

No. 15-1007

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 2015

UNITED STATES,

Petitioner,

v.

KOURTNEY LUHV,

Respondent.

On Writ of Certiorari to the
United States Court of Appeals
for the Federal Circuit

BRIEF FOR PETITIONER

ORAL ARGUMENT REQUESTED

QUESTIONS PRESENTED

- I. Whether Section 2(a) of the Lanham Act prohibits registration of the trademark DUMB BLONDE because it disparages women, as held by the Trademark Trial and Appeal Board.

- II. Whether Section 2(a)'s prohibition on registration of disparaging trademarks abridges freedom of speech in a way that implicates the First Amendment to the United States Constitution.

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<i>In re Hines</i> , 31 U.S.P.Q.2d 1685 (T.T.A.B. 1994)	9
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<u>Secondary Sources:</u>	
<i>About Us</i> , USPTO, http://www.uspto.gov/about-us	27
Anne Gilson LaLonde & Jerome Gilson, <i>Trademarks Laid Bare: Marks That May Be Scandalous or Immoral</i> , 101 Trademark Rep. 1476 (2011)	32

Barbara L. Frederickson & Tomi-Ann Roberts, <i>Objectification Theory: Toward Understanding Women's Lived Experiences and Mental Health Risks</i> , 21 Psychol. Women Q. 173 (1997).....	10
Britain A. Scott & Julie A. Derry, <i>Women in Their Bodies: Challenging Objectification through Experiential Learning</i> , 33 Women & Sports 188 (2005)	10
Cass R. Sunstein, <i>Why the Unconstitutional Conditions Doctrine is an Anachronism (with Particular Reference to Religion, Speech, and Abortion)</i> , 70 B. U. L. Rev. 593 (1990)	26, 32, 33
Charlotte Alter, <i>U.S. Ambassador to Turkey Goes Blonde in Solidarity With Spokeswoman Called 'Dumb Blonde'</i> , Time, May 1, 2015, http://time.com/3843175/john-bass-us-ambassador-turkey-blonde/	15-16
Eric Partridge, <i>A Concise Dictionary of Slang and Unconventional English</i> (Paul Beale ed., 1990).....	7
Janet K. Swim, et al., <i>Everyday Sexism: Evidence for Its Incidence, Nature, and Psychological Impact From Three Daily Diary Studies</i> , 57 J. Soc. Issues 31 (2001).....	16
Jeannie B. Thomas, <i>Dumb Blondes, Dan Quayle, and Hillary Clinton: Gender, Sexuality, and Stupidity in Jokes</i> , 110 J. Am. Folklore 277 (1997)	11, 15
Jim Blascovich, et al., <i>African Americans and High Blood Pressure: The Role of Stereotype Threat</i> , 12 Psychol. Sci. 225 (2001)	16
Joshua R. Ernst & Daniel C. Lumm, <i>Does Budda Beachwear Actually Fit? An Analysis of Federal Registration for Allegedly Disparaging Trademarks in the Non-Corporate Context</i> , 10 Wake Forest Intell. Prop. L.J. 177 (2010)	10
Kathleen M. Sullivan, <i>Unconstitutional Conditions</i> , 102 Harv. L. Rev. 1413 (1989)	22, 23
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. 7 (1994).....	31, 32

Limor Shifman & Dafna Lemish, <i>Virtually Blonde: Blonde Jokes in the Global Age and Postfeminist Discourse</i> , in <i>The Handbook of Gender, Sex, and Media</i> (Karen Ross ed., 2011)	7, 10, 15
Lindsay M. Howden & Julie A. Meyer, <i>Age and Sex Composition: 2010</i> , U.S. Census Bureau (2011), http://www.census.gov/prod/cen2010/briefs/c2010br-03.pdf	12
Llewellyn Joseph Gibbons, <i>Semiotics of the Scandalous and the Immoral and the Disparaging: Section 2(a) Trademark Law After Lawrence v. Texas</i> , 9 Marq. Prop. L. Rev. 187 (2005)	30-31
Mara Cadinu, et al., <i>Why Do Women Underperform Under Stereotype Threat?</i> , 16 Psychol. Sci. 572 (2005)	16
Michael D. Frakes & Melissa F. Wasserman, <i>Does the U.S. Patent and Trademark Office Grant Too Many Bad Patents? Evidence from a Quasi-Experiment</i> , 67 Stan. L. Rev. 613 (2015)	23-24, 27
Nita M. McKinley & Janet S. Hyder, <i>The Objectified Body Consciousness Scale</i> , 20 Psychol. Women Q. 181 (1996).....	11
Random House Unabridged Dictionary (1993).....	9
Regan Smith, <i>Trademark Law and Free Speech: Protection for Scandalous and Disparaging Marks</i> , 42 Harv. C.R.-C.L. L. Rev. 451 (2007)	27
Sonia K. Katyal, <i>Trademark Intersectionality</i> , 57 UCLA L. Rev. 1601 (2010).....	13, 30
Stephen R. Baird, <i>Moral Intervention in the Trademark Arena: Banning the Registration of Scandalous and Immoral Trademarks</i> , 83 Trademark Rep. 661 (1993)	31, 32
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OPINIONS BELOW

The decision of the Trademark Trial and Appeal Board (No. 18201565) is not reported. The decision of the United States Court of Appeals for the Federal Circuit (No. 90264-2015) is reported at *In re Kourtney Luhn*, 1337 F.3d 455 (Fed. Cir. 2015).

STATEMENT OF JURISDICTION

The Court of Appeals for the Federal Circuit entered its decision on June 6, 2015. This Court granted the petition for writ of certiorari, and has jurisdiction pursuant to 28 U.S.C. § 1254(1) (2012).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The relevant constitutional and statutory provisions in this case are the First Amendment to the United States Constitution, U.S. Const. amend. I, and Section 2(a) of the Lanham Act, 15 U.S.C. § 1052(a) (2012).

STATEMENT OF THE CASE

Kourtney Luhv (“Luhv”), a musician, has performed under the stage name “Dumb Blonde” since 2012. *In re Luhv*, 1337 F.3d at 455. Under this name, she accumulated a substantial fan base, comprised mostly of women, and approximately 140,000 social media relationships through her Soundpuff and uTube accounts. *Id.* at 455-56. After two years of performing under this name, Luhv finally sought to release an “extended play” format record. *Id.* at 456. Luhv negotiated with a record label, and secured an agreement that would furnish her a \$2 million advance upon its execution. *Id.* However, the \$2 million advance was contingent upon Luhv’s registration of the mark DUMB BLONDE. *Id.*

Within a month, Luhv filed an application to register the mark DUMB BLONDE with the United States Patent and Trademark Office (“PTO”). *Id.* Luhv’s application stated that she intended to use the mark in relation to entertainment and clothing. *Id.* An examining attorney at the PTO denied Luhv’s application because DUMB BLONDE disparages women. *Id.* Luhv appealed to the Trademark Trial and Appeal Board (“TTAB”) to reverse the examining attorney’s decision. *Id.*

The TTAB considered an assortment of evidence on appeal. *Id.* at 458-57. The TTAB looked to images presumably posted by Luhv that represent blonde women as unintelligent. *Id.* at 456. These image include a blonde woman eating plastic fruit and applying Wite-Out® to text displayed on a computer monitor. *Id.* at 456-57. The TTAB also reviewed dictionary definitions, scholarly articles, and online user content on Luhv’s social media sites. *Id.* at 457. Upon review, the TTAB affirmed

the examining attorney's denial of Luhv's application because DUMB BLONDE disparages women. *Id.* In making that determination, the TTAB dismissed Luhv's intent to reclaim the stereotypes generated by the phrase DUMB BLONDE. *Id.* at 457-58.

Luhv appealed the TTAB's decision to the Federal Circuit upon two contentions, arguing that: (1) the TTAB incorrectly affirmed the examining attorney's determination that DUMB BLONDE is disparaging; and (2) Section 2(a) of the Lanham Act prohibiting registration of disparaging marks violated the First Amendment to the United States Constitution. *Id.* at 457. The Federal Circuit upheld the TTAB's refusal to register the mark, but found that Section 2(a)'s prohibition on registration of disparaging trademarks on the Principal Register was unconstitutional under the First Amendment. *Id.* at 459, 460.

The Solicitor General's Office filed a petition for writ of certiorari on behalf of the United States, which the this Court granted. Petition for Writ of Certiorari, *United States v. Kourtney Luhv* (No. 15-1007).

SUMMARY OF THE ARGUMENT

The TTAB correctly found that Luhv's mark, DUMB BLONDE, is disparaging to a substantial composite of blonde women and negatively enforces gender stereotypes of all women. Substantial evidence proves that DUMB BLONDE refers to an identifiable group of persons—namely, blonde women. Dictionary definitions, the nature of goods and services related to the mark, and the manner of the Luhv's use of DUMB BLONDE in the marketplace all illustrate that the trademark refers to blonde women.

Further, DUMB BLONDE disparages a substantial composite of blonde women. Legal and academic scholars alike agree that “dumb blonde” references perpetuate cultural stereotypes of female stupidity and, in turn, lower women's self-esteem. And although Luhv argues that she aims to “reclaim” this demeaning stereotype, evidence from user comments on her uTube videos and photographs on her website both fail to negate the disparaging nature of her mark. In any event, a mark's potential for reclamation is not a proper consideration for determining whether the mark is disparaging.

Allowing registration of a mark like DUMB BLONDE would only serve to perpetuate negative stereotypes of women. This pejorative phrase undermines women's accomplishments and continues to insult women to this day. Compelling social science evidence also suggests that sexist references like this harm women's psychological and physical well-being. The TTAB thus correctly refused to register Luhv's disparaging mark.

The First Amendment should not bar this Court from affirming that Luhv's mark is disparaging. Aside from its misguided opinion below, every Federal Circuit opinion to consider this issue has found that by refusing to register disparaging trademarks, the PTO does not affect an applicant's use of the mark and therefore does not implicate the First Amendment. Additionally supporting Luhv's ability to use her mark, Section 43 of the Lanham Act already provides essentially the same trademark protection as Luhv would receive if her mark were officially registered.

The unconstitutional conditions doctrine cannot bring Section 2(a) within the realm of a First Amendment violation for virtually the same reasons. The PTO has not forced Luhv to forego using DUMB BLONDE as a source identifier, and thus did not require that she forfeit her freedom of speech. The government can thus validly prohibit that registration of disparaging trademarks. Moreover, the Principal Register's use of federal funds and resources to facilitate trademark registration entitles Congress to define the scope of the PTO's registration program.

Even if Section 2(a) implicated the First Amendment, it remains constitutional under *Central Hudson*. Courts give ample deference to the intent of Congress. The legislative intent behind the Lanham Act supports the inference that the government has a substantial interest in regulating commerce and maintaining stability in the marketplace. Congress enacted Section 2(a) in furtherance of this interest, and it restricts registration no more than necessary to achieve marketplace stability. The PTO's refusal to register Luhv's mark is therefore constitutional under the First Amendment.

ARGUMENT

I. SECTION 2(A) OF THE LANHAM ACT PROHIBITS LUHV'S REGISTRATION OF THE DISPARAGING MARK DUMB BLONDE WITH THE PTO, AS CORRECTLY HELD BY THE TTAB.

DUMB BLONDE is disparaging to a substantial composite of blonde women, regardless of Luhv's attempt to recast its meaning in a positive light. Accordingly, the TTAB correctly affirmed the PTO's determination that the mark was unregistrable under Section 2(a) of the Lanham Act. Even if Luhv's intent to reclaim the mark's meaning is relevant, the record does not reflect substantial evidence of the mark's reformation from its inherent antagonism of women. Further, DUMB BLONDE advances gender stereotypes of immeasurable consequences, which are appropriately hindered by the Lanham Act.

The TTAB upheld the PTO's refusal to register DUMB BLONDE because it is disparaging to a substantial composite of blonde women. The factual findings supporting that conclusion are reviewed for substantial evidence, while the TTAB's legal determinations are reviewed *de novo*. *McDermott v. S.F. Women's Motorcycle Contingent*, 240 F. App'x 865, 867 (Fed. Cir. 2007) citing *In re Bose*, 476 F.3d 1331, 1334 (Fed. Cir. 2007).

A. DUMB BLONDE Disparages A Substantial Composite Of Blonde Women.

The TTAB correctly relied upon the following two prong test to determine that DUMB BLONDE is disparaging under Section 2(a) of the Lanham Act: "(1) what is the likely meaning of the matter in question . . .; and (2) if that meaning 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 Geller*, 751 F.3d 1355, 1358 (Fed. Cir. 2014).

This test, first applied in *Harjo v. Pro-Football, Inc.*, 50 U.S.P.Q.2d 1705, 1740 (T.T.A.B. 1999) *rev'd on other grounds*, 284 F. Supp. 2d 96, 125 (D.C. Cir. 2003), *remanded*, 415 F.3d 44 (D.C. Cir. 2005), replicates the substance of the plain language of the Lanham Act. The language of the Lanham Act provides that marks “which may disparage ... persons, living or dead, institutions, beliefs, or national symbols” are unregistrable by the PTO. 15 U.S.C. § 1502(a) (2012). The *Harjo* test provides two-prongs representative of that statutory language, first focusing on the mark’s meaning, and second on whether that meaning may disparage. *Harjo*, 50 U.S.P.Q.2d at 1740-41. As such, it “enforce[s] plain and unambiguous statutory language according to its terms.” *Hardt v. Reliance Standard Life Ins. Co.*, 560 U.S. 242, 251 (2010) (citing *Carcieri v. Salazar*, 555 U.S. 379 (2009); *Jimenez v. Quarterman*, 555 U.S. 113 (2009)).

Applying the language of the Lanham Act under the *Harjo* framework to the mark at issue, the TTAB accurately found that DUMB BLONDE’s likely meaning refers to blonde women. More importantly, substantial evidence provides that reference is disparaging to a substantial composite of blonde women. As a result, the TTAB correctly affirmed the PTO’s decision to deny Luhv’s application for registration of DUMB BLONDE.

1. *DUMB BLONDE* refers to an identifiable group of persons, blonde women.

The TTAB’s reliance upon substantial evidence, including dictionary

definitions of the mark, the nature of the goods and services related to the mark, and the manner of the mark's use in the marketplace, resulted in its determination that DUMB BLONDE refers to blonde women. This variety of proof, endorsed by the Federal Circuit, *In re Geller*, 751 F.3d at 1358, represents resources that the PTO and the TTAB regularly utilize to make factual determinations regarding disparagement. *In re Squaw Valley Dev. Co.*, 80 U.S.P.Q.2d 1264, 1267 (T.T.A.B. 2006); *In re Lebanese Arak Corp.*, 94 U.S.P.Q.2d 1215, 1217 (T.T.A.B. 2010).

Foremost, various dictionary definitions of “dumb blonde” establish its exclusive reference to blonde women. One of the most reliable dictionaries on the English language, the Oxford English Dictionary, *Taniguchi v. Kan Pacific Saipan, Ltd.*, --- U.S. ---, 132 S. Ct. 1997, 2003 (2012), defines “dumb blonde” as “a conspicuously attractive but stupid blonde woman.” *Dumb blonde*, The Oxford English Dictionary (2d ed. 1989). Additionally, studies interpreting dumb blonde references concluded that the “vast majority refer directly to women.” Limor Shifman & Dafna Lemish, *Virtually Blonde: Blonde Jokes in the Global Age and Postfeminist Discourse*, in *The Handbook of Gender, Sex, and Media* 109 (Karen Ross ed., 2011). Moreover, less conventional but nonetheless relevant authorities on the English language provide a similar meaning. See Eric Partidge, *A Concise Dictionary of Slang and Unconventional English* 141 (Paul Beale ed., 1990) (defining “dumb blonde” as “a pretty but stupid person (usu[ally] female)”).

While dictionary and academic definitions of DUMB BLONDE are useful, they are also generic. Since trademarks are not used in a vacuum, the TTAB must

consider “whether term would be considered disparaging as the term is used in connection with the identified goods or services.” *In re Squaw Valley Dev. Co.*, 80 U.S.P.Q.2d at 1270. Accordingly, the TTAB looked to the nature of the goods and services in the trademark application and DUMB BLONDE’s manner of use in the marketplace to supplement dictionary definitions. *In re Luhv*, 1337 F.3d at 457. Luhv applied to use the mark in relation to both services and goods. The nature of both reveal that DUMB BLONDE likely refers to blonde women. The services comprise of live musical performances by Luhv, a blonde woman, containing lyrics tailored to women’s issues. The attendees of those performances are overwhelmingly female. Members of that female audience are likely to be the sole consumers of any clothing bearing the mark, which constitutes the only good at issue. The nature of the goods and services thus provide that the mark refers to blonde women.

Also, the manner of use of DUMB BLONDE in the marketplace demonstrates that the mark’s likely meaning is limited to blonde women. The Federal Circuit has noted that the meaning of the mark may be derived from “the manner in which the mark is used in the marketplace in connection with the goods or services.” *In re Geller*, 751 F.3d at 1358. Here, Luhv uses the mark on her website alongside images of blonde women. *In re Luhv*, 1337 F.3d at 456-57. She displays it on banners during performances to female audiences. *Id.* at 457. The mark, as currently used in the marketplace, refers to blonde women.

Finally, Luhv’s own arguments in the Federal Circuit corroborate that

DUMB BLONDE alludes to blonde women. In pursuit of her shaky rationalization that DUMB BLONDE is not disparaging to *certain* members of *her* fan base, Luhv makes claims conceding that the mark DUMB BLONDE refers to women. First, she points to the composition of her fan base and attendees of her performances, both comprised mostly of women. *In re Luhv*, 1337 F.3d at 457-58. Second, she points to comments on her band's social media page. *Id.* at 458. The comments are written by women and refined to remarks about Luhv's influence on women. *Id.* DUMB BLONDE is intended and received as a reference to blonde women.

2. *DUMB BLONDE is disparaging to a substantial composite of blonde women.*

The evidence below substantiates that DUMB BLONDE is disparaging to a substantial composite of blonde women. A person or group may be disparaged when "lower[ed] in esteem or reputation," "run down," "depreciate[d]," or even "belittle[d]." *In re Hines*, 31 U.S.P.Q.2d 1685, 1688 (T.T.A.B. 1994) *vacated on other grounds*, 32 U.S.P.Q.2d 1376 (T.T.A.B. 1994) (citing Webster's Third New International Dictionary 653 (1976); Random House Unabridged Dictionary 567 (1993)). In determining whether a mark disparages a person or group, the general population is irrelevant. *In re Hines*, 31 U.S.P.Q.2d at 1688. Instead, reviewing bodies must look to a substantial composite of the referenced group. *In re Heeb Media, LLC*, 89 U.S.P.Q.2d 1071, 1074 (T.T.A.B. 2008). A substantial composite is not quantifiable, nor is it the equivalent of a majority. *Id.* Here, the TTAB found that the mark DUMB BLONDE is disparaging to a substantial composite of blonde

women. Photos on Luhv's website, dictionary definitions, academic articles, and user comments on Luhv's uTube videos support that finding.

The TTAB must look outside personal opinions and encyclopedic sources to determine whether a substantial composite of the referenced group is disparaged. *In re Hines*, 32 U.S.P.Q.2d at 1377, citing *In re Mavety Media Group, Ltd.*, 33 F.3d 1367, 1374 (Fed. Cir. 1994). Here the board did not simply rely on those limited resources. Rather, the board supplemented dictionary definitions and encyclopedic articles with the meaning determined by scholars and connotations from the content created by both Luhv and her fan base. *In re Luhv*, 1337 F.3d at 456-57. These varied sources, which "suffice by inference" for the views of the referenced population, Joshua R. Ernst & Daniel C. Lumm, *Does Budda Beachwear Actually Fit? An Analysis of Federal Registration for Allegedly Disparaging Trademarks in the Non-Corporate Context*, 10 Wake Forest Intell. Prop. L.J. 177, 188 (2010), provide that DUMB BLONDE disparages blonde women.

Academics specializing in gender studies find that one of the primary characteristics of a dumb blonde reference is its allusion to female stupidity. Shifman & Lemish, *supra*, at 109. In general, social scientists are in agreement that the glamorization of appearances and simultaneous depreciation for lack of intelligence lowers the esteem of women. Britain A. Scott & Julie A. Derry, *Women in Their Bodies: Challenging Objectification through Experiential Learning*, 33 Women & Sports 188, 190 (2005) (citing Barbara L. Frederickson & Tomi-Ann Roberts, *Objectification Theory: Toward Understanding Women's Lived Experiences*

and Mental Health Risks, 21 Psychol. Women Q. 173 (1997); Nita M. McKinley & Janet S. Hyder, *The Objectified Body Consciousness Scale*, 20 Psychol. Women Q. 181 (1996)). More specifically, at least one survey found that dumb blonde references “can be disparaging.” Jeannie B. Thomas, *Dumb Blondes, Dan Quayle, and Hillary Clinton: Gender, Sexuality, and Stupidity in Jokes*, 110 J. Am. Folklore 277, 281 (1997). These apt studies report on the term’s actual effect on the referenced group, rather than merely editorializing blonde women’s beliefs. Thus, the TTAB appropriately relied upon them to determine that DUMB BLONDE is disparaging.

Additionally, the TTAB looked to photos on Luhv’s website and user comments on Luhv’s uTube videos. *In re Luhv*, 1337 F.3d at 457. This content confirms that DUMB BLONDE is disparaging. First, the photos on Luhv’s website depict blonde women as unintelligent. *In re Luhv*, 1337 F.3d at 456-57. In one image, a blonde woman is eating plastic fruit. *Id.* at 457. In another image, a blonde woman applies Wite-Out to text on the computer. *Id.* The latter image exactly replicates a dumb blonde reference used in the study that produced the finding that dumb blonde references “can be disparaging.” Thomas, *supra*, at 280, 281.

Finally, Luhv’s evidence does not refute the determination that DUMB BLONDE is disparaging. While Luhv’s fan base may find the mark positive, TTAB opinions reflect that there may be disparate opinions within a referenced group. *In re Heeb Media, LLC*, 89 U.S.P.Q.2d at 1076-77. Luhv’s fan base may be comprised mostly of women, but their personal opinions should not be attributed to a

substantial composite of all blonde women. For reference, there are approximately 157 million women in the United States. Lindsay M. Howden & Julie A. Meyer, *Age and Sex Composition: 2010*, U.S. Census Bureau, 2 (2011), <http://www.census.gov/prod/cen2010/briefs/c2010br-03.pdf>. Meanwhile, Luhv only attracts 140,000 individuals to her Soundpuff account and uTube channel, *In re Luhv*, 1337 F.3d at 456, and likely less to her live performances. Luhv also refers to user comments on her uTube channel in her attempt to persuade the TTAB that DUMB BLONDE does not disparage blonde women. *Id.* at 458. However, not one of the comments mentions DUMB BLONDE. Instead, the comments focus on the impact of Luhv on women. While Luhv's positive image is applaudable, it does not negate the disparaging nature of the mark she wishfully seeks to reclaim.

Notably absent from the PTO and TTAB's review of DUMB BLONDE is a survey of any kind. While conducting a survey of each group that may be potentially disparaged by a prospective trademark would be ideal, it would be cumbersome for the PTO and similarly situated agencies. Additionally, surveys are certainly relevant, but not always dispositive, *Harjo*, 50 U.S.P.Q.2d at 1734, or reliable. *Blackhorse v. Pro-Football, Inc.*, 111 U.S.P.Q.2d 1080 (T.T.A.B. 2014). Without a representative survey of blonde women, the TTAB correctly relied upon the materials in the record to determine that DUMB BLONDE is disparaging to a substantial composite of blonde women.

B. Even If this Court Accepts Luvv's Argument That Her Intent To Reclaim The Meaning Of DUMB BLONDE Is Relevant Under Section 2(a) Of The Lanham Act, The Evidence Does Not Support Her Claim.

1. *The Lanham Act does not reference the intent of the applicant in the prohibition of disparaging marks.*

A mark's potential for reclamation is not a proper consideration in disparaging determinations made by the TTAB. Interpretations of Section 2(a) of the Lanham Act do not consider the mark's potential for reclamation because the plain language of the Lanham Act does not mention the mark's potential for reclamation. While the legislative history behind the disparagement provision is thin, Sonia K. Katyal, *Trademark Intersectionality*, 57 UCLA L. Rev. 1601, 1631 (2010), the plain language is not. 15 U.S.C. § 1502 (2012). The Lanham Act states that a disparaging mark may not be registered on the Principal Register, regardless of the applicant's intent to reclaim the mark's meaning. 15 U.S.C. § 1502 (2012). If the PTO were to consider the intent of every applicant applying for registration, then the PTO would have to make impossible judgments about the potential for the meaning of a word or phrase to revolutionize from its disparaging nature. More suitably, the PTO currently reviews available resources to determine if the mark may disparage under the *Harjo* two-prong test, and if it does then it is unregistrable with the PTO. Under this framework, once the mark is actually reclaimed and no longer disparages a substantial composite of the referenced group, the applicant could seek registration the mark.

While the *Harjo* framework effectively enforces the Lanham Act, it

inconveniences Luhv's pursuit of a record deal contingent upon the registration of DUMB BLONDE. In her determination to register DUMB BLONDE, Luhv cites to the PTO's registration of the mark DYKES ON BIKES. While it is true that the corporate applicant there asserted its intent to use the mark positively, Applicant's Request to Remand for Additional Evidence at 2, *In re S.F. Women's Motorcycle Contingent Appeal*, No. 000020-007200US (T.T.A.B. Sept. 15, 2005), the examining attorney only registered DYKES ON BIKES upon the submission of additional evidence supporting that the term is actually not disparaging. Remanded to Examiner, U.S. Trademark Application Serial No. 78/281,746 (T.T.A.B. Nov. 2, 2005) (on file with the United States Patent and Trademark Office). Even if the T.T.A.B. considered the applicant's intent to reclaim the mark in that case, such an error would not be relevant to the registration of DUMB BLONDE. "The fact that, whether because of administrative error or otherwise, some marks have been registered even though they may be in violation of the governing statutory standard does not mean that the agency must forgo applying that standard in all other cases." *In re Boulevard Entm't, Inc.*, 334 F.3d 1336, 1343 (Fed. Cir. 2003). Applying the appropriate standard here, DUMB BLONDE disparages a substantial composite of women. If Luhv truly wishes to have the TTAB consider her intention to reclaim a mark that is currently disparaging, then she has not chosen the appropriate venue. Only Congress may amend the language of Section 2(a).

2. *The evidence does not support that Luhv intends to reclaim DUMB BLONDE.*

Even if the TTAB were required to consider whether Luhv intended to

reclaim the mark, the evidence does not support this claim. Luhv concludes that her fan base infers a positive meaning of the mark, but she does not provide testimony supporting that conclusion. *In re Luhv*, 1337 F.3d at 458. Even if she did, the disparaging analysis is not restricted to the perceptions of the consumers of the good at issue. *See In re Heeb Media, LLC*, 89 U.S.P.Q.2d at 1077. Next, she asserts that a majority of the attendees at her performances are women. *In re Luhv*, 1337 F.3d at 458. However, this is not persuasive. An individual can simultaneously attend a musical performance and be disparaged by a reference ancillary to the music. Finally, she hand selects comments posted on her social media sites that discuss her positive image. *Id.* Those comments focus on Luhv, not the mark DUMB BLONDE. The comments, and the record, fail to support a finding that DUMB BLONDE does not disparage, or that Luhv is capable of reclaiming it.

C. DUMB BLONDE Promotes Gender Stereotypes Of Immeasurable Social Consequences

Regardless of Luhv's hope to revolutionize it's meaning, DUMB BLONDE perpetuates stereotypes of all women. Despite the deceptive packaging of the reference, which appears to be exclusive to blondes, the phrase embodies stereotypes harmful to all women. Shifman & Lemish, *supra*, at 119. Similar to other jokes belittling a marginalized group upon its visibility, "dumb blonde" began as an attempt to undercut the accomplishments of women. Thomas, *supra*, at 278. The phrase is still hurled as an insult towards women to this day. Most recently, a Turkish official addressed a United States spokeswoman as a "dumb blonde" following her criticism of the Turkish government. Charlotte Alter, *U.S.*

Ambassador to Turkey Goes Blonde in Solidarity With Spokeswoman Called 'Dumb Blonde', Time, May 1, 2015, <http://time.com/3843175/john-bass-us-ambassador-turkey-blonde/>.

The effects of a dumb blonde reference are not limited. Sexist references harm women's psychological well-being. Janet K. Swim, et al., *Everyday Sexism: Evidence for Its Incidence, Nature, and Psychological Impact From Three Daily Diary Studies*, 57 J. Soc. Issues 31, 50 (2001). They are associated with anger, depression, and low self-esteem. *Id.* Even more troublesome, one study found that the reference to a stereotype of a minority group, including women, diminishes the actual performance by members of that group in a wide spectrum of contexts. Mara Cadinu, et al., *Why Do Women Underperform Under Stereotype Threat?*, 16 Psychol. Sci. 572, 572 (2005). This phenomenon is called stereotype-threat, and it confirms the harsh effects of disparaging marks. *Id.* Those effects may even manifest as physical ailments in members of the disparaged group. Jim Blascovich, et al., *African Americans and High Blood Pressure: The Role of Stereotype Threat*, 12 Psychol. Sci. 225, 228 (2001). This is unique to the stress associate with "desir[ing] positive evaluation but fac[ing] the possibility of being evaluated stereotypically in a negative way." *Id.* The harm of a disparaging reference is substantial. Thankfully, the Lanham Act limits registration of these significantly dangerous references as source identifiers in the stream of commerce through Section 2(a).

II. SECTION 2(A)'S PROHIBITION ON REGISTERING DISPARAGING TRADEMARKS DOES NOT VIOLATE THE FIRST AMENDMENT.

Luhv raises a facial challenge to the constitutionality of Section 2(a), and therefore must satisfy a “heavy burden” to succeed on her claim. *See Nat’l Endowment for the Arts v. Finley*, 524 U.S. 569, 580 (1998). “Facial invalidation ‘is, manifestly, strong medicine’ that ‘has been employed by the Court sparingly and only as a last resort.’” *Id.* (quoting *Broadrick v. Oklahoma*, 413 U.S. 601, 613 (1973)). Luhv cannot meet her burden here because she has failed to show “a substantial risk that application of the provision will lead to the suppression of speech.” *See Finley*, 524 U.S. at 580.

Luhv’s invocation of the First Amendment to compel registration of her trademark under Section 2(a) of the Lanham Act is fundamentally misplaced. Section 2(a) does not abridge speech in any way that implicates the First Amendment because Luhv remains free to use her trademark in the marketplace. Further, and under this Court’s well-reasoned rationale in analogous cases, the existence of a constitutional right does not imply a correlative right to receive federal resources in furtherance thereof. *See, e.g., U.S. v. American Library Ass’n, Inc.*, 539 U.S. 194, 203 (2003); *Rust v. Sullivan*, 500 U.S. 173, 178-79 (1991); *Regan v. Taxation With Representation of Washington*, 461 U.S. 540, 542 (1983).

Additionally, even if Section 2(a) did implicate the First Amendment (it does not), the regulation remains constitutional. Trademarks, as a form of commercial speech, receive less protection than private speech under the purview of the First

Amendment.¹ *S.F. Arts & Athletics, Inc. v. U.S. Olympic Comm.*, 483 U.S. 522, 535, 564 (1987); *see also Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n of N.Y.*, 447 U.S. 557, 562, 591 (1980) (holding that “commercial speech is entitled to First Amendment protection” but that this Court’s “decisions have recognized the commonsense distinction” between commercial speech and other types of speech (internal quotation omitted)). Here, under the *Central Hudson* framework, Section 2(a) remains constitutional because it furthers the government’s substantial interest in refusing to endorse the promulgation of marks that disrupt the regulation of commerce and stability in the marketplace by disparaging socially disadvantaged groups.

A. Section 2(a) Does Not Abridge Speech In A Manner That Implicates The First Amendment Because It Does Not Prohibit Luhv From Using Her Trademark.

Section 2(a) does not abridge speech in a manner that implicates the First Amendment for two reasons. First, by refusing to register disparaging marks under Section 2(a), the PTO does not affect an applicant’s right to *use* a trademark. Second, the federal government’s allocation of resources to support the trademark registration program renders the unconstitutional conditions doctrine inapplicable to Section 2(a) and thus the denial of trademark registration is not brought within the protected scope of the First Amendment.

¹ The Court has never addressed the constitutional protections afforded to disparaging trademarks, but it is worth noting that “[t]he Constitution places no value on discrimination” against socially disadvantaged minorities—e.g., women—and even private discrimination “has never been accorded affirmative constitutional protections” under the First Amendment. *Runyon v. McCrary*, 427 U.S. 160, 176 (1976).

1. *The PTO's refusal to register Luv's trademark does not affect her right to use it.*

Any argument challenging Section 2(a)'s constitutionality under the First Amendment is a red herring. The First Amendment prohibits Congress from passing any law that, *inter alia*, “abridg[es] the freedom of speech.” U.S. Const. amend. I. Unrelated to the suppression of speech, Congress passed Section 2(a) as a prohibition on *the PTO* from *registering* certain trademarks. Thus, in no way does Section 2(a) prohibit trademark *applicants* from *using* their marks in the marketplace.

The Federal Circuit—the only court to have directly addressed this issue—maintains a long history of recognizing that Section 2(a) does not violate the First Amendment, reasoning that a denial of trademark registration does not restrict the applicant's use of the mark. *See, e.g., In re Fox*, 702 F.3d 633, 635 (Fed. Cir. 2012) (explaining that “[b]ecause a refusal to register a mark has no bearing on the applicant's ability to use the mark, we have held that § 1052(a) does not implicate the First Amendment rights of trademark applicants”); *In re Boulevard Entm't, Inc.*, 334 F.3d at 1343 (holding “[t]he refusal to register a mark does not proscribe any conduct or suppress any form of expression because it does not affect the applicant's right to use the mark in question”); *In re McGinley*, 660 F.2d 481, 484 (C.C.P.A. 1981) (finding “[w]ith respect to appellant's First Amendment rights, it is clear that the PTO's refusal to register appellant's mark does not affect his right to use it. No conduct is proscribed, and no tangible form of expression is suppressed.

Consequently, appellant's First Amendment rights would not be abridged by the refusal to register his mark").

Here, and as recognized by several decades of judicial precedent, *supra*, Luhv may continue her unfettered use of DUMB BLONDE as the source identifier for her music group. Section 2(a) does not prohibit Luhv from continuing to advertise her music, concerts, and merchandise under the stage name DUMB BLONDE. Similarly, there are no restrictions preventing Luhv from continuing to interact with online followers via Soundpuff or uTube under her chosen moniker. And although Luhv may have a record label offer contingent on her officially registering the trademark DUMB BLONDE, the Constitution unfortunately does not include any First Amendment right to a lucrative recording contract.

Luhv's freedom to continue using her disparaging mark is also evidenced by the fact that the Lanham Act extends protection to registered trademarks and unregistered trademarks alike. Section 43(a) of the Act guarantees a cause of action for "any . . . symbo[l] or device . . . likely to cause confusion . . . as to the origin . . . of [one's] goods" for elements such as trademarks and trade dress. 15 U.S.C. § 1125(a) (2012); *see also Wal-Mart Stores, Inc. v. Samara Bros., Inc.*, 529 U.S. 205, 209 (2000) (recognizing that "[t]he breadth of the definition of . . . the confusion-producing elements recited as actionable by § 43(a) has been held to embrace not just word marks, such as 'Nike,' and symbol marks, such as Nike's 'swoosh' symbol, but also 'trade dress'"). Under Section 43(a)'s protective shield, "[u]nregistered marks receive essentially the same protection as registered marks." *Rosco, Inc. v. Mirror Lit Co.*,

304 F.3d 1373, 1383 (Fed. Cir. 2002); *see also Two Pesos, Inc. v. Taco Cabana, Inc.*, 505 U.S. 763, 776 (1992) (Stevens, J., concurring) (interpreting Section 43(a) “as having created a federal cause of action for infringement of unregistered trademark or trade dress and conclud[ing] that such a mark or trade dress should receive essentially the same protection as those that are registered”). Moreover, Section 43(c) provides that the owner of any “famous mark that is distinctive” may bring a cause of action for injunctive relief against any person who uses a “mark or trade name in commerce that is likely to cause dilution by blurring or dilution by tarnishment of the famous mark, regardless of the presence or absence of actual or likely confusion, of competition, or of actual economic injury.” 15 U.S.C. § 1125(c)(1) (2012). Owners of unregistered marks thus have a number of remedies available to them under the Lanham Act.

Therefore, Luv’s freedom to continue using her mark, coupled with the protections already provided to her under Section 43 of the Lanham Act, cannot sustain any argument that Section 2(a) abridges her freedom of speech.

2. *The unconstitutional conditions doctrine does not apply because Section 2(a) does not require Luv to waive her First Amendment rights, and Congress is not required to allocate resources to support disparaging speech.*

The unconstitutional conditions doctrine prohibits the government from “deny[ing] a benefit to a person on a basis that infringes his constitutionally protected . . . freedom of speech[.]” *Rumsfeld v. Forum for Academic and Institutional Rights, Inc.*, 547 U.S. 47, 59 (2006) (quoting *American Library*, 539 U.S. at 210). However, when Congress’ spending power is the impetus for the

federal benefit, it may rightfully “refuse to subsidize” certain speech or conduct. *Rust*, 500 U.S. at 197 (quoting *Regan*, 461 U.S. at 545). Thus, when electing to provide subsidies, Congress may constitutionally “attach conditions on the receipt of federal funds.” *South Dakota v. Dole*, 483 U.S. 203, 206 (1987). It follows that even if Section 2(a) were infringing on Luv’s First Amendment right to free speech, the unconstitutional conditions doctrine could not apply because Congress may refuse to allocate its resources for the purpose of registering disparaging trademarks.

In any event, this doctrine is patently inapplicable to the instant case. First, and as discussed *supra*, Section 2(a) does not curtail Luv’s freedom to use her disparaging mark, and therefore does not require Luv to forfeit any constitutional rights for the receipt of a benefit. *See In re Fox*, 702 F.3d at 635; *see also* Kathleen M. Sullivan, *Unconstitutional Conditions*, 102 Harv. L. Rev. 1413, 1427 (1989) (clarifying that “[i]f no right is implicated, then government could directly compel the result that the condition on a benefit seeks to induce”). Secondly, unregistered trademarks receive essentially the same protections as registered trademarks under the Lanham Act, so the argument that registering a trademark constitutes a governmentally endowed benefit is a *non sequitur*. *See Two Pesos*, 505 U.S. at 776 (recognizing that unregistered trademarks receive essentially the same protections under the Lanham Act as registered trademarks.) Luv never even raised the argument, however, that she was in need of registration as a means of protecting her mark against infringement. *See In re Luv*, 1337 F.3d at 456. Rather, she identified only a single benefit she could glean from registration: the possibility of a

lucrative \$2 million recording contract. *Id.* Such a benefit is surely not what this Court had in mind when it developed the unconstitutional conditions doctrine. *C.f.* Sullivan, *supra*, at 1427 (explaining that to invoke the doctrine, “the constitutional interest at issue must rise to the level of a recognized right—indeed, a *preferred* right normally protected by strict judicial review”) (emphasis in original)).

Furthermore, governmental financial support of the PTO’s operations also precludes application of the unconstitutional conditions doctrine. “Congress has wide latitude to attach conditions to the receipt of federal assistance in order to further its policy objectives.” *American Library*, 539 U.S. at 203 (citing *Dole*, 483 U.S. at 206) (refusing to apply the unconstitutional conditions doctrine and declining to apply heightened scrutiny to a regulation forbidding access to pornography in public libraries). Here, even though the PTO now receives much of its operational funding through registrant application fees, the dissent in the Federal Circuit below correctly noted that “federal funds are used to cover employee benefits for PTO staff members.” *In re Luvh*, 1337 F.3d at 461 (McCartny, J., dissenting) (citing *Figueroa v. United States*, 466 F.3d 1023, 1028 (Fed. Cir. 2006)). Specifically, the general treasury funds PTO employee “pensions, health insurance, and life insurance, which are administered by the Office of Personnel Management[.]” *Figueroa*, 466 F.3d at 1028. And although the PTO has been primarily self-funded through application fees since 1991, Congress still maintains control of setting the agency’s budget and retains the ability to increase the office’s funding. *See* Michael D. Frakes & Melissa F. Wasserman, *Does the U.S. Patent and*

Trademark Office Grant Too Many Bad Patents? Evidence from A Quasi-Experiment, 67 Stan. L. Rev. 613, 630, 660, 673 n.147 (2015). Therefore, Congress may absolutely retain the right to regulate the PTO’s trademark registration program through Section 2(a).

This Court has already recognized the inapplicability of the unconstitutional conditions doctrine in situations analogous to the one at issue here. In *Regan*, 461 U.S. at 542, the Internal Revenue Service (“IRS”) denied a nonprofit corporation tax exempt status because of certain lobbying activities it advocated before Congress. The nonprofit argued that “Congress’ decision not to subsidize its lobbying violate[d] the First Amendment.” *Id.* at 545. The Court ruled against the nonprofit, averring that it “has never held that the Court must grant a benefit such as [the nonprofit] claims here to a person who wishes to exercise a constitutional right” and “reject[ing] the notion that First Amendment rights are somehow not fully realized unless they are subsidized by the State.” *Id.* at 545-46 (quoting *Cammarano v. United States*, 358 U.S. 498, 515 (1959) (Douglas, J., concurring)). Similarly, the PTO is not required to grant registration to Luhv’s mark on the basis that she wishes to brand herself with disparaging speech. Her freedom of speech is not somehow repressed just because the PTO refuses to use its resources to grant her a licensed trademark registration.

In *Rust*, 500 U.S. at 178-79, the Court again refused to apply the unconstitutional conditions doctrine—this time where congressional regulations denied federal funding to family-planning clinics offering abortions. In so holding,

the Court distinguished the “unconstitutional conditions cases” as those “involv[ing] situations in which the Government has placed a condition on the *recipient* of the subsidy rather than on a particular program or service, thus effectively prohibiting the recipient from engaging in the protected conduct outside the scope of the federally funded program.” *Id.* at 197 (emphasis in original). The Court also noted that the clinic’s employees’ First Amendment rights were not abridged because those individuals were “voluntarily employed” for the government project and “remain[ed] free . . . to pursue abortion-related activities when they [were] not acting under the auspices” of that program. *Id.* at 198. The same reasoning rings true here. Luhv voluntarily applied for trademark registration and in so doing subjected herself to the regulations of the PTO’s trademark registration program. Outside of that sphere, she remained free to pursue the use of her mark.

American Library, 539 U.S. at 211, demonstrates yet another instance where the Court rejected the unconstitutional conditions doctrine in favor of congressional discretion over federally funded institutions. There, certain libraries brought suit claiming that the Children’s Internet Protection Act (“CIPA”) was unconstitutional. *Id.* at 198-99. Congress passed the CIPA in part to prevent public libraries from receiving federal funding for Internet access “unless [they] install[ed] software to block images that constitute obscenity or child pornography, and in part to prevent minors from obtaining access to material that is harmful to them.” *Id.* Reasoning that a “library’s need to exercise judgment in making collection decisions depends on its traditional role in identifying suitable and worthwhile material,” the Court

upheld the constitutionality of CIPA. *Id.* at 209. In so doing, the Court directly refused to entertain the unconstitutional conditions claim, finding it “would fail on the merits.” *Id.* at 211. Relying on its prior holdings in cases like *Rust* and *Finley*, the Court reiterated the widely accepted rule that “when the Government appropriates public funds to establish a program it is entitled to define the limits of that program.” *See id.* (quoting *Rust*, 500 U.S. at 194).

These cases illustrate this Court’s steadfast recognition that the existence of certain rights does not imply the right to receive federal funding for those rights. *See* Cass R. Sunstein, *Why the Unconstitutional Conditions Doctrine is an Anachronism (with Particular Reference to Religion, Speech, and Abortion)*, 70 B. U. L. Rev. 593, 615 (1990) (explaining that in *Rust*, the Court found “that the existence of a right to an abortion does not imply a correlative right to public funding of abortion, even if the government is also funding childbirth.”). In the same vein, Luhn’s First Amendment right to use a disparaging trademark does not convert into a “correlative right” to the PTO’s registration of the disparaging mark, even if the PTO ultimately decides to register other, non-disparaging trademarks. *See id.* at 614-15 (arguing that the “[g]overnment might have sufficient reason to refuse to fund” speech that “is not merely offensive, but also helps produce a distinctive set of harms, including a perpetuation of second-class citizenship for certain groups”). The fact that the government originally funded the PTO’s Principal Register through Congress’ spending power, U.S. Const. art. I, § 8, cl. 1, and now maintains it through the commerce clause, U.S. Const. art. I, § 8, cl. 3, further supports the

inapplicability of the unconstitutional conditions doctrine. *C.f.* Frakes & Wasserman, *supra*, at 627 (pointing out that the PTO only became self-funded after 1991); *About Us*, USPTO, <http://www.uspto.gov/about-us> (last visited Oct. 18, 2015) (stating that the PTO “registers trademarks based on the commerce clause”).

In addition to receiving federal resources from the government, the PTO itself only possesses limited resources with which to operate its trademark registration program. Regan Smith, *Trademark Law and Free Speech: Protection for Scandalous and Disparaging Marks*, 42 Harv. C.R.-C.L. L. Rev. 451, 475-76 (2007). “Two people cannot separately possess the same federally registered trademark,” meaning that “the actual trademark license [for that term] is used up when given to an applicant.” *Id.* at 476. The PTO is thus justified in denying registration of a disparaging term, “because a potentially disparaging term can be nondisparaging when used in another context, and only one party can trademark the term.” *See id.* at 475-76 (arguing that in this way, denial of registration under Section 2(a) would justify even viewpoint discrimination under the First Amendment).

The Court’s analysis in *Finley* is particularly illustrative of this limited resources argument. There, Congress created the National Endowment for the Arts (“NEA”), through which it provided funding for certain artistic pursuits. *Finley*, 524 U.S. at 573. The NEA had broad discretion in deciding to whom it granted funding, and considered “general standards of decency and respect for the diverse beliefs and values of the American public” when doing so. *Id.* at 576. The Court upheld the constitutionality of the regulation, even though it constituted a content-based

consideration, because the “NEA has limited resources, and must deny the majority of the grant applications that it receives[.]” *Id.* at 585. Relying on *Rust*, the Court reasoned that “Congress may selectively fund a program to encourage certain activities it believes to be in the public interest, without at the same time funding an alternative program which seeks to deal with the problem in another way.” *Id.* at 588 (quoting *Rust*, 500 U.S. at 193).² Regarding the instant matter, the PTO’s limited resources (i.e., only one license available per mark) prevent it from granting registration to every single applicant, and justify Section 2(a)’s prohibition on disparaging marks. Thus, even under the unconstitutional conditions doctrine, the regulation should still survive First Amendment scrutiny.

B. Even If Section 2(a) Implicates The First Amendment, It Remains Constitutional Under The *Central Hudson* Test For Commercial Speech.

Even if this Court were to analyze Section 2(a) under the misguided premise that it implicates the First Amendment, the statute still passes muster under the appropriate commercial speech framework. *Central Hudson* established a four-part test to determine whether commercial speech is protected by the First Amendment: (i) the speech must “concern lawful activity and not be misleading,” and if so, then as long as (ii) “the asserted governmental interest is substantial,” (iii) “the regulation [must] directly advance[] the governmental interest asserted,” and (iv)

² The Court also expressly rejected the argument that such a regulation would amount to viewpoint discrimination. *Id.* (finding that “the Government has not discriminated on the basis of viewpoint, it has merely chosen to fund one activity to the exclusion of another” (quoting *Rust*, 500 U.S. at 193)). Thus, any attempt by Luvv to argue that Section 2(a) constitutes viewpoint discrimination falls flat.

cannot be “more extensive than is necessary to serve that interest.” *Central Hudson*, 447 U.S. at 566.³

Although Section 2(a) may superficially appear to be a content-based restriction on speech, the type of registered trademark it aims to proscribe is undoubtedly associated with preventing the secondary effects certain to result if disparaging trademark were permitted to enter the stream of commerce. *See supra*, Section I.C.; *see also R.A.V. v. City of St. Paul*, 505 U.S. 377, 389 (1992) (holding that a “valid basis for according differential treatment to even a content-defined subclass of proscribable speech is that the subclass happens to be associated with particular ‘secondary effects’ of the speech, so that the regulation is ‘justified without reference to the content of the . . . speech’”) (citing *Renton v. Playtime Theaters, Inc.*, 475 U.S. 41, 48 (1986) (emphasis in original)). Even so, commercial speech is necessarily subject to “greater government regulation and oversight” and therefore survives First Amendment scrutiny even in situations like this, where

³ Luhv submitted to the Federal Circuit that “she chose the mark DUMB BLONDE as a way to reclaim the stereotype associated with blonde women and raise awareness of the challenges stemming from gender discrimination and negative stereotypes faced by all women.” *In re Luhv*, 1337 F.3d at 457. To the extent Luhv is arguing that her trademark is something more than purely commercial speech, that argument must fail. Because she uses the mark as a source identifier for her band and therefore her brand, “there is nothing whatever inextricable about the noncommercial aspects” of her trademark. *See Bd. of Trustees of State Univ. of N.Y. v. Fox*, 492 U.S. 469, 474 (1989) (finding that when the speaker was not prevented by a university regulation from conveying its noncommercial messages outside of the scope of its commercial messages, the speech fell squarely within the realm of commercial speech). This Court has made clear that commercial speech “which links a product to a current public debate is not thereby entitled to the constitutional protection afforded noncommercial speech.” *Id.* at 475 (quoting *Central Hudson*, 447 U.S. at 563, n.5).

Luhv will surely argue that Section 2(a) constitutes a content-based restriction on speech. *See Katyal, supra*, at 1663 (citing an article by Justice Kagan, prior to her tenure on this Court, where she argued that certain content-specific regulations related to discrimination may survive First Amendment scrutiny).

Therefore, even if this Court analyzed Section 2(a) as a content-based restriction under *Central Hudson*, it would remain constitutional under the First Amendment. Although Luhv's trademark DUMB BLONDE is disparaging and unregistrable under Section 2(a), the mark is neither illegal nor misleading. But Section 2(a) still passes muster under the final three considerations of the *Central Hudson* test because (i) the PTO has a substantial interest in refusing to register trademarks like DUMB BLONDE, and (ii) Section 2(a) is a narrowly tailored regulation designed to further the PTO's substantial interest in preventing confusion in the marketplace.

1. *The government has a substantial interest in regulating commerce and maintaining stability in the marketplace.*

The only explicit explanation of congressional intent behind the Lanham Act indicates that Congress aimed to regulate commerce, protect registered marks, protect against unfair competition, prevent fraud and deception, and provide rights and remedies for international trademarks. 15 U.S.C. § 1127 (2012); *see also POM Wonderful LLC v. Coca-Cola Co.*, 134 S. Ct. 2228, 2233-34 (2014). Because Congress never alluded to the specific intent behind Section 2(a), courts must infer its purpose for themselves. *See* Llewellyn Joseph Gibbons, *Semiotics of the Scandalous and the Immoral and the Disparaging: Section 2(a) Trademark Law After Lawrence*

v. Texas, 9 Marq. Prop. L. Rev. 187, 206 (2005) (recognizing that “[c]ourts have been unable to discern Congress’ intent behind [S]ection 2(a)”). Courts must consider the Lanham Act as a whole in construing the legislative intent of Section 2(a). *Univ. of Notre Dame Du Lac v. J.C. Gourmet Food Imports Co., Inc.*, 703 F.2d 1372, 1376 (Fed. Cir. 1983).

Bearing in mind the statute’s general legislative intent as a backdrop, the Lanham Act supports the substantial government interest of preventing the registration of disparaging trademarks. Contrary to legislative intent, allowing registration of disparaging marks would disrupt the regulation of commerce in two distinct ways. First, the public would reasonably infer that the government endorses disparagement by registering offensive marks through the PTO’s Principal Register and publishing them in the PTO’s Trademark Official Gazette (“TMOG”). See Kimberly A. Pace, *The Washington Redskins Case and the Doctrine of Disparagement: How Politically Correct Must a Trademark Be?*, 22 Pepp. L. Rev. 7, 40 (1994); see also Stephen R. Baird, *Moral Intervention in the Trademark Arena: Banning the Registration of Scandalous and Immoral Trademarks*, 83 Trademark Rep. 661, 674 (1993) (asserting that a “commonly asserted policy reason for denying . . . disparaging marks . . . is that the government should not place its imprimatur on unwholesome and offensive matter”); *In re Luvv*, 1337 F.3d at 461 (McCartny, J., dissenting) (positing that “[s]ince the public may easily interpret a potentially disparaging mark’s publication as the government’s endorsement of its subject matter, this would constitute a substantial governmental interest which satisfies

the second prong of the *Central Hudson* test”). Even though the TTAB emphatically denies that “the act of registration” amounts to “a government imprimatur,” the general public is far more likely to see it the other way around. See Anne Gilson LaLonde & Jerome Gilson, *Trademarks Laid Bare: Marks That May Be Scandalous or Immoral*, 101 Trademark Rep. 1476, 1485 (2011) (quoting *In re Old Glory Condom Corp.*, 26 U.S.P.Q.2d 1216, n.3 (T.T.A.B. 1993) (arguing that even if “[t]rademark lawyers and the USPTO may understand that registration is not a stamp of approval,” the general public would “inevitably infer that registration connotes support or endorsement”).

Second, by lending its resources to advance the promulgation of anti-women trademarks in interstate commerce, the government would be disrupting the marketplace by abandoning its traditional role of “protecting the health and welfare of its citizens.” See Pace, *supra*, at 40; see also Baird, *supra*, at 674; McGinley, 660 F.2d at 486 (reasoning that Section 2(a) is not “an attempt to legislate morality, but, rather, a judgment by the Congress that such marks not occupy the time, services, and use of funds of the federal government”). If the PTO were to register disparaging trademarks—which are, by definition, highly offensive to a substantial composite of members of the demographic—it would be sure to cause confusion in the stream of commerce as to why the government supports such speech. *C.f.* Sunstein, *supra*, at 614-15 (arguing that the government should be able to refuse funding “that fuel hatred of disadvantaged social groups). In fact, such speech “helps produce a distinctive set of harms, including a perpetuation of second-class

citizenship for certain groups,” *id.*, and should not receive the benefit of federal resources with which to do so.

Therefore, the only remaining concern is whether Section 2(a) is narrowly tailored and furthers the government’s legitimate interest.

2. *Section 2(a) furthers the substantial government interest—in a way no more extensive than necessary—by denying registration of disparaging trademarks.*

“The last two steps of the *Central Hudson* analysis basically involve a consideration of the ‘fit’ between the legislature’s ends and the means chosen to accomplish those ends[.]” *Posadas de P.R. Assocs. v. Tourism Co. of P.R.*, 478 U.S. 328, 341 (1986). There can be no question that Section 2(a) advances the government’s interest of regulating the marketplace by prohibiting disparaging marks from entering the stream of commerce as source identifiers. The regulation is properly confined to restricting such disparaging marks by the plain language of the statute. *See* 15 U.S.C. § 1052(a) (2012). Through explicit and implicit references in the Lanham Act itself, Congress intentionally enacted Section 2(a) in order to further its stated goal of regulating commerce. Congress’ intent that Section 2(a) would advance this goal is indisputable. *See S.F. Arts & Athletics, Inc.*, 483 U.S. at 536 (finding that a statute clearly furthered the substantial government interest where it was supported by congressional intent).

Section 2(a) is also not broader than necessary. While Section 2(a) must be “narrowly tailored” to further the government’s interest under *Central Hudson*, this equates to a much lighter burden than the rigid “least restrictive means” test

employed in noncommercial speech cases. *See Fox*, 492 U.S. at 477-78. The Court has “not insisted that there be no conceivable alternative” to the regulation, but only “that the regulation not ‘burden substantially more speech than is necessary to further the government’s legitimate interests.’” *Id.* at 478 (quoting *Ward v. Rock Against Racism*, 491 U.S. 675, 689 (1985)). Moreover, the government’s judgment as to what constitutes “no greater than necessary” receives great deference from the Court. *See id.* (citing *Clark v. Community for Creative Non-Violence*, 468 U.S. 288, 299 (1984); *United States v. Albertini*, 472 U.S. 675, 689 (1985)) (stating that the Court has “been loath to second-guess the Government’s judgment” as to the final *Central Hudson* prong).

Here, by enacting Section 2(a), Congress demonstrated that it valued registration of certain categories of commercial speech over other types of commercial speech—i.e., immoral, deceptive, scandalous, and disparaging trademarks, *see* 15 U.S.C. § 1052(a)—in order to further its legitimate goal of exercising its powers under the commerce clause. Such a determination is perfectly valid, as it presents a regulation that is not more restrictive than necessary to achieve the government’s interest. *See Metromedia, Inc. v. City of San Diego*, 453 U.S. 490, 512 (1981) (holding that a city ordinance restricting commercial offsite advertising billboards but allowing onsite billboards was constitutional, and when the city “ha[d] obviously chosen to value one kind of commercial speech—onsite advertising—more than another kind of commercial speech—offsite advertising” the Court would defer to the city’s judgment); *see also Posadas*, 478 U.S. at 344

(deciding a casino gambling advertising restriction was constitutionally valid and that “it is up to the legislature to decide” whether alternative means of accomplishing its end would have had the same effectiveness). In sum, even under the *Central Hudson* test, the PTO’s refusal to register disparaging trademarks embodies a perfectly legitimate restriction on commercial speech. This Court should find that Section 2(a) is constitutional under the First Amendment.

CONCLUSION

For these reasons, Petitioner respectfully asks this Court to (i) affirm the TTAB's refusal to register Luv's trademark DUMB BLONDE under Section 2(a) because it is disparaging to a substantial composite of women, and (ii) reverse the Court of Appeals for the Federal Circuit's holding that Section 2(a) violates the First Amendment.

Respectfully submitted,

Team 110

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