the PTO’s rejection of the DUMB BLONDE mark, namely, whether it misinterpreted and misapplied the relevant case law. *Id.* Second, whether Section 2(a) of the Lanham Act’s prohibition on registering disparaging marks is unconstitutional. *Id.*

In support of her appeal, Ms. Luhv provided evidence that the mark DUMB BLONDE is not disparaging to women because of the context in which she uses the mark. *Id.* at 457–58. The stage name Dumb Blonde refers to the substance of her music career, through which she focuses her lyrics on the issues faced by women in today’s society in order to draw attention to gender discrimination. *Id.* at 455, 457. Ms. Luhv has expressed that she seeks to reclaim the stereotype by recasting the phrase “dumb blonde” in a positive light. *Id.* at 458. By using the mark DUMB BLONDE as her stage name, Ms. Luhv displays the negative stereotype in ironic proximity to her own successful career as a woman, simultaneously contradicting the stereotype. *Id.* Ms. Luhv points to the hundreds of thousands of female fans that support this message by attending her concerts and leaving online social media comments referring to her a “positive role model” and highlighting her “ability to bring attention to the challenges faced by women.” *Id.* at 457.

Despite this evidence of successful attempts to recast the phrase “dumb blonde” in a positive light, the Federal Circuit pointed to “significant evidence suggest[ing] that women view ‘dumb blonde’ jokes negatively.” *Id.* at 457 (citing Karen Ross, *The Handbook of Gender, Sex, and Media* 88 (John Wiley & Sons, Sept. 7, 2011)). The Federal Circuit upheld the TTAB’s refusal to register the mark despite noting Ms. Luhv’s good intentions and ability to provide evidence of disparate and positive opinions surrounding her use of the DUMB BLONDE mark. *Id.* at 458–59.

The Federal Circuit went on to hold, however, that Section 2(a)'s prohibition on registering potentially disparaging marks was unconstitutional as it violated the First Amendment rights as they relate to commercial speech. *Id.* at 460. To find a First Amendment violation in connection with a restriction placed on speech, the speech needed to be protected speech, the regulation needed to abridge the speech, and the abridgement needed to be analyzed under the proper framework. *Id.* at 459. The court found that the trademark constituted protected commercial speech and that section 2(a) abridged the protected speech because it denied procedural rights and benefits awarded to trademark owners. *Id.* Furthermore, the court found that the unconstitutional conditions doctrine applied. *Id.* at 460.

In analyzing section 2(a) under the proper framework, the court considered (i) whether the speech concerned illegal or misleading information; (ii) whether the government had asserted a substantial interest; (iii) whether the regulation directly advanced that interest; and (iv) whether the regulation was more extensive than necessary to serve that interest. *Id.* The court found that the first prong was satisfied; however, the second prong was not satisfied because the government's interest in discouraging the use of marks that may be offensive did not satisfy the test. *Id.* Therefore, the court found that section 2(a) was unconstitutional.

5. This Court granted certiorari.

SUMMARY OF THE ARGUMENT

This Court should hold that the Trademark Trial and Appeal Board erred when it rejected Kourtney Luhv's application to register the name DUMB BLONDE on the grounds that the mark may be disparaging to women within the meaning of section 2(a) of the Lanham Act because the mark in question is not disparaging to women both in its meaning nor when its meaning is put even further into context.

The proposed mark, DUMB BLONDE is not disparaging to a substantial composite of the referenced group after applying the two-prong disparagement test utilized by the TTAB because the intended meaning of the mark is not offensive either on its face or in the context within which the mark is used.

The TTAB specifically erred in failing to consider alternative meanings for the phrase "dumb blonde." Although determining the likely meaning of the matter in question necessarily begins with analysis of the dictionary definition, the first prong of disparagement analysis specifically requires looking into the context and manner in which the mark is used to also determine meaning. While it is true that Ms. Luhv is a blonde woman and depicts images of blonde women on her website, which suggests that the referenced group is blonde women, it is also true that Ms. Luhv uses the phrase "dumb blonde" in the context of empowering women. Ms. Luhv's use of the phrase "dumb blonde" in the context of women with highly successful careers and lyrics that promote gender equality and activism, Ms. Luhv has created an alternative meaning of "dumb blonde" that contrasts the PTO and TTAB's description of a singular meaning, denoting a purely negative stereotype

against women. This alternative meaning is supported by ample evidence on the record of Ms. Luhv's fans who attend her shows and leave comments on social media, suggesting that her use of the phrase "dumb blonde" has a meaning other than the negative stereotype suggested by the Federal Circuit in its opinion.

The TTAB also erred when it failed to provide sufficient evidence to suggest that a substantial composite of the referenced group may be disparaged by the mark. In previous decisions regarding disparagement, the TTAB often relies on vulgarity and offensiveness of the phrase or mark itself as evidence that a substantial composite of the referenced group would be offended. Similarly, previous decisions have put importance on the availability of multiple kinds of evidence supporting the possibility or actuality that disparagement would occur. Further, previous decisions suggest the opinions need to be expressed by or considered from the perspective of the referenced group themselves, and not just from the perspective of the judges. Here, however, there was minimal evidence that the mark would be considered vulgar or offensive on the same level as marks that have been held disparaging previously, as the dictionary definitions and public reaction to the phrase was not as severe as seen in comparable cases of disparagement. Additionally, previous decisions have shown the importance and relevance of when a mark has political or social significance, which can help to outweigh a potential for disparagement. This was also the case here, where Ms. Luhv has a political and social agenda, which she plans to advance through use of the mark in her music career to promote awareness of issues such as gender discrimination.

Further, because the little evidence of disparagement provided in this case was not provided by the referenced group, and was not a sufficient amount of evidence generally, TTAB precedent suggests that the mark should have been approved for publication, which would then open up the opportunity for anyone in the referenced group who actually felt disparaged by the mark to initiate an opposition proceeding. This would provide the opportunity for both sides to get more evidence on the record in order to properly determine what the likely meaning of the mark and the likelihood of disparagement is. The potentially disparaging mark must be considered in the context of the actual goods and services provided by the applicant, not just in regards to whether or not the phrase is disparaging. Here, while evidence was provided that women may find “dumb blonde” jokes offensive, no evidence was provided that women may find Ms. Luhv’s use of the phrase “dumb blonde” to be offensive within the context of her music career which is strongly focused on advancing women’s rights and promoting knowledge of women’s issues. By contrast, Ms. Luhv provided actual evidence that women are not offended by the use of the mark DUMB BLONDE, in that she has hundreds of thousands of fans and many social media followers who leave comments praising her as a role model bringing awareness to women’s issues. In light of this contradictory evidence, the TTAB should have found in favor of the applicant and passed the mark for publication, leaving the door open for the referenced group to state their opposition in an opposition hearing should they have been offended by the mark.

The Federal Circuit correctly held that section 2(a) of the Lanham Act was unconstitutional. In order to determine whether the government is restricting the content of speech that is protect by the First Amendment, the court must first determine (i) whether the speech is type of speech that is protected by the First amendment; (ii) whether the regulation is abridging the speech in some way; and finally (iii) whether the regulation is narrowly tailored to advance a substantial governmental interest.

The phrase DUMB BLONDE constitutes speech that is protected by the First Amendment. DUMB BLONDE is a trade name that falls under the purview of commercial speech. Because commercial speech plays an important part in ensuring the free flow of information within the marketplace, the court has an interest in protecting commercial speech from governmental intrusion and influence.

For it's second requirement, section 2(a) abridges the commercial speech in a way that violates First Amendment protections. Under section 2(a), the state denied trademark registration to Ms. Luhv because it found the content of the speech to be offensive. The state has a right to regulate the characteristics surrounding the speech; however, it may not regulate the content of the speech like it did when it denied Ms. Luhv the right to register DUMB BLONDE as a trademark. Furthermore, the unconstitutional conditions doctrine applies to the state's actions. It denied Ms. Luhv the right to benefit from having her trademark

registered and protected on the grounds that her trademark was disparaging. Denying a benefit on grounds that deny a person of their constitutionally protected right conjures the unconstitutional conditions doctrine.

Finally the regulation is not narrowly tailored to advance a substantial governmental interest. Because this analysis deals with the First Amendment and the constitutionally protected right to speech, the court will apply a strict scrutiny analysis. In order to achieve this, (i) the speech must not be unlawful or misleading, (ii) the state interest must be substantial, (iii) the regulation must advance the state's goals, and (iv) the regulation must be narrowly tailored to achieve these goals.

The phrase DUMB BLONDE does not constitute unlawful or misleading information. The law does not protect untruthful information; however the phrase DUMB BLONDE does not fit within the purview of this type of speech. Therefore, the court may examine continue with its analysis of whether it is afforded First Amendment protections.

For the second criteria, the state does not assert a substantial interest for denying a trademark on the grounds that it is disparaging. The state wants to restrict offensive speech, and it wants to discourage dissemination of disparaging speech. However, as previous courts have found, "offensiveness" is not a valid reason for restricting one's speech.

In regards to the third criteria, even if the state had a legitimate interest, section 2(a) does not advance that interest. In order to justify restriction such a

regulation, the state would need to show that individuals have suffered a harm and that the regulation materially alleviates that harm. However, here the state is unable to show that individuals have suffered a real harm from viewing offensive material. In addition, section 2(a) does not restrict Ms. Luhv from using and marketing merchandise with the phrase DUMB BLONDE. It just precludes her from registering it as a trademark; therefore, section 2(a) does not promote the state's interest, because she may still use the phrase DUMB BLONDE on everything.

Finally, section 2(a) is more extensive than is necessary to achieve the state's interest. If the state invalidates the trademark application because it is offensive, it creates a standard that is hard to perpetuate. What is offensive or disparaging will change over time; therefore, to simply declare across the board that the material is dismissed means that information that is not offensive or that is arguably on the border may be dismissed without further review.

For the forgoing reasons, the Supreme Court should affirm the Federal Circuit's holding that section 2(a) of the Lanham Act is unconstitutional.

STANDARD OF REVIEW

The judgment of the court of appeals was entered in June 6, 2015. The petition for a writ of certiorari was granted on October 20, 2015. The jurisdiction of this Court rests in Article 2, Section 2, Clause 2 and Article 3, Section 2 of the Constitution.

ARGUMENT

III. **THE TRADEMARK TRIAL AND APPEAL BOARD ERRED WHEN IT REJECTED MS. LUHV'S APPLICATION TO REGISTER THE MARK DUMB BLONDE BECAUSE THE MARK IS NOT DISPARAGING TO WOMEN WITHIN THE MEANING OF SECTION 2(A) OF THE LANHAM ACT AND BECAUSE THE PATENT AND TRADEMARK OFFICE DID NOT PROVIDE SUFFICIENT EVIDENCE FOR PROVING DISPARAGEMENT AND AS SUCH THE MARK SHOULD HAVE BEEN APPROVED FOR PUBLICATION AND LATER SETTLED IN AN OPPOSITION PROCEEDING, IF NECESSARY.**

Section 2(a) of the Lanham Act states that the Patent and Trademark Office (PTO) can refuse to register a mark that “[c]onsists of or comprises . . . matter which may disparage . . . persons, living or dead, institutions, beliefs, or national symbols.” 15 U.S.C. § 1052(a). To assist in this highly subjective inquiry, the Trademark Trial and Appeal Board (TTAB) uses a two-prong test, which takes into consideration both the likely meaning of the matter in question, and whether that meaning may be disparaging to a substantial composite of the referenced group. *In re Lebanese Arak Corp.*, 94 U.S.P.Q.2d 1215, 2010 WL 766488 (T.T.A.B. 2010).

Here, the TTAB erred when it rejected Ms. Luhv's application to register the mark DUMB BLONDE for two main reasons. First, under the two-prong disparagement test applied by the TTAB and the Federal Circuit, *see In re Lebanese Arak Corp.* at 3, Ms. Luhv's satirical and positive use of the DUMB BLONDE mark is not clearly offensive or disparaging to a substantial composite of the referenced group. Second, where there is insufficient evidence or uncertainty as to the extent of the offensiveness of a mark, the mark should be approved for publication and

then disputed in an opposition proceeding instituted by the potentially disparaged group. *See, e.g., In re Mavety Media Grp. Ltd.*, 33 F.3d 1367, 1373 (Fed. Cir. 1994).

- A. **The mark DUMB BLONDE is not disparaging to a substantial composite of the referenced group, blonde women, because the intended meaning is not indicative of overt offensiveness or vulgarity and the satirical context within which the mark is used similarly mitigates the offensiveness in question.**

The TTAB uses a two-prong test to determine whether a mark “may disparage” persons. *In re Kourtney Luhv*, 1337 F.3d 455, 457 (Fed. Cir. 2015). The first prong requires the TTAB to ask, “what is the likely meaning of the matter in question?” *In re Geller*, 751 F.3d 1355, 1358 (Fed. Cir. 2014). The second prong requires the TTAB to determine whether that meaning may be disparaging to a substantial composite of the referenced group. *Id.* First, with regard to prong one, the TTAB erred in failing to consider alternate, ironic uses of the phrase “dumb blonde” especially within the context of Ms. Luhv’s music career. Second, the TTAB’s analysis under prong two fails in that it does not contain adequate evidence that a substantial composite of the referenced group would find the term disparaging, especially when taking into consideration the more positive use of “dumb blonde” that Ms. Luhv’s career has advanced.

1. *Prong One: The likely meaning of the matter in question is unclear given the context of Ms. Luhv’s extensive use of the mark in a positive way.*

In determining the likely meaning of the matter in question, case law dictates that courts should consider “not only dictionary definitions, but also the relationship of the matter to the other elements of the mark, the nature of the goods or services, and the manner in which the mark is used in the marketplace in

connection with the goods or services.” *In re Lebanese Arak Corp.*, 94 U.S.P.Q.2d 1215, at *3, 2010 WL 766488 (T.T.A.B. 2010). The inquiry starts by examining dictionary definitions, as they “represent an effort to distill the collective understanding of the community with respect to language.” *In re Boulevard Entm’t*, 334 F.3d 1336, 1340 (Fed. Cir. 2010). In examining meaning through dictionary definitions, if the evidence shows the mark has only one pertinent meaning, dictionary evidence can be sufficient to satisfy the PTO’s burden by itself, but when ambiguous, dictionary evidence may not be enough. *See id.* at 1341 (holding that although meaning of JACK-OFF mark was ambiguous, in relation to adult entertainment, mark was clearly intended to refer to masturbation and not to alternate definition of an incompetent man); *see also In re Hershey*, 6 U.S.P.Q.2d 1470, at *2–3, 1988 WL 252485 (T.T.A.B. 1988) (considering public perception and various slang and dictionary definitions when determining the likely meaning of the mark BIG PECKER BRAND, which contained a double entendre referring both to an innocuous bird definition or the more scandalous definition of male genitalia).

Here, although the dictionary definition of “dumb blonde” suggests only one, negative, meaning; when taken in the context of Ms. Luhv’s use of the mark, an alternative positive interpretation is created. The examining attorney and the TTAB presented evidence that the “phrase ‘dumb blonde’ implies a negative, stereotypical view of women,” and characterized it as “offensive or insulting.” *In re Kourtney Luhv*, 1337 F.3d 455, 457 (Fed. Cir. 2015). Ms. Luhv is herself a blonde woman, and utilizes images of other blonde women on her website, leading to the

Federal Circuit’s conclusion that, based on this context, “the mark is likely intended to refer to women who have a blonde hair color.” *Id.* Ms. Luhv, however, uses the mark DUMB BLONDE in the context of promoting blondes who are not actually dumb. *See id.* at 458 (describing Ms. Luhv’s use of the phrase “dumb blonde” to show women with successful careers, such as depicting a blonde woman as the president of the United States). Like in *In re Boulevard Entm’t*, 334 F.3d 1336, 1340 (Fed. Cir. 2010), where the context of the use of the mark in the adult entertainment industry showed the intended meaning was masturbation and not an incompetent man, here, the context of Ms. Luhv’s use of the mark in reference to her own career in the music industry and to other blonde women with powerful careers shows the intended meaning is successful blonde women, not just blonde women or blonde women who are actually believed to be dumb. As in *Hershey*, where alternative meanings were differentiated between by public perception, *Hershey* at *2–3, here, public perception of a more positive meaning for “dumb blonde” is demonstrated by Ms. Luhv’s substantial fan base and “other women who are familiar with her musical performances, who infer a different, more positive meaning for the mark,” *Kourtney Luhv* at 458.

As such, the negative stereotypical meaning referencing blonde women is not the only potential meaning of the mark, because a more positive meaning of the phrase “dumb blonde” is also created by the context in which the mark is used.

1. *Prong Two: Likelihood the meaning may be disparaging to a substantial composite of the referenced group was not sufficiently proven by the PTO, as the evidence regarding actual disparagement was minimal and inconclusive.*

The second prong of the disparagement test states requires a determination that “if [the meaning from prong one] is found to refer to identifiable persons, institutions, beliefs or national symbols, whether that meaning may be disparaging to a substantial composite of the referenced group.” *In re Lebanese Arak Corp.*, 94 U.S.P.Q.2d 1215, at *3, 2010 WL 766488 (T.T.A.B. 2010). A necessary requirement of this prong is determining what “disparage” actually means. In *Pro-Football, Inc. v. Harjo*, 284 F.Supp.2d 96, 124 (D.D.C. 2003), the court declared that “trademarks may disparage if they may ‘dishonor by comparison with what is inferior, slight, deprecate, degrade, or affect or injure by unjust comparison.’”

The second necessary element of this prong is determining what a “substantial composite” of the referenced group is. Although “case law does not provide a fixed number or percentage, it is well established that a ‘substantial composite’ is not necessarily a majority.” *In re Heeb Media, LLC*, 89 U.S.P.Q.2d 1071, at *8, 2008 WL 5065114 (T.T.A.B. 2008) (citing *In re McGinley*, 660 F.2d 481, 485 (C.C.P.A. 1981)). Additionally, the determination as to whether a substantial composite of the general public may be disparaged needs to be made “in the context of contemporary attitudes.” *In re Old Glory Condom Corp.*, 26 U.S.P.Q.2d 1216, 1219, 1993 WL 114384 (T.T.A.B. 1993). In *Mavety Media*, the T.T.A.B. reiterated this idea and made clear that it “must be mindful of ever-changing social attitudes and sensitivities. Today’s scandal can be tomorrow’s vogue.” *In re Mavety Media*

Grp. Ltd., 33 F.3d 1367, 1371. In coming to these decisions, the court in *Mavety Media* also stressed that the determination must be made from the perspective of a substantial composite of the referenced group, not from the perspective of the judges. *Mavety Media* at 1371.

Both in determining what is disparaging and as to what may disparage a substantial composite of the public, TTAB and Federal Circuit decisions have often relied on the overall offensiveness of the mark, especially in the context of dictionary definitions and their categorizations of terms. *See, e.g., In re Heeb Media, LLC*, 89 U.S.P.Q.2d 1071, at *1, *8, 2008 WL 5065114 (T.T.A.B. 2008) (holding that HEEB was a disparaging mark that could not be registered because the term is “derogatory,” “informal, offensive” and filled with “anti-Semitic animus”); *In re Geller*, 751 F.3d 1355, 1357, 1361 (Fed. Cir. 2014) (holding that STOP THE ISLAMISATION OF AMERICA should not be registered because a substantial composite would find association with something as undesirable as terrorism and violence to be disparaging). Additionally, prior decisions have placed a high level of importance on dictionary definitions that categorize words as “vulgar.” *See, e.g., In re Boulevard Entm’t*, 334 F.3d 1336, 1338 (Fed. Cir. 2003) (denying JACK-OFF for being a scandalous, offensive, vulgar reference to masturbation); *In re Mavety Media Grp. Ltd.*, 33 F.3d 1367, 1368–69 (Fed. Cir. 1994) (initially denying registration to BLACK TAIL because the meaning of tail as it refers to sexual intercourse is considered vulgar).

Additionally, the TTAB and Federal Circuit also have based their judgment of what is disparaging and whether it is disparaging to a substantial composite of the referenced group on the extent of evidence presented showing negative reactions to use of the mark. *See, e.g., In re Heeb Media, LLC*, 89 U.S.P.Q.2d 1071, at *8, 2008 WL 5065114 (T.T.A.B. 2008) (holding that there was clear evidence that a substantial composite of the referenced group considered HEEB to be disparaging based on evidence from various segments of the Jewish community, including the Anti-defamation League, a university professor, rabbis, a talk-show host, and ordinary citizens).

Here, Ms. Luhv's proposed mark DUMB BLONDE has not been proven to carry any connotations of vulgarity and offensiveness that would resemble the severity of the proposed marks discussed above. The TTAB's definition of the phrase "dumb blonde" as implying a "negative, stereotypical view of women," was categorized as offensive or insulting by the TTAB and examining attorney, *In re Kourtney Luhv*, 1337 F.3d 455, 457 (Fed. Cir. 2015), but the dictionary definition doesn't categorize "dumb blonde" as "vulgar" or "offensive," *see, e.g.,* Dictionary.com, <http://dictionary.reference.com/browse/dumb-blonde> (providing a slang definition of dumb blonde as a "noun phrase" where it categorizes many other marks as vulgar or offensive). Further, the TTAB and examining attorney's determination that dumb blonde is offensive or insulting is not clearly a determination made from the perspective of the referenced group, and, unlike *In re Heeb*, where there was a multitude of evidence from many different sources that the mark would disparage a

substantial composite, the only evidence referenced in Ms. Luhv's case is that evidence in a *The Handbook of Gender, Sex, and Media* "suggests that women view 'dumb blonde' jokes negatively." *Kourtney Luhv* at 457.

The TTAB has also previously held that a mark could be registered despite its potential offensiveness when balanced against mitigating factors, stating that "the seriousness of purpose surrounding the use of the applicant's mark—a seriousness of purpose made manifest to purchasers on the packaging for applicant's goods—is a factor to be taken into account in assessing whether the mark is offensive or shocking." *See Old Glory Condom Corp.* at 1221 (holding that a condom wrapper with an American flag on it could be registered despite allegations that the mark was disparaging or scandalous). The TTAB has also allowed for registration of a mark to be registered when a group takes a potentially offensive term and asserts their intent to positively reclaim the term for political and social reasons. *See In re San Francisco Women's Motorcycle Contingent Appeal*, No. 000020-007200US (T.T.A.B. Sept. 15, 2005) (allowing registration of the mark DYKES ON BIKES because applicant provided evidence of positive public reception to the mark's use in the context of trying to reclaim the term).

Here, Ms. Luhv has an important political and social message regarding gender inequality and other critical issues faced by women that drive her in her mission to reclaim the phrase "dumb blonde." Like in *Old Glory Condom Corp.*, where the important political message regarding safe sex outweighed the potential for disparagement, *Old Glory Condom Corp* at 1221, Ms. Luhv's use of the mark

advances an important political message regarding gender discrimination and negative stereotypes against women, *Kourtney Luhv* at 457. Similarly, just as the lesbian community’s attempt to reclaim the offensive term “dyke” and use the mark DYKE in furtherance of their political and social agenda was sufficient reason to overcome disparagement analysis and get the mark registered, *San Francisco Women’s Motorcycle Contingent Appeal*, Ms. Luhv should be allowed to reclaim the negative stereotype “dumb blonde” in furtherance of her own agenda against gender discrimination and women’s issues, *Kourtney Luhv* at 457.

As such, the minimal evidence provided in relation to the actual offensiveness of the mark and opinions of the referenced group in regards to Ms. Luhv’s specific use of the mark, along with the importance of Ms. Luhv’s political message, all indicate that the mark was not sufficiently proven to be disparaging to a substantial composite of the referenced group.

- B. **Because the PTO failed to make an adequate evidentiary showing that the DUMB BLONDE mark is offensive to a substantial composite of the referenced group, the Mark should have been passed for publication and later debated at an opposition hearing initiated by any offended members of the referenced group.**

The PTO has the burden of proving that a trademark falls within a prohibition of Section 1052. *In re Mavety Media Grp. Ltd.*, 33 F.3d 1367, 1371 (Fed. Cir. 1994). The PTO must prove the proposed mark is disparaging in the context of the actual goods or services provided by the applicant. *See In re Squaw Valley Development Co.*, 80 U.S.P.Q.2d 1264, at *3, 2006 WL 1546500 (T.T.A.B. 2006) (“Both *Harjo I* and *Harjo II* require evidence that a substantial composite of the

referenced group considers the use of the mark in connection with the relevant goods or services to be disparaging.”). The PTO must further be able to show *by sufficient evidence* that the proposed mark would be disparaging in the context of those goods and services. *See Pro-Football, Inc. v. Harjo*, 284 F.Supp.2d 96, 127 (D.D.C. 2003) (holding that it was not sufficient evidence that Native Americans would find the term offensive in the sports team context of the proposed mark just because the term “redskins” is disparaging to Native Americans generally); *see also In re Mavety Media Grp. Ltd.*, 33 F.3d 1367, 1374 (Fed. Cir. 1994) (holding that in light of alternative non-vulgar meanings, the mark should be published for opposition because the only evidence of record suggesting disparagement consisted of personal opinions and a single dictionary source); *In re Hines*, 32 U.S.P.Q.2d 1376, at *1, 1994 WL 587037 (T.T.A.B. 1994) (holding that because the PTO did not sustain its burden of proof and the evidence on the record raises doubts about whether the mark is disparaging to Buddhists, the mark should be published for opposition.)

The PTO only provided one specific reference to evidence that women would find the DUMB BLONDE mark disparaging, and it was in regards to “dumb blonde” jokes generally, not in the specific anti-discrimination and women’s rights context within which Ms. Luhv uses the phrase. *In re Kourtney Luhv*, 1337 F.3d 455, 457 (Fed. Cir. 2015). Additionally, Ms. Luhv provided significant evidence that women view her use of the mark DUMB BLONDE in regards to women’s issues to be “inspiring” and refer to Ms. Luhv as a “positive role model” for her efforts. *Id.* at

458. Like in *Harjo*, where disparagement could not be proven when the term had not been considered in the context of the applicant's goods and services, *Harjo* at 127, here, the evidence of disparagement is in reference to "dumb blonde" jokes generally, not in specific regards to Ms. Luhv's use of the term in her music career. Like in *Hines*, where conflicting evidence existed as to whether Buddhists would feel disparaged by the mark, *Hines* at *1, here, conflicting evidence exists in the record as to whether women would feel disparaged by the mark in the context of Ms. Luhv's positive framing of the term. Finally, like in *Mavety Media Grp.*, where only one source of potential disparagement was not enough, *Mavety Media Grp.* at 1374, the only source of evidence of potential disparagement referenced in the Federal Circuit's opinion is *The Handbook of Gender, Sex, and Media*.

When evidence as to whether a mark is scandalous or disparaging is uncertain or unclear, the matter should be resolved in favor of the applicant and the mark should be passed for publication. *See In re Mavety Media Grp. Ltd.*, 33 F.3d 1367, 1374 (Fed. Cir. 1994) ("We therefore commend the practice adopted by the Board in another case to resolve the issue whether a mark comprises scandalous matter under § 1052(a) 'in favor of [the] applicant and pass the mark for publication with the knowledge that if a group does find the mark to be scandalous . . . an opposition proceeding can be brought and a more complete record can be established.'").

Therefore, in light of the conflicting, inconclusive, and insufficient evidence regarding disparagement, the TTAB should have approved the mark for publication

in order to determine whether there was in fact any opposition on behalf of the referenced group.

IV. THE FEDERAL CIRCUIT CORRECTLY HELD THAT SECTION 2(A) OF THE LANHAM'S ACT PROHIBITION ON REGISTERING DISPARAGING MARKS IS UNCONSTITUTIONAL.

Under the law of the United States, the First Amendment precludes Congress for enacting any law that abridges the citizens' freedom of speech. U.S. CONST. amend. I. This creates an "open marketplace" where different ideas about political, economic, and social issues can compete freely for public acceptance without governmental interference, *Knox v. Service Employees Intern. Union, Local 1000*, 132 S. Ct. 2277, 2288 (2012) (quoting *N.Y. State Bd. of Elections v. Lopez Torres*, 552 U.S. 196, 208 (2008)), which ultimately limits the government's ability to regulate expression due to its message, ideas, subject matter, or content. *U.S. v. Alvarez*, 132 S. Ct. 2537, 2543 (2012). *See also Bolger v. Youngs Drug Products Corp.*, 463 U.S. 60, 65 (1983) (quoting *Police Dept. of City of Chicago v. Mosley*, 408 U.S. 92, 95 (1972)).

If the government does impose restrictions on the content of the speech, the extent of protection that the First Amendment provides depends upon the nature of the expression and the governmental interest that is served by this regulation. *Central Hudson Gas & Elec. Corp. v. Public Service Commission of New York*, 447 U.S. 557, 563 (1980). For the First Amendment to afford protection, the speech must first be within the purview of the forms of speech that are protected by the First Amendment. *See, e.g., Roth v. U.S.*, 354 U.S. 476, 481 (1957). Second, the

governmental regulation must abridge the speech in some way. *Texas v. Johnson* , 491 U.S. 397, 405 (1989). Lastly, the regulation must be narrowly tailored to advance a substantial governmental interest. *Central Hudson*, 447 U.S. at 564.

For the reasons set forth below, this Court should affirm the Federal Circuit’s holding that the Lanham Act is unconstitutional because (i) the speech in question is a form of speech protected by the First Amendment; (ii) the act unlawfully abridges the appellants expression of that speech; and (iii) Section 2(a) of the Lanham Act is not narrowly tailored in a way that advances a substantial governmental interest.

A. **A trademark constitutes a form of commercial speech, which is protected under the First Amendment.**

Speech used in a commercial setting is protected under the First Amendment because it aids in the free flow of information within the marketplace. *Thompson v. Western States Medical Center*, 535 U.S. 357, 366 (2002) (discussing *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748 (1976)). The speaker and the audience, as opposed to the government, assess the value of information, which ultimately allows the conveyance of vital information that is protected by the First Amendment. *Id.* at 367. A trade name falls within the category of commercial speech because it is used as a part of a proposal of a commercial transaction. *Friedman v. Rogers*, 440 U.S. 1, 12 (1979). Information in this setting does not lose its First Amendment protection just because it is carried in a form that is “sold” for profit. *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 761 (1976)). However, commercial

speech differs from expressive speech because it varies in the degree of verifiability; therefore, it is granted a degree of protection that is proportionate to its position in relation to other constitutionally guaranteed expression. *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 553-54 (2001) (citing *Florida Bar v. Went For It, Inc.*, 515 U.S. 618, 623 (1995)).

Here, the speech is the phrase DUMB BLONDE which Ms. Luhv already uses to promote her music and which she hopes to use for entertainment, clothing, and headwear. *In re Kourtney Luhv*, 1337 F. 3d 455, 457 (2015). Although Ms. Luhv has been using the name to promote her music on Soundpuff and u Tube, by registering the name she hopes to introduce the name into the marketplace in order to monopolize off of it. Because she intends to use DUMB BLONDE as a trade name, it constitutes a type of commercial speech that is ultimately protected by the First Amendment.

The state may argue that the trade name does not count as commercial speech because the name itself does not carry any intrinsic meaning with it. *See Friedman v. Rogers*, 440 U.S. 1, 12 (1979). Because trade names have no intrinsic meaning, people who use trade names can easily mislead the public and deceive the public in regards to the quality of information that is associated with the name. *See id.* at 12-13. This argument is inapposite because Ms. Luhv has been using the name DUMB BLONDE since 2012. *In re Kourtney Luhv*, 1337 F. 3d 455, 455 (2015). She performs under this name in Calidonia, on Soundpuff, and on u Tube. In addition, she has received positive feedback for her images on her website that

depict a blond women as president. *Id.* at 458. Through Ms. Luhv's promotional efforts, she has already associated a concept with the terminology DUMB BLONDE therefore, unlike other trade names, Ms. Luhv's trade name already carries meaning with it.

B. **Denying a trademark because it is disparaging according to section 2(a) of the Lanham Act abridges Ms. Luhv's right to freedom of speech under the First Amendment.**

The First Amendment does not restrict the government's right to regulate the time, place, or manner of expression; however, the regulations must be executed in order to serve a significant governmental interest, and it must be done so without reference to the content of the speech. *Friedman v. Rogers*, 440 U.S. at 9. Here, the state explicitly regulates the content of the speech because it basis is decision for denying trademark on the basis that the trademark content is disparaging. In doing so, the unconstitutional conditions doctrine applies.

The unconstitutional conditions doctrine prohibits a government from denying a benefit to a person on a basis that infringes his constitutionally protected freedom of speech even if that person is not entitled to the benefit. *Rumsfeld v. Forum for Academic and Institutional Rights, Inc.*, 547 U.S. 47 (2006) (citing *U.S. v. American Library Ass'n, Inc.*, 539 U.S. 194, 210 (2003)); *See also Perry v. Sindermann*, 408 U.S. 593, 597 (1972); *44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 513 (1996). The unconstitutional conditions doctrine extends to the state's rights to regulate commercial speech. *44 Liquormart, Inc.*, 517 U.S. at 513. By denying Ms. Luhv the right to register her mark, the government is denying her the benefits that trademark registration bestows to users, and the government is basing

its decision on grounds that violate her constitutionally protected right to freedom of speech.

The state raises the point that the Luhv is not precluded from using the mark—just from registering it. However, Ms. Luhv’s injury extends further. By not having a trademark registration for DUMB BLONDE she cannot receive actual benefits from her name. In addition, because she has such a substantial number of followers on social media, she runs the risk of losing a significant amount of profit to someone who may use the name and falsely market products as hers. Registering trademarks provides the double benefit of encouraging innovation and quality by offering people protect for their ideas in exchange for monetary returns. Mark P. McKenna, *The Normative Foundations of Trademark Law*, NOTRE DAME L. REV. 1863 (2007). Registering trademarks also protects the public from exposure to fraudulent and misleading information that is disseminated through imposters. *Id.* By allowing Ms. Luhv to register her trademark, the court ensures that she benefits associated with trademarks and that she protects the meaning that she has come to associate with the term DUMB BLONDE.

The state may also argue that section 2(a) does not abridge the speech in a manner that implicates the First Amendment because Ms. Luhv still has alternate ways of conveying the same information used to empower women. *Compare San Francisco Arts & Athletics, Inc. v. U.S. Olympic Committee*, 483 U.S. 522 (1987) (discussing how San Francisco Arts & Athletics can not use the term “Olympics” but could use “games” or “tournament” and not lose the meaning of the name. Ms.

Luhv's situation is distinguishable from this case because Ms. Luhv intentionally took a derogatory term and attempted to redefine it by re-associating with images and ideas that contradict its plain meaning. By asking Ms. Luhv to accomplish this and not use intrinsically insulting terminology would defeat the purpose of overcoming common social perceptions.

C. **Section 2(a) of the Lanham Act does not assert a substantial governmental interest that is advanced by narrowly tailored means; therefore, it is unconstitutional.**

The First Amendment provides less protection to commercial speech as opposed to other constitutionally guaranteed forms of expression. *Central Hudson Gas & Elec. Corp.*, 447 U.S. at 562. However, when the state regulates speech, the First Amendment requires that the court examine the constitutionality of the regulation under strict scrutiny. *Sorrell v. IMS Health Inc.*, 131 S. Ct. 2653 (2011) (citing *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989)); *See also Florida Bar v. Went For It, Inc.*, 515 U.S. 618, 623 (1995). In order to maintain its First Amendment protection, the commercial speech must not include any unlawful activity or be misleading. *Central Hudson Gas & Elec. Corp.*, 447 U.S. at 563-64. The state must have a substantial interest that is achieved by regulating the speech. *Id.* The regulation must be carefully designed to advance the state's interests, and the interests cannot be served by a more limited restriction on speech. *Id.* For the regulation to be constitutional, each factor of the *Central Hudson* test must be answered affirmatively. *Thompson*, 535 U.S. at 367.

For the reasons set forth below, section 2(a) of the Lanham Act is unconstitutional.

1. *The trade name DUMB BLONDE is not unlawful or misleading.*

In order for commercial speech to be protected under the First Amendment, it must concern lawful activity and not be misleading. *Central Hudson Gas & Elec. Corp.*, 447 U.S. at 566. Commercial speech is protected in order to ensure the flow of truthful and legitimate information ; therefore untruthful speech is never protected. *Friedman*, U.S. at 9-11.

Here, Ms. Luhv's use of the term DUMB BLONDE is not unlawful or misleading as she uses it to promote her music and her merchandise. In addition, associating that phrase with her clothes does not falsely advertise as the court might suspect it would; therefore, it still does not impede the free flow of information within the marketplace.

The state may argue that because a trade name has no intrinsic meaning, it can still be commercial speech that is deceptive or misleading. *See generally Virginia State Bd. of Pharmacy*, 425 U.S. at 771. While this may be true, the state is not precluded from dealing with this issue. *Id.* Here, the state dismisses DUMB BLONDE because it is disparaging; however the state could regulate the use of the term DUMB BLONDE or similar terms to ensure that trade name users are not using them to deceive or mislead consumers.

2. *The state's asserted interest is not substantial enough to deny Ms. Luhv's trademark registration.*

As a general matter, the government may not prohibit the dissemination of ideas that it disfavors, nor compel the endorsement of ideas that it approves. *Harris v. Quinn*, 134 S. Ct. 2618, 2639 (2014)(citing *Knox v. Services Employees*

Intern. Union, Local 1000, 132 S. Ct. 2277 (2012)). The court cannot suppress speech in order to protect the young from ideas or images that a legislative body thinks are unsuitable for them. *Erznoznik v. City of Jacksonville*, 422 U.S. 205 (1975)(J. Thomas, *concurring*). Furthermore, a state may not use suppress an expression that is protected by the First Amendment just because the state finds it “offensive”; that has classically been held as not a valid justification. *Bolger v. Youngs Drug Products Corp.*, 463 U.S. 60, 71 (1983) (quoting *Carey v. Population Services, Intern.*, 431 U.S. 678, 700-01 (1977)).¹ The constitution does not permit the government to decide what types of speech are sufficiently offensive to require protection from an unwilling listener; instead the burden falls on the listener to avoid further exposure to something that offends them. *Erznoznik v. City of Jacksonville*, 422 U.S. 205, 210-11 (1975). If a state is to justify a restriction, it must base its decision solely on history, consensus, and ‘simple common sense’. *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525 (2001)(quoting *Florida Bar v. Went For It, Inc.*, 515 U.S. 618 (1995)).

Here, the TTAB denied Ms. Luhv’s registration on the grounds that it was disparaging and that it wanted to discourage the dissemination of disparaging material. However, its main purpose of restricting the use of DUMB BLONDE was to limit the prevalence of a phrase that might offend someone. Apart from that, no

¹ The court holds that calling an expression “offensive” is not a valid reason to suppress speech in both a commercial and a non-commercial context because as it is applied, there is no distinction between the two forms of speech that would warrant offensiveness a valid justification for a restriction on speech protected by the First Amendment. *Bolger*, 463 U.S. at 71.

one would suffer an injury or be harmed by the use of the term DUMB BLONDE. Furthermore, Ms. Luhv was able to show that a significant number of her followers on social media have appreciated her efforts to reclaim a traditionally derogatory phrase. *In re Kourtney Luhv*, 1337 F. 3d at 458.

The state may argue again that it has a legitimate interest in protecting speech that is deceptive or misleading in order to ensure the free flow of truthful information, and this information is misleading because someone unfamiliar with Ms. Luhv's social media may assume she is talking about dumb blondes. *Friedman* 440 U.S. at 15. Commercial speech is especially more susceptible to having false information inlaid in it. *Id.* at 9. However this argument is inapposite. If information, is misleading, the nature of the marketplace will reveal that fact. *Central Hudson Gas & Elec. Corp.*, 447 U.S. at 597. Therefore, the market will generally weed out information that is not entirely truthful or in time, it will bring to light the other meanings that Luhv associates with DUMB BLONDE.

3. Even if the state has a legitimate interest in regulating Ms. Luhv's trade name, section 2(a) of the Lanham Act does not advance that interest.

In order for commercial speech to be protected under the First Amendment, it must concern lawful activity and not be misleading. *Central Hudson Gas & Elec. Corp.*, 447 U.S. at 566. Commercial speech is protected in order to ensure the flow of truthful and legitimate information ; therefore untruthful speech is never protected. *Friedman*, U.S. at 9-11.

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4. *Section 2(a) is more extensive regulation than is necessary to achieve the state's interest.*

When determining whether the regulation is more extensive than is necessary, the court does not need to look for the "least restrictive" means possible. *Lorillard Tobacco Co.*, 533 U.S. at 556 (quoting *Florida Bar*, 515 U.S. 618, 632 (1995)). In addition, the state cannot settle for a convenient means; it must find a necessary means. *Thompson*, 535 at 373. This is defined as means that are narrowly tailored to achieve the desired objective. *Lorillard Tobacco Co.*, 533 U.S. at 556. If there is a better alternative, the government must use it. *Id.* at 582.

Here, section 2(a) prohibits "immoral, deceptive, or scandalous matter; or matter which may disparage". 15 U.S.C. § 1052(a). If the state maintains that its

interest is to discouraging the use of marks that are offensive, the state could achieve the means in a less restrictive way. “Offensiveness” is a subjective term; therefore, something that might be offensive to one person may not be to another. *See generally In re Kourtney Luhv*, 1337 F. 3d at 457 (where Respondent holds that a substantial composite of women applaud her for redefining a traditionally disparaging term). If the state restricts the use of terms on the basis that they are deceptive or scandalous, it does not create a sustainable standard. Instead, it creates a standard that will change over time and that can even change with each new judicial body. Therefore, section 2(a) of the Lanham Act is more extensive than is necessary to achieve the state’s goal.

CONCLUSION

For the foregoing reasons, Ms. Luhv respectfully requests that this Court reverse the Federal Circuit’s holding that DUMB BLONDE is disparaging to women within the meaning of section 2(a) of the Lanham Act, and Ms. Luhv respectfully requests that this Court affirm the Federal Circuit’s holding that section 2(a) is unconstitutional because it restricts a constitutionally protected right to free speech.