

No. 15-1007

IN THE  
SUPREME COURT OF THE UNITED STATES

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OCTOBER TERM 2015

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UNITED STATES,  
*Petitioner,*

v.

KOURTNEY LUHV,  
*Respondent.*

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

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BRIEF FOR PETITIONER

Team 9  
Counsel for Petitioner  
October 20, 2015

## QUESTIONS PRESENTED

- I. Did the Trademark Trial and Appeal Board err in rejecting an application to register the trademark DUMB BLONDE on the ground that the mark may be disparaging to women within the meaning of Section 2(a) of the Lanham Act?
- II. Is the Lanham Act's prohibition against registering marks that may be disparaging constitutional?

## TABLE OF CONTENTS

	<u>Page</u>
QUESTIONS PRESENTED.....	i
TABLE OF AUTHORITIES.....	v
OPINION BELOW.....	1
JURISDICTIONAL STATEMENT.....	1
STANDARD OF REVIEW.....	2
STATEMENT OF THE CASE .....	2
<u>Statement of the Facts</u> .....	2
<u>Procedural History</u> .....	3
SUMMARY OF ARGUMENT .....	4
ARGUMENT .....	6
I.    THE TRADEMARK TRIAL AND APPEAL BOARD DID NOT ERR IN REJECTING RESPONDENT’S APPLICATION TO REGISTER HER TRADEMARK BECAUSE THE PHRASE “DUMB BLONDE” IS DISPARAGING TO A SUBSTANTIAL COMPOSITE OF THE REFERENCED GROUP.....	6
A. <u>The Likely Meaning of the Phrase “Dumb Blonde” Refers           to a Derogatory Stereotype of Blonde Women</u> .....	7
1.    Dictionary definitions demonstrate that the likely meaning of the phrase “dumb blonde” promulgates the negative stereotype that blonde women are unintelligent. ....	7
2.    Other courts recognize the negative connotation of the phrase “dumb blonde.” .....	8

TABLE OF CONTENTS (CONT.)

	<u>Page</u>
3. The relationship of the phrase “dumb blonde” to the other elements in Respondent’s mark demonstrates that the likely meaning of the phrase is disparaging. ....	9
B. <u>The Government Proved That a Substantial Composite of Blonde Women Find the Phrase “Dumb Blonde” Disparaging.</u> .....	11
1. The government met its low burden of proving that a substantial composite of the referenced group finds the phrase “dumb blonde” disparaging. ....	11
2. A “substantial composite” of the referenced group does not need to constitute a majority of that group. ....	14
3. Respondent’s intentions in using the phrase “dumb blonde” are irrelevant in light of the fact that a substantial composite of the referenced group finds the phrase disparaging. ....	15
II. THE LANHAM ACT’S PROHIBITION AGAINST REGISTERING DISPARAGING TRADEMARKS IS NOT UNCONSTITUTIONAL. ....	17
A. <u>Section 2(a) of the Lanham Act Does Not Violate the First Amendment Because the Denial of Federal Trademark Registration Does Not Infringe Freedom of Speech.</u> .....	17
1. A federally registered trademark is not protected speech under the First Amendment because trademark registration is government speech.....	18
2. The denial of federal trademark registration does not violate the First Amendment because it does not restrict conduct, access to a forum for protected speech, or ideas in the marketplace. ....	20

TABLE OF CONTENTS (CONT.)

	<u>Page</u>
i. Denial of a federal trademark application does not restrict any conduct because applicants can still use a mark without federal registration.....	21
ii. Denial of a federal trademark application does not restrict access to a forum for protected speech because the trademark registration program does not provide a forum for protected speech.....	23
iii. Denial of a federal trademark application does not restrict ideas from the marketplace because the application review process is viewpoint-neutral and reasonable.....	24
3. Section 2(a) of the Lanham Act does not violate the First Amendment because the government has substantial interests in rejecting disparaging trademarks. ....	27
B. <u>Section 2(a) of the Lanham Act Is Not Unconstitutional Under the Due Process Clause of the Fifth Amendment Because an Ordinary Person Can Determine What Constitutes a Disparaging Mark</u> .....	29
C. <u>The Lanham Act’s Prohibition Against Registering Disparaging Trademarks Is Not Unconstitutional Under the Equal Protection Clause of the Fourteenth Amendment Because the Government Denies Registration of an Applicant’s Mark for Legitimate, Non-Discriminatory Reasons</u> .....	31
CONCLUSION.....	32

TABLE OF AUTHORITIES

Page(s)

CASES

UNITED STATES SUPREME COURT

<i>Agency for Int’l. Dev. v. Alliance for Open Soc’y Int’l, Inc.</i> , 133 S. Ct. 2321 (2013).....	22
<i>Bd. of Regents of Univ. of Wisconsin Sys. v. Southworth</i> , 529 U.S. 217 (2000).....	18
<i>Bd. of Trs. of State Univ. of New York v. Fox</i> , 492 U.S. 469 (1989).....	29
<i>Broadrick v. Oklahoma</i> , 413 U.S. 601 (1973).....	17
<i>Cent. Hudson Gas &amp; Elec. Corp. v. Pub. Serv. Com’n</i> , 447 U.S. 557 (1980).....	17, 27, 28
<i>City of Chicago v. Morales</i> , 527 U.S. 41 (1999).....	30
<i>Consol. Edison Co. of New York v. Pub. Serv. Comm’n of New York</i> , 447 U.S. 530 (1980).....	24
<i>Cornelius v. NAACP Legal Def. &amp; Educ. Fund, Inc.</i> , 473 U.S. 788 (1985).....	26
<i>Davenport v. Washington Educ. Ass’n</i> , 551 U.S. 177 (2007).....	21, 25, 26
<i>Grayned v. City of Rockford</i> , 408 U.S. 104 (1972).....	30
<i>Heller v. Doe</i> , 509 U.S. 312 (1993).....	30
<i>Holder v. Humanitarian Law Project</i> , 561 U.S. 1 (2010).....	30
<i>Inwood Labs., Inc. v. Ives Labs., Inc.</i> , 456 U.S. 844 (1982).....	24

TABLE OF AUTHORITIES (CONT.)

	<u>Page(s)</u>
<i>Johanns v. Livestock Mktg. Ass’n</i> , 544 U.S. 550 (2005) .....	18
<i>Papachristou v. Jacksonville</i> , 405 U.S. 156 (1972) .....	30
<i>Pierce v. Underwood</i> , 487 U.S. 552 (1988) .....	2
<i>Pleasant Grove City, Utah v. Summum</i> , 555 U.S. 460 (2009) .....	18
<i>R.A.V. v. St. Paul</i> , 505 U.S. 377 (1992) .....	25
<i>Rosenberger v. Rectors and Visitors of Univ. of Virginia</i> , 515 U.S. 819 (1995) .....	21, 23, 24
<i>Rust v. Sullivan</i> , 500 U.S. 173 (1991) .....	22
<i>Simon &amp; Schuster, Inc. v. Members of New York State Crime Victims Bd.</i> , 502 U.S. 105 (1991) .....	24
<i>Sorrell v. IMS Health, Inc.</i> , 131 S. Ct. 2653 (2011) .....	27
<i>Texas v. Johnson</i> , 491 U.S. 397 (1989) .....	21
<i>Two Pesos, Inc. v. Taco Cabana, Inc.</i> , 505 U.S. 763 (1992) .....	22
<i>Virginia State Bd. of Pharm. v. Virginia Citizens Consumer Council, Inc.</i> , 425 U.S. 748 (1976) .....	19
<i>Walker v. Texas Div., Sons of Confederate Veterans, Inc.</i> , 135 S. Ct. 2239 (2015) .....	18

TABLE OF AUTHORITIES (CONT.)

	<u>Page(s)</u>
<u>UNITED STATES COURTS OF APPEALS</u>	
<i>Figueroa v. United States</i> , 466 F.3d 1023 (Fed. Cir. 2006) .....	23
<i>Hartsell v. Duplex Prods.</i> , 123 F.3d 766 (4th Cir. 1997).....	9
<i>In re Boulevard Entm't, Inc.</i> , 334 F.3d 1336 (Fed. Cir. 2003) .....	7, 8, 14, 21
<i>In re Fox</i> , 702 F.3d 633 (Fed. Cir. 2012) .....	21, 27
<i>In re Geller</i> , 751 F.3d 1355 (Fed. Cir. 2014) .....	<i>passim</i>
<i>In re Kourtney Luhv</i> , 1337 F.3d 455 (Fed. Cir. 2015) .....	<i>passim</i>
<i>In re Loew's Theaters, Inc.</i> , 769 F.2d 764 (Fed. Cir. 1985) .....	12
<i>In re Pacer Tech.</i> , 338 F.3d 1348 (Fed. Cir. 2003) .....	12
<i>In re Shinnecock Smoke Shop</i> , 571 F.3d 1171 (Fed. Cir. 2009) .....	31
<i>In re Tam</i> , 785 F.3d 567 (Fed. Cir. 2015) .....	10
<i>In re Tam</i> , 600 F. App'x 775 (Fed. Cir. 2015).....	10
<i>Marshak v. Treadwell</i> , 240 F.3d 184 (3d Cir. 2001) .....	28
<i>Mendoza v. Borden, Inc.</i> , 195 F.3d 1238 (11th Cir. 1999).....	8

TABLE OF AUTHORITIES (CONT.)

Page(s)

UNITED STATES COURTS OF APPEALS

<i>Perry v. McDonald</i> , 280 F.3d 159 (2d Cir. 2001) .....	28
<i>Ridley v. Massachusetts Bay Transp. Auth.</i> , 390 F.3d 65 (1st Cir. 2004) .....	25
<i>Thomas v. Town of Hammonton</i> , 351 F.3d 108 (3d Cir. 2003) .....	9
<i>Weiss v. Coca-Cola Bottling Co.</i> , 990 F.2d 333 (7th Cir. 1993).....	9

UNITED STATES DISTRICT COURTS

<i>Harris v. MoorMan's, Inc.</i> , U.S. Dist. LEXIS 18728 (S.D. Ind. Aug. 14, 2001) .....	8, 9
<i>Pro-Football, Inc., v. Blackhorse</i> , 2015 U.S. Dist. LEXIS 90091 (E.D. Va. Jul. 8, 2015) .....	12
<i>Pro-Football, Inc. v. Harjo</i> , 284 F. Supp. 2d 96 (D.D.C. 2003).....	7, 14
<i>Ridge v. Farmer</i> , 2008 U.S. Dist. LEXIS 96022 (D.S.C. Aug. 11, 2008) .....	9

UNITED STATES COURT OF CUSTOMS AND PATENT APPEALS

<i>Holiday Inn v. Holiday Inns, Inc.</i> , 534 F.2d 312 (C.C.P.A. 1976) .....	21
<i>In re McGinley</i> , 660 F.2d 481 (C.C.P.A. 1981) .....	14, 21, 27, 28

TRADEMARK TRIAL AND APPEAL BOARD

<i>In re Heeb Media, LLC</i> , 89 U.S.P.Q.2d (BNA) 1071 (T.T.A.B. 2008) .....	14, 15, 16, 30
--	----------------

TABLE OF AUTHORITIES (CONT.)

Page(s)

UNITED STATES COURTS OF APPEALS

*In re Lebanese Arak Corp*  
94 U.S.P.Q.2d (BNA) 1215 (T.T.A.B. 2010) ..... 7, 30

*In re Squaw Valley Dev. Co.,*  
80 U.S.P.Q.2d (BNA) 1264 (T.T.A.B. 2006) ..... 12, 14, 30

UNITED STATES CONSTITUTION

U.S. CONST. amend. I..... 17

U.S. CONST. amend. V ..... 29

U.S. CONST. amend. XIV ..... 31

FEDERAL STATUTES

15 U.S.C. § 1052..... 6, 31

15 U.S.C. § 1057..... 19, 27

15 U.S.C. § 1062..... 27

15 U.S.C. § 1072..... 20

15. U.S.C. § 1111..... 19

15 U.S.C. § 1113..... 23

15 U.S.C. § 1117..... 20

15 U.S.C. § 1125..... 21, 22

18 U.S.C. § 2320..... 28

28 U.S.C. § 1254..... 1

35 U.S.C. § 42..... 23

TABLE OF AUTHORITIES (CONT.)

	<u>Page(s)</u>
<u>STATE STATUTES</u>	
CAL. BUS. & PROF. CODE § 14245 (West 2015).....	22
N.Y. GEN. BUS. LAW § 360-k (McKinney 2015).....	22
TEX. TRANS. CODE ANN. § 504.801(c) (West 2015).....	18
<u>SECONDARY SOURCES</u>	
Kimberly A. Pace, <i>The Washington Redskins Case and the Doctrine of Disparagement: How Politically Correct Must a Trademark Be?</i> , 22 Pepp. L. Rev. 1 (1995) .....	6, 16, 28
Rachaelisthecoolest, Comment to Urban Dictionary, (February 21, 2009), <a href="http://www.urbandictionary.com/define.php?term=Dumb+Blonde">www.urbandictionary.com/define.php?term=Dumb+Blonde</a> .....	8
Tom ‘JF’ C, Comment to Urban Dictionary, (January 20, 2006), <a href="http://www.urbandictionary.com/define.php?term=Dumb+Blonde">www.urbandictionary.com/define.php?term=Dumb+Blonde</a> .....	8
<u>OTHER SOURCES</u>	
33 Stat. 724 .....	17
60 Stat. 427 .....	17

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BRIEF FOR PETITIONER

OPINION BELOW

The opinion of the United States Court of Appeals for the Federal Circuit is reported at *In re Kourtney Luvh*, 1337 F.3d 455 (Fed. Cir. 2015).

JURISDICTIONAL STATEMENT

This Court has jurisdiction pursuant to 28 U.S.C. section 1254(1).

## STANDARD OF REVIEW

Federal appellate courts review the Trademark Trial and Appeal Board's ("TTAB", "the Board") factual findings for substantial evidence, while they review the ultimate conclusion as to registrability *de novo*. *In re Geller*, 751 F.3d 1355, 1358 (Fed. Cir. 2014). This Court reviews constitutional issues *de novo*. *Pierce v. Underwood*, 487 U.S. 552, 558 (1988).

## STATEMENT OF THE CASE

### Statement of the Facts

Kourtney Luhv ("Respondent") is a vocalist and solo artist known by her stage name, Dumb Blonde. *In re Kourtney Luhv*, 1337 F.3d at 455. Respondent's lyrics focus on issues women face in today's society. *Id.* Respondent has blonde hair and has been performing under the name Dumb Blonde since 2012. *Id.* at 457.

Respondent has a devoted fan base, primarily composed of women in their twenties and thirties with varying hair colors. *Id.* at 457-58. Many online users follow Respondent's music on the streaming service [www.soundpuff.com](http://www.soundpuff.com) ("Soundpuff"). *Id.* at 455-56. Additionally, Respondent hosts videos through her registered account on the video hosting website [www.uTube.com](http://www.uTube.com) ("uTube") to communicate with her fans. *Id.* At the time Respondent filed her application for federal trademark registration, more than 40,000 people "followed" Respondent's Soundpuff account, and over 100,000 people actively subscribed to her uTube channel. *Id.* Respondent's website contains images depicting a blonde woman

eating plastic fruit and applying Wite-Out to text displayed on the woman's computer monitor. *In re Kourtney Luhv*, 1337 F.3d at 456-57.

In June of 2014, Respondent negotiated a deal with a record label for a recording contract that would include a two million dollar advance upon execution of the agreement. *Id.* at 456. This deal was contingent, however, upon Respondent's ability to federally register the mark DUMB BLONDE. *Id.*

#### Procedural History

On July 9, 2014, Respondent filed an application with the United States Patent and Trademark Office ("USPTO") seeking to register the mark DUMB BLONDE. *Id.* The examining attorney found that the mark may be disparaging to women under Section 2(a) of the Lanham Act and therefore refused to register it. *Id.* Respondent appealed to the TTAB. *Id.*

The TTAB affirmed the examining attorney's refusal to register the mark on the basis that the mark "may be disparaging to a substantial composite of the referenced group, namely women who have a blonde hair color." *Id.* The Board found that the mark may disparage a substantial composite of women because dictionary definitions, numerous articles, and user comments on Respondent's uTube videos show that women find the phrase "dumb blonde" offensive. *Id.* at 457.

Respondent appealed the TTAB's decision to the Federal Circuit Court of Appeals, which held that the mark may be disparaging to a substantial composite of blonde women. *Id.* at 460. The Federal Circuit further held, however, that Section 2(a) of the Lanham Act is unconstitutional under the First Amendment. *Id.*

## SUMMARY OF ARGUMENT

The Federal Circuit’s refusal to register the trademark DUMB BLONDE under Section 2(a) is proper because the likely meaning of the phrase is disparaging to a substantial composite of blonde women. The court’s analysis of whether a trademark is disparaging focuses on two main inquiries: (1) the likely meaning of the phrase; and (2) whether that meaning may be disparaging to a substantial composite of the referenced group.

The likely meaning of the phrase “dumb blonde” refers to unintelligent blonde women. Dictionary definitions, the phrase’s negative connotation among the other circuits, and the relationship of the phrase to other elements in Respondent’s mark support that the likely meaning of the phrase “dumb blonde” is derogatory toward blonde women.

Having established the likely meaning of the phrase “dumb blonde,” the government presented sufficient evidence to prove that a substantial composite of the referenced group finds the phrase disparaging. The government met its low burden by providing dictionary definitions, media references, and statements from individuals to show that a substantial composite of blonde women find the phrase “dumb blonde” disparaging. The fact that a “substantial composite” need not be a majority of the referenced group further supports the government’s contention. Finally, Respondent’s intent to recast the phrase “dumb blonde” in a positive light is irrelevant to the disparaging analysis because her good intentions do not minimize the disparaging effect of the phrase on blonde women.

Additionally, contrary to the Federal Circuit's holding below, Section 2(a) of the Lanham Act does not violate the United States Constitution. Section 2(a) does not implicate the First Amendment because a federally registered trademark is government speech, which the First Amendment does not protect. If Section 2(a) did implicate the First Amendment, however, Section 2(a) would still not violate the First Amendment because the denial of trademark registration does not restrict an applicant's speech, conduct, or access to a forum for protected speech. Further, the unconstitutional conditions doctrine does not apply because the government funds the USPTO, and Section 2(a) does not restrict speech or activity outside of the federal registration process. Lastly, the Lanham Act's prohibition against the registration of disparaging marks does not violate the First Amendment because the government has a substantial interest in rejecting such marks.

Moreover, Section 2(a) of the Lanham Act does not violate any other constitutional provisions. Section 2(a) does not violate the Due Process Clause of the Fifth Amendment because there is a clear, well-established test for determining if a mark is disparaging. Section 2(a) also does not violate the Equal Protection Clause of the Fourteenth Amendment because neither the method used to determine a mark's registrability nor the government's purpose in denying registration of a disparaging mark is discriminatory.

Accordingly, this Court should affirm the Federal Circuit's holding that the phrase "dumb blonde" is disparaging, but this Court should reverse the Federal

Circuit's ultimate decision by upholding the constitutionality of Section 2(a) of the Lanham Act.

## ARGUMENT

### I. THE TRADEMARK TRIAL AND APPEAL BOARD DID NOT ERR IN REJECTING RESPONDENT'S APPLICATION TO REGISTER HER TRADEMARK BECAUSE THE PHRASE "DUMB BLONDE" IS DISPARAGING TO A SUBSTANTIAL COMPOSITE OF THE REFERENCED GROUP.

Trademark protection is the law's recognition of the importance of symbols to the consuming public.<sup>1</sup> The Lanham Act is the federal regime that governs trademark law, but trademark owners can also acquire protection from state registration or the common law. *Id.* There is a presumption of registrability under the Lanham Act, but the USPTO may refuse registration. *Id.* at 21. Section 2(a) of the Lanham Act provides:

No trademark by which the goods of the applicant may be distinguished from the goods of others shall be refused registration . . . on account of its nature unless it . . . [c]onsists of or comprises . . . 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 . . . .

15 U.S.C. § 1052(a).

Courts focus on two main inquiries when analyzing whether a trademark may be disparaging. *In re Geller*, 751 F.3d at 1358. First, courts consider the likely meaning of the matter in question. *Id.* Next, courts consider if that likely meaning

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<sup>1</sup> Kimberly A. Pace, *The Washington Redskins Case and the Doctrine of Disparagement: How Politically Correct Must a Trademark Be?*, 22 Pepp. L. Rev. 1, 17 (1995).

refers to identifiable persons, institutions, beliefs or national symbols, and whether that meaning may be disparaging to a substantial composite of the referenced group. *In re Geller*, 751 F.3d at 1358; *See also In re Lebanese Arak Corp.*, 94 U.S.P.Q.2d (BNA) 1215, 1217 (T.T.A.B. 2010).

A mark may disparage when it "dishonor[s] by comparison with what is inferior, slight[s], deprecate[s], degrade[s], or affect[s] or injure[s] by unjust comparison." *Pro-Football, Inc. v. Harjo*, 284 F. Supp. 2d 96, 124 (D.D.C. 2003). The TTAB correctly found Respondent's mark DUMB BLONDE disparaging to a substantial composite of women under Section 2(a) of the Lanham Act.

A. The Likely Meaning of the Phrase "Dumb Blonde" Refers to a Derogatory Stereotype of Blonde Women.

Courts take dictionary definitions and the relationship of the phrase to other elements in the mark into account when determining the likely meaning of the phrase in question. *In re Geller*, 751 F.3d at 1358.

1. Dictionary definitions demonstrate that the likely meaning of the phrase "dumb blonde" promulgates the negative stereotype that blonde women are unintelligent.

Dictionary definitions indicate that the phrase "dumb blonde" has no pertinent meaning outside the negative stereotype that women with blonde hair are intellectually deficient. Dictionary definitions are critical to the analysis of the likely meaning of a term because they "represent an effort to distill the collective understanding of the community with respect to language and thus clearly constitute more than a reflection of . . . individual views." *In re Boulevard Entm't*, 334 F.3d 1336, 1340 (2003). Where offensive matter has only one pertinent

meaning, the dictionary definition alone can satisfy the USPTO's burden of proving a mark unregistrable. *In re Boulevard*, 334 F.3d at 1340.

Here, the dictionary definition examined by the Board shows that Respondent's desired mark "implies a negative stereotypical view of women." *In re Kourtney Luhv*, 1337 F.3d at 457. Online dictionaries contain many definitions of the phrase "dumb blonde," all of which imply that the phrase is disparaging to women. Urban Dictionary, a crowd-sourced, online dictionary of slang phrases, defines "dumb blonde" as "a young woman that has blonde hair and has a very stupid personality"<sup>2</sup> and as "a person (usually female) with blonde hair who is slow to learn or understand; lacking intellectual acuity."<sup>3</sup> Respondent did not present a dictionary definition showing a positive or neutral interpretation of the phrase, suggesting that there is only the derogatory meaning. Thus, dictionary definitions suggest that the likely meaning of the phrase "dumb blonde" is disparaging.

2. Other courts recognize the negative connotation of the phrase "dumb blonde."

Other federal courts have likewise assumed that the phrase "dumb blonde" negatively refers to women. The phrase permeates other areas of the law, including claims for sexual harassment and discrimination. *See, e.g., Mendoza v. Borden, Inc.*, 195 F.3d 1238, 1247 (11th Cir. 1999) (sexual harassment claim alleged employer called plaintiff employee "dumb blonde"); *Harris v. MoorMan's Inc.*, 2001

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<sup>2</sup> Rachaelisthecoolest, Comment to Urban Dictionary, (February 21, 2009), [www.urbandictionary.com/define.php?term=Dumb+Blonde](http://www.urbandictionary.com/define.php?term=Dumb+Blonde).

<sup>3</sup> Tom 'JF' C, Comment to Urban Dictionary, (January 20, 2006), [www.urbandictionary.com/define.php?term=Dumb+Blonde&page=2](http://www.urbandictionary.com/define.php?term=Dumb+Blonde&page=2).

U.S. Dist. LEXIS 18728, \*6 (S.D. Ind. Aug. 14, 2001) (discrimination claim alleged employer’s “dumb blonde” jokes created a hostile work environment); *Ridge v. Farmer*, 2008 U.S. Dist. LEXIS 96022, \*5 (D.S.C. Aug. 11, 2008) (defamation claim alleged defendant called plaintiff a “dumb blonde bimbo”); *Thomas v. Town of Hammonton*, 351 F.3d 108, 118 (3d Cir. 2003) (sexual harassment and retaliation claims alleged use of “dumb blonde” jokes); *Weiss v. Coca-Cola Bottling Co.*, 990 F.2d 333, 337 (7th Cir. 1993) (gender discrimination claim alleged employer repeatedly called employee “dumb blonde”); *Hartsell v. Duplex Prods.*, 123 F.3d 766, 769 (4th Cir. 1997) (emotional distress and retaliation claims alleged coworkers repeatedly directed “dumb blonde” jokes at plaintiff). Courts have consistently assumed that the phrase “dumb blonde” is derogatory by nature, and that it principally refers to women. *Harris*, 2001 U.S. Dist. LEXIS 18728 at \*15 (“any American adult knows the principal targets of [“dumb blonde” jokes] historically have been women”). Like the lower federal courts, this Court should assume that the likely meaning of the phrase “dumb blonde” refers to a negative stereotype of women.

3. The relationship of the phrase “dumb blonde” to the other elements in Respondent’s mark demonstrates that the likely meaning of the phrase is disparaging.

The relationship of the phrase to other elements in the mark is critical to the Board’s determination of a phrase’s likely meaning. *Geller*, 751 F.3d at 1358. In *In*

*re Tam*,<sup>4</sup> the Federal Circuit used images on the appellant’s website to infer that the likely meaning of the appellant’s mark was disparaging. 785 F.3d 567, 571 (Fed. Cir.), *reh’g granted en banc*, 600 F. App’x 775, 775 (Fed. Cir. 2015). Seeking to register the mark THE SLANTS as the name of his band, the appellant claimed that the word “slant,” historically a racial slur directed at people of Asian descent, did not refer to Asian people. *Id.* Considering other elements of the appellant’s mark, the court determined the likely meaning of the phrase “the slants” by observing how the phrase was used on the band’s website. *Id.* The court found the mark likely referred to people of Asian descent by noting that images of Asian women, a stylized dragon, and rising-sun imagery appeared on the appellant’s website in conjunction with mark. *Id.*

Like the phrase “the slants,” the phrase “dumb blonde” used in conjunction with other elements of Respondent’s mark demonstrates the negative meaning of the phrase. The other elements of Respondent’s mark include images and symbols associated with Respondent’s brand, such as Respondent’s appearance, images on her website, her posts on social media, and music videos she uploads to www.uTube.com. Respondent herself has blonde hair, which suggests that the phrase “dumb blonde” refers to women with blonde hair. Also, the phrase “dumb blonde” appears on Respondent’s website alongside images of other blonde-haired

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<sup>4</sup> The Federal Circuit granted rehearing en banc of *In re Tam* presumably to address the same constitutionality issue discussed *infra* at 17-32. With that in mind, the opinion reported at 785 F.3d 567 was vacated by the order granting rehearing. The Federal Circuit’s analysis with respect to the relationship of the phrase to the other elements in the mark, however, remains helpful.

women. These images depict a blonde woman “eating plastic fruit and applying Wite-Out to text displayed on her computer monitor.” *In re Kourtney Luhv*, 1337 F.3d at 457. The website’s images appear alongside the text “dumb blonde,” and Respondent performs under the name Dumb Blonde. Thus, the other elements of Respondent’s mark, including the website images and Respondent’s appearance, are inextricably related to the phrase “dumb blonde.” Just as the phrase “the slants” clearly refers to Asian people when shown next to the other elements of the mark, the phrase “dumb blonde” clearly refers to a negative stereotype of blonde women when presented alongside the blonde singer and images of blonde women acting idiotically. Respondent’s use of the phrase “dumb blonde” in conjunction with other elements of her mark therefore demonstrates the derogatory meaning of the phrase.

B. The Government Proved That a Substantial Composite of Blonde Women Find the Phrase “Dumb Blonde” Disparaging.

Once courts establish that the likely meaning of a phrase is disparaging, courts then consider whether that meaning is disparaging to a substantial composite of the referenced group. *In re Geller*, 751 F.3d at 1358.

1. The government met its low burden of proving that a substantial composite of the referenced group finds the phrase “dumb blonde” disparaging.

The government’s burden of proving that some people within the referenced group find the mark disparaging is consistently low throughout the trademark appeal process. *Id.* The government must provide “substantial evidence” that the mark is unregistrable because a substantial composite of the referenced group finds the mark disparaging. *Id.* Courts define “substantial evidence” to mean “more than

a scintilla of evidence.” *In re Pacer Tech.*, 338 F.3d 1348, 1352 (Fed. Cir. 2003). Absent direct evidence, the government may meet its burden of showing that a substantial composite of the referenced group finds the applicant’s use of the mark objectionable by “extrapolating from the evidence of record.” *In re Squaw Valley Dev. Co.*, 80 U.S.P.Q.2d (BNA) 1264, 1272 (T.T.A.B. 2006). Given its limited resources, the Board is not required to conduct surveys whenever the disparaging nature of a term is in question. *In re Loew’s Theaters, Inc.*, 769 F.2d 764, 768 (Fed. Cir. 1985).

Here, the government met its burden of proving that a substantial composite of blonde women finds the phrase “dumb blonde” disparaging. The evidence offered in this case to demonstrate that women find the phrase “dumb blonde” offensive, including dictionary definitions, articles, and social media comments, surpasses the “scintilla of evidence” required to show that a substantial composite of women finds the phrase disparaging.

Dictionary definitions, media references, and statements from individuals, historically have sufficed to show that a substantial composite of the referenced group finds the phrase disparaging and therefore unregistrable. *Pro-Football, Inc., v. Blackhorse*, 2015 U.S. Dist. LEXIS 90091, \*89-90 (Jul. 8, 2015). In *Blackhorse*, the court cancelled the plaintiffs’ federal trademark registrations associated with the football team the Redskins. *Id.* The court found that dictionary definitions, media references, and statements from individuals sufficiently showed that a substantial composite of Native Americans finds the marks disparaging. *Id.* The

court observed that, in every case before both the Board and the Federal Circuit in which the government presented each of these categories of evidence (dictionary definitions, media references, and statement from individuals) to show that a substantial composite of the referenced group finds the marks disparaging, those courts found the marks in question unregistrable. *Blackhorse*, 2015 U.S. Dist. LEXIS 90091 at 90. The weight of this trio of evidence suggests a lower court trend of finding this particular combination of evidence dispositive of disparagement.

This Court should affirm the finding that Respondent's mark DUMB BLONDE is disparaging because the Board provided evidence from the same three categories referenced in *Blackhorse*, showing that a substantial composite of the referenced group finds the mark disparaging. The Board presented dictionary definitions, articles, and statements from individuals in the form of uTube user comments to show that the mark is disparaging to a substantial composite of women. Articles and uTube user comments fall within the categories of media references and statements from individuals, respectively. The government satisfied its burden of proving the phrase "dumb blonde" is disparaging to a substantial composite of blonde women by presenting evidence from each of these three categories to support this contention. The lower courts' analyses are not binding on this Court, however, this Court should consider this evidentiary trend and affirm the Federal Circuit's refusal to register Respondent's mark.

2. A “substantial composite” of the referenced group does not need to constitute a majority of that group.

A mark need not offend everyone in the referenced group, or even a majority of the group, to warrant the Board’s refusal to register the mark. *In re Squaw Valley*, 80 U.S.P.Q.2d at 1269; *Harjo*, 284 F. Supp. 2d at 126; *In re Boulevard*, 334 F.3d at 1340; *In re McGinley*, 660 F.2d 481, 485 (C.C.P.A. 1981). The Board may find that a substantial composite of the referenced group views a mark as disparaging upon a showing that *some* people within that group find the mark objectionable. *In re Squaw Valley*, 80 U.S.P.Q.2d at 1269. The Board has historically weighed competing views within the referenced group in favor of the offended. *Id.*

In *In re Heeb Media, LLC*, the court refused to register the mark HEEB as the name of a magazine targeting young Jewish students. 89 U.S.P.Q.2d (BNA) 1071, 1072 (T.T.A.B. 2008). The students understood the use of the religious slur “heeb” to reflect the “playful, satirical nature” of the magazine and did not find the meaning of the word disparaging. *Id.* at 1074. The court, however, found the mark HEEB unregistrable because another sector of the referenced group who encountered the magazine, older Jewish people, considered its title disparaging. *Id.* The court therefore weighed the perception of this older group more heavily than the perception of the group at which the magazine was targeted, despite the fact that the older group did not constitute a majority of the Jewish population or even a majority of the magazine’s readers. *Id.* at 1076.

Respondent's mark is unregistrable under Section 2(a) regardless of whether the majority of the referenced group (blonde women) finds the phrase "dumb blonde" disparaging. This enormous referenced group encompasses both Respondent's fans and members of the general population who may happen upon her music. User comments on Respondent's uTube videos confirm that some women find the use of the phrase "dumb blonde" offensive. Like in *In re Heeb*, where only a portion of the referenced group found the mark disparaging, here only some blonde women find the mark disparaging. This Court should likewise hold that this portion constitutes a "substantial composite," even though it is not a majority of the referenced group. The opinion of those not offended is enough to characterize the phrase "dumb blonde" as disparaging because a "substantial composite" does not mean a majority.

3. Respondent's intentions in using the phrase "dumb blonde" are irrelevant in light of the fact that a substantial composite of the referenced group finds the phrase disparaging.

Courts analyze the second inquiry of the 'disparaging' analysis from the perspective of the referenced group, irrespective of the applicant's intent. *In re Heeb*, 89 U.S.P.Q.2d at 1077. In *In re Heeb*, the applicant argued he intended to transform the historically anti-Semitic term "heeb" into a term of pride for a new generation of Jewish youth. *Id.* at 1079. The Board did not find the applicant's argument persuasive, stating:

The fact that applicant has good intentions with its use of the term does not obviate the fact that a substantial composite of the referenced group find the term objectionable. Applicant's evidence, in support of

its contention that its use of the term HEEB is not disparaging, does not erase the perception of the others . . . .

*In re Heeb*, 89 U.S.P.Q.2d at 1079.

Here, Respondent stated her intent to use the mark DUMB BLONDE to “recast the phrase in a positive light by displaying it prominently alongside a woman with a successful career . . . .” *In re Kourtney Luvv*, 1337 F.3d at 458. Respondent’s intent, however, is irrelevant. The courts have firmly established that good intentions do not minimize the degradation felt by those who find the use of the mark disparaging. *In re Heeb*, 89 U.S.P.Q.2d at 1077. Applying the Board’s rationale from *In re Heeb*, the fact that Respondent intends to reclaim the phrase does not mean members of the referenced group do not find the phrase disparaging. Even if a member of a referenced group seeks to register a slur, the rest of the referenced group may still find the slur disparaging. *Pace*, *supra* note 1, at 29. Inferring otherwise could lead to support for an African American registering the mark “nigger” or a Hispanic American registering the mark “spick.” *Id.* This idea underscores both the logical and public policy reasons behind courts’ decisions to omit applicants’ intentions from the ‘disparaging’ analysis in trademark registration.

Even though Respondent seeks to reclaim the term and recast it in a positive light, the phrase “dumb blonde” currently disparages blonde women and is therefore unregistrable. Because a substantial composite of the referenced group finds the phrase “dumb blonde” disparaging, Respondent’s intent for the mark is irrelevant.

## II. THE LANHAM ACT'S PROHIBITION AGAINST REGISTERING DISPARAGING TRADEMARKS IS NOT UNCONSTITUTIONAL.

In an opinion contrary to the entirety of its precedent, the Federal Circuit below invalidated and held a body of law that has stood for over one hundred years unconstitutional. Act of Feb. 20, 1905, Pub. L. No. 58-84, § 5(a), 33 Stat. 724, 725; Act of July 5, 1946, Pub. L. No. 79-489, § 2(a), 60 Stat. 427, 428. Trademark law has prohibited the registration of immoral or scandalous material since 1905 and has prohibited the registration of disparaging material since 1946. *Id.*

### A. Section 2(a) of the Lanham Act Does Not Violate the First Amendment Because the Denial of Federal Trademark Registration Does Not Infringe Freedom of Speech.

The First Amendment to the United States Constitution prohibits Congress from enacting legislation “abridging the freedom of speech.” U.S. CONST. amend. I. Facial invalidation of a congressional law as a result of a first amendment violation is applied sparingly and only as a last resort. *Broadrick v. Oklahoma*, 413 U.S. 601, 613 (1973). Respondent must meet three requirements to invalidate Section 2(a) under the First Amendment. *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Com’n*, 447 U.S. 557, 566 (1980). Respondent must show: (1) that the speech at issue is protected speech; (2) that the government restricts that speech; and (3) that the government does not have a substantial interest in restricting that speech. *Id.* Respondent failed to meet each of these requirements to show that Section 2(a) violates the First Amendment.

1. A federally registered trademark is not protected speech under the First Amendment because trademark registration is government speech.

The Free Speech Clause does not restrict government speech. *Pleasant Grove City v. Summum*, 555 U.S. 460, 467 (2009). The democratic electoral process provides a check on government speech that the First Amendment would otherwise provide. *Bd. of Regents of Univ. of Wisconsin Sys. v. Southworth*, 529 U.S. 217, 235 (2000). Thus, government statements, actions, and programs that take the form of speech do not normally trigger the first amendment rules designed to protect the marketplace of ideas. *Johanns v. Livestock Mktg. Ass'n*, 544 U.S. 550, 559 (2005).

In *Walker v. Texas Division, Sons of Confederate Veterans, Inc.*, this Court rejected a first amendment challenge to the State of Texas's refusal to issue specialty license plates with the confederate flag<sup>5</sup> because specialty license plates are government speech. 135 S. Ct. 2239, 2239 (2015). This Court considered three factors in determining that license plates qualify as government speech: (1) license plates historically communicate a government message; (2) the public closely associates license plates with the government; and (3) the state effectively controls license plates by having final approval authority of their content. *Id.* at 2248-49.

Under the factors this Court considered in *Walker*, federal trademark registration is government speech. First, federally registered trademarks communicate a government message. The USPTO prints registered trademarks in

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<sup>5</sup> See TEX. TRANS. CODE. ANN. § 504.801(c) (West 2015) (providing “a state agency can refuse to create a specialty plate if the design might be offensive to any member of the public.”)

government publications and distributes the publications domestically and internationally to indicate which marks have been registered and with whom they are associated. *See* 15 U.S.C. § 1057. Federally registered trademarks are therefore a means used by the government to communicate the owner of a mark and the mark's validity to the public. *Id.* Second, the public closely associates registered trademarks with the government. The symbol that follows a registered trademark (“®”) indicates to the public that the USPTO has registered the mark. 15 U.S.C. § 1111. The public views the symbol as the government's stamp of approval of a trademark. The public also closely associates trademark registration with the government because the principal registry upon which all the registered trademarks are printed is a government publication containing the United States' seal. *See* 15 U.S.C. § 1057. Third, the USPTO exclusively controls and administers the registration program, giving the government final approval authority. *Id.* These factors establish that trademark registration is government speech and thus not subject to first amendment challenges.

The Federal Circuit incorrectly categorized trademark registration as commercial speech. Commercial speech “does no more than propose a commercial transaction” and falls under first amendment protections. *Virginia State Bd. of Pharm. v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 761 (1976). For example, advertisements are protected commercial speech because they do no more than propose a commercial transaction. *Id.*

Unlike advertisements, however, trademark registration is not commercial speech because trademark registration does far more than propose a commercial transaction. Advertisements only communicate the availability of a product or service in the marketplace, thereby only proposing a commercial transaction. Although the marks themselves are designed for commercial purposes, the registration system does not propose a commercial transaction. Trademark registration constitutes nationwide constructive notice that a party owns a trademark. *See* 15 U.S.C. § 1072. Federal registration also provides markholders the ability to recover treble damages upon a showing of willful trademark infringement. 15 U.S.C. § 1117. These noncommercial purposes served by federal registration illustrate that registered trademarks do not qualify as commercial speech and thus do not fall under first amendment protection.

Respondent has not shown that federal trademark registration is protected speech, and the Lanham Act's prohibition against registering disparaging trademarks is therefore not a violation of the First Amendment's Free Speech Clause.

2. The denial of federal trademark registration does not violate the First Amendment because it does not restrict conduct, access to a forum for protected speech, or ideas in the marketplace.

Even if trademark registration were not government speech, however, Section 2(a) would still not violate the First Amendment because Respondent has not shown that the government took action to restrict that speech. To show a free speech violation, a party must show that the government's actions actually restrict

speech. *Texas v. Johnson*, 491 U.S. 397, 405 (1989). For first amendment purposes, restricting speech includes: (1) restricting conduct; *In re McGinley*, 660 F.2d at 484; (2) restricting access to a forum for protected speech; *Rosenberger v. Rectors and Visitors of Univ. of Virginia*, 515 U.S. 819, 833 (1995); and (3) restricting ideas in the marketplace. *Davenport v. Washington Educ. Ass'n*, 551 U.S. 177, 188 (2007).

Respondent has failed to show that Section 2(a) of the Lanham Act restricts speech.

- i. Denial of a federal trademark application does not restrict any conduct because applicants can still use a mark without federal registration.

In *In re McGinley*, the Federal Circuit affirmed the USPTO's refusal to register an appellant's mark and held that, "the [US]PTO's refusal to register [the] mark does not affect his right to use it." 660 F.2d at 484 (citing *Holiday Inn v. Holiday Inns, Inc.*, 534 F.2d 312, 319 (C.C.P.A. 1976)). The court held that the refusal did not infringe on the appellant's rights because "[n]o conduct [was] proscribed, and no tangible form of expression [was] suppressed." *McGinley*, 660 F.2d at 484; *See also In re Boulevard*, 334 F.3d at 1336; *In re Fox*, 702 F.3d 633, 635 (Fed. Cir. 2012).

Denial of trademark registration pursuant to Section 2(a) neither restricts conduct nor suppresses a tangible a form of expression. Upon registration denial, a manufacturer or seller can continue to express ideas and use disparaging marks in the marketplace with legal protection. *See* 15 U.S.C. § 1125(a). Regardless of federal registration, a federal cause of action for trademark infringement can still exist. *Id.* For example, other provisions of the Lanham Act protect against the use

of a mark causing likely confusion, mistake, or deception as to the source of goods or services in commerce. *See* 15 U.S.C. § 1125(a); *see, e.g., Two Pesos, Inc. v. Taco Cabana, Inc.*, 505 U.S. 763, 768 (1992). Parties may also still bring a valid cause of action for trademark infringement absent any federal registration in state court. *See, e.g.,* CAL. BUS. & PROF. CODE § 14245 (West 2015); N.Y. GEN. BUS. LAW § 360-k (McKinney 2015). Because the denial of federal trademark registration does not proscribe any conduct, Section 2(a) does not violate first amendment protections.

The court below improperly applied the unconstitutional conditions doctrine to Section 2(a) of the Lanham Act. The unconstitutional conditions doctrine holds that the government may not deny a benefit to an individual on a basis that infringes a constitutionally protected interest. *Rust v. Sullivan*, 500 U.S. 173, 197 (1991). An unconstitutional condition occurs when the “government has placed a condition on the recipient of a subsidy rather than on a particular program of service, thus effectively prohibiting the recipient from engaging in the protected conduct outside the scope of the federally funded program.” *Id.* Congress may, however, permissibly “specify the activities it wants to subsidize as long as it does not impose conditions that seek to leverage funding to regulate speech outside the contours of the [government] program itself.” *Agency for Int’l. Dev. v. Alliance for Open Soc’y Int’l, Inc.*, 133 S. Ct. 2321, 2328 (2013).

Contrary to the Federal Circuit’s holding below, the unconstitutional conditions doctrine does not apply to Section 2(a) of the Lanham Act. First, the Lanham Act’s registration program sets permissible restrictions on participation.

*See infra* at 23-26. Second, Congress can restrict participation because Congress provides federal funds to the registration program thus qualifying it as a government program. The Federal Circuit below misinterpreted the source of the USPTO’s funding to be comprised entirely of users’ fees. *See Figueroa v. United States*, 466 F.3d. 1023, 1028 (Fed. Cir. 2006) (“[US]PTO employee benefits, including pensions, health insurance, and life insurance . . . have been funded from the general treasury.”) The USPTO receives money through both users’ fees and congressional funding. 15 U.S.C. § 1113; 35 U.S.C. § 42. The USPTO deposits the users’ fees and congressional funding into the treasury and may expend those funds only to the “extent and in the amount provided in advance in appropriation acts [by Congress].” 35 U.S.C. § 42. The government, therefore, retains ultimate control over how the USPTO expends its resources, including those resources allocated to the registration process. *See id.* Because Section 2(a) sets permissible restrictions on participation and the government controls the funding for the federal trademark registration process, the unconstitutional conditions doctrine does not apply.

- ii. Denial of a federal trademark application does not restrict access to a forum for protected speech because the trademark registration program does not provide a forum for protected speech.

The government unconstitutionally restricts speech when it creates a forum for protected speech but limits access to that forum. *Rosenberger*, 515 U.S. at 833. The government limits access to such a forum by arbitrarily denying funding to a program based on its viewpoints. *Id.* For example, in *Rosenberger*, this Court held that a public university violated the First Amendment by denying funds to a

newspaper because the newspaper promoted religion. *Rosenberger*, 515 U.S. at 828-33. The government provided a forum by funding newspapers but limited access to that forum by refusing to fund a publication promoting religious views. *Id.* This Court held that the government’s arbitrary denial of funding therefore violated freedom of speech. *Id.* at 819.

Here, the government has not violated the First Amendment by restricting access to a forum for protected speech. Unlike the public university in *Rosenberger*, Congress did not create the federal trademark registration program to be a forum for expression. The goals of the Lanham Act are to protect the goodwill of owners and enable consumers “to distinguish among the goods of competing manufacturers.” *Inwood Labs., Inc. v. Ives Labs., Inc.*, 456 U.S. 844, 854 (1982). While some expression may occur in the marks themselves, the registration program is not a forum for that expression. Because the government did not design the federal registration program as a forum for expression, Section 2(a) does not violate the First Amendment by denying registration to disparaging marks.

- iii. Denial of a federal trademark application does not restrict ideas from the marketplace because the application review process is viewpoint-neutral and reasonable.

The Free Speech Clause prohibits the creation of laws that restrict ideas from the marketplace based on their content. *Simon & Schuster, Inc. v. Members of New York State Crime Victims Bd.*, 502 U.S. 105, 115 (1991); *Consol. Edison Co. of New York v. Pub. Serv. Comm’n of New York*, 447 U.S. 530, 536 (1980). The government cannot suppress speech where the real rationale for the restriction is disagreement

with the underlying ideology or perspective that the speech expresses. *Ridley v. Massachusetts Bay Transp. Auth.*, 390 F.3d 65, 82 (1st Cir. 2004). Thus, content-based restrictions on speech are presumptively invalid. *R.A.V. v. St. Paul*, 505 U.S. 377, 382 (1992). When the government permits speech “on government property that is a nonpublic forum, [however,] it can exclude speakers on the basis of their [content], so long as the distinctions drawn are viewpoint-neutral and reasonable in light of the purpose served.” *Davenport*, 551 U.S. at 188.

The government may restrict speech as long as the restriction enforced is viewpoint-neutral. *Ridley*, 390 F.3d at 90. In *Ridley*, the court established that “[g]uidelines prohibiting demeaning or disparaging ads are themselves viewpoint-neutral because the state is not attempting to give one group an advantage over another in the marketplace of ideas.” *Id.* The court reasoned that all advertisers on all sides of all questions were allowed to positively promote their own perspective, and they were even able to criticize other positions so long as they did not use demeaning speech in their attacks. *Id.* at 91. The court found that the law restricting disparaging advertisements was viewpoint-neutral, did not drive ideas from the marketplace, and therefore was not unconstitutional. *Id.*

Here, the government is not restricting ideas from the marketplace by denying registration applications based on their content. Like the guidelines in *Ridley*, Section 2(a) does not prefer one markholder’s application to another’s based on the markholder’s viewpoint. The USPTO only rejects a trademark application under Section 2(a) if the mark is disparaging to a substantial composite of the

referenced group regardless of the markholder's actual intention or views about the mark. *See supra* at 15-16. Respondent's assertion that she wants to register the mark to reclaim and embrace its associated connotations does not change the fact that the USPTO would still reject it as potentially disparaging to others. *See supra* at 15-16. Section 2(a) of the Lanham Act is therefore viewpoint-neutral and does not restrict ideas from the marketplace.

Under the First Amendment, the government may limit viewpoint-neutral speech in a nonpublic forum, but the distinctions drawn must also be reasonable. *Davenport*, 551 U.S. at 188. The reasonableness requirement is a low standard because an action need not be the most reasonable possible in order to be reasonable. *Cornelius v. NAACP Legal Def. & Educ. Fund, Inc.*, 473 U.S. 788, 808 (1985). The court must assess the reasonableness of the government's restriction of access to the nonpublic forum in light of the purpose of the forum and all the surrounding circumstances. *Id.* at 809.

The denial of applications pursuant to Section 2(a) is not only viewpoint-neutral but also reasonable. *Davenport*, 551 U.S. at 188. It is reasonable for the government to place certain limitations on trademark registration because the government endorses the marks under the United States' seal. Section 2(a) of the Lanham Act therefore meets each of the criteria for permissible, content-based restrictions. Section 2(a) does not restrict ideas from the marketplace, and thus does not violate the First Amendment.

3. Section 2(a) of the Lanham Act does not violate the First Amendment because the government has substantial interests in rejecting disparaging trademarks.

Even if this Court holds that Section 2(a) of the Lanham Act meets the first two requirements for free speech violations (that (1) trademark registration is protected speech; and (2) the government restricts speech), Respondent still must show that the government has no substantial interest in rejecting disparaging marks. *Cent. Hudson*, 447 U.S. at 564. Regulation of protected speech survives first amendment scrutiny if the regulation “directly advances a substantial government interest and the measure is drawn to achieve that interest.” *Sorrell v. IMS Health, Inc.*, 131 S. Ct. 2653, 2667-68 (2011); *Cent. Hudson*, 447 U.S. at 564.

Section 2(a) of the Lanham Act survives first amendment scrutiny because the government has two substantial interests in regulating the federal registration of trademarks: (1) disassociating from trademarks that offend this country’s citizens, and (2) not spending government resources enforcing offensive remarks.

The government has a substantial interest in dissociating from disparaging commercial trademarks because registering such marks would compromise the integrity of the federal register. *See In re McGinley*, 660 F.2d at 486; *In re Fox*, 702 F.3d at 640. The USPTO issues federal trademarks on the federal register, and publishes that register, along with the Official Gazette of the Patent and Trademark Office, to both domestic and foreign markets. 15 U.S.C. § 1062. The register contains the signature of the director of the USPTO and the official seal of the United States. 15 U.S.C. § 1057(a). Printing a disparaging mark on the

register and using the nationally recognized “®” after the mark conveys the message that the government approves of and endorses the mark. *See Marshak v. Treadwell*, 240 F.3d 184, 194 (3d Cir. 2001) (the government has an interest in protecting the integrity of the register). This message indicates to the public that the government is partially responsible for that trademark. The United States has a substantial interest in maintaining its reputation, and endorsing disparaging and offensive marks is directly contrary to that interest. *See Perry v. McDonald*, 280 F.3d 159, 169 (2d Cir. 2001) (recognizing Vermont’s interest in not associating the state with offensive speech on license plates).

The government also has a substantial interest in not wasting limited government resources on investigating and enforcing disparaging marks. *See McGinley*, 660 F.2d at 486. Refusing to register such marks ensures that the government does not waste “the time, services, and use of funds of the federal government.” *Id.* When infringement amounts to criminal fraud, the government expends resources to prosecute an infringing party on behalf of the markholder. 18 U.S.C. § 2320. If trademark registration was not restricted, the government would be prosecuting on behalf of disparaging marks such as “Niggerhead Brand” or “Nigger Hair Tobacco.” *See Pace*, note 1, at 8. The government does not want to waste resources enforcing marks that are harmful and offensive to many of its citizens.

Under the First Amendment, the measures must be drawn to achieve the government’s substantial interest. *Cent. Hudson*, 447 U.S. at 566. Here, both of the

government's interests in rejecting disparaging trademarks are proportional to the means of the restriction imposed. The prohibitions imposed by Section 2(a) are not overly restrictive because Section 2(a)'s prohibitions do not preclude applicants' common-law trademark rights. *See supra* at 21-23; *See Bd. of Trs. of State Univ. of New York v. Fox*, 492 U.S. 469, 480 (1989) (requiring a reasonable restriction proportionate to the interest presented). Congress did not draw Section 2(a) more extensively than necessary to serve the government's interests because applicants can still use a disparaging mark and bring infringement actions in state and federal court. The regulation merely requires a certain level of decency for acquiring federal approval and support. Thus, Congress drew the measures of Section 2(a) to achieve the government's substantial interest.

Respondent has failed to meet any of the prongs necessary to invalidate legislation under the First Amendment because (1) a federally registered trademark is not protected speech; (2) the denial of federal trademark registration does not restrict speech; and (3) the government has a substantial interest in rejecting disparaging trademarks. Section 2(a) of the Lanham Act therefore does not violate the First Amendment.

B. Section 2(a) of the Lanham Act Is Not Unconstitutional Under the Due Process Clause of the Fifth Amendment Because an Ordinary Person Can Determine What Constitutes a Disparaging Mark.

The Due Process Clause of the Fifth Amendment prohibits the United States' government from arbitrarily denying life, liberty or property without the sanction of law. U.S. CONST. amend. V. A law is constitutional under the Due Process Clause

if a person of ordinary intelligence reasonably understands what the law prohibits. *Grayned v. City of Rockford*, 408 U.S. 104, 108 (1972). When certain aspects of a law are unclear, or when certain words are not easily defined, this Court has struck down those laws for being unconstitutionally vague. *See Papachristou v. Jacksonville*, 405 U.S. 156, 162 (1972). Federal laws are presumptively constitutional. *Heller v. Doe*, 509 U.S. 312, 320 (1993). When a term in a particular law has a clear definition, the Court applies the term's ordinary usage. *See City of Chicago v. Morales*, 527 U.S. 41, 89 (1999). Thus, a "plaintiff whose speech is clearly proscribed by a given statute cannot raise a successful vagueness claim under the Due Process Clause." *Holder v. Humanitarian Law Project*, 561 U.S. 1, 20 (2010).

Section 2(a)'s use of the term "disparaging" is not unconstitutionally vague and therefore does not violate the Due Process Clause because courts have developed a two-part test to determine whether a mark is disparaging. *See supra* at 7; *In re Geller*, 751 F.3d at 1358. Under this test, the courts first determine the likely meaning of the mark and the referenced group, and courts next determine if that meaning is disparaging to a substantial composite of the referenced group. *Id.* The courts have successfully utilized this well-defined test in a number of cases. *See id.*; *In re Lebanese*, 94 U.S.P.Q.2d at 1217-18; *In re Heeb*, 89 U.S.P.Q.2d at 1074; *In re Squaw Valley*, 80 U.S.P.Q.2d at 1267. Given the number of decisions evaluating the parameters of the term "disparaging," an ordinary person can determine what constitutes a disparaging mark. Therefore, the term "disparaging"

as employed in courts' Section 2(a) analyses is not unconstitutionally vague and does not violate the Due Process Clause.

C. The Lanham Act's Prohibition Against Registering Disparaging Trademarks Is Not Unconstitutional Under the Equal Protection Clause of the Fourteenth Amendment Because the Government Denies Registration of an Applicant's Mark for Legitimate, Non-Discriminatory Reasons.

The Equal Protection Clause of the Fourteenth Amendment prohibits the government from denying any person the equal protection of its laws. *See* U.S. CONST. amend. XIV. Section 2(a) of the Lanham Act does not violate the Equal Protection Clause because the government may only deny registration of an applicant's mark for legitimate, non-discriminatory reasons. *See* 15 U.S.C. § 1052. The government has many valid, non-discriminatory reasons for denying registration of disparaging marks. These reasons include the government's concern of conveying its approval of disparaging marks and the concern of expending resources to prosecute them. *See supra* at 27-29.

The government does not evaluate the applicant's gender or race when examining an application for trademark registration. *See* 15 U.S.C. § 1052; *see also In re Shinnecock Smoke Shop*, 571 F.3d 1171, 1175 (Fed. Cir. 2009) (where nothing in the record indicated that the applicants' status as Native Americans affected the rejection of their application). The USPTO does not discriminate against a particular applicant for being a member of the class disparaged by the mark, as registering the mark would similarly be denied to anyone outside that class. *See In re Shinnecock*, 571 F.3d at 1175. The USPTO may not reject federal trademark

registration under Section 2(a) for any discriminatory reason, therefore Section 2(a) does not violate the Equal Protection Clause of the Fourteenth Amendment.

### CONCLUSION

Petitioner respectfully requests that this Court affirm in part the decision of the Federal Circuit Court of Appeals by holding that Respondent's mark DUMB BLONDE is disparaging to a substantial composite of the referenced group.

Petitioner respectfully requests that this Court REVERSE the ultimate decision of the Federal Circuit Court of Appeals by holding that the Lanham Act's prohibition against registering disparaging trademarks is not unconstitutional.

Dated: October 20, 2015

Respectfully Submitted,

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Team 9  
Brief for Petitioner

No. 15-1007

IN THE  
SUPREME COURT OF THE UNITED STATES

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OCTOBER TERM 2015

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UNITED STATES,  
*Petitioner,*

v.

KOURTNEY LUHV,  
*Respondent.*

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

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CERTIFICATE OF SERVICE

We, Team 9, attorneys for Petitioner, do swear and declare that on the 20<sup>th</sup> day of October, 2015, as required by Supreme Court Rule 29, we have served the enclosed BRIEF FOR PETITIONER on each party to the above proceeding or that party's counsel, and on every other person required to be served, by personally serving a copy to each of them.

The names and address of those served are as follows:

Patty Hayes/Moot Court Board  
Pepperdine University School of Law  
24255 Pacific Coast Highway  
Malibu, California 90263

We declare under penalty of perjury that the foregoing is true and correct.

Dated: October 20, 2015

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Team 9  
Counsel for Petitioner