

IN THE SUPREME COURT OF THE
UNITED STATES

UNITED STATES OF AMERICA,
Petitioner,

v.

KOURTNEY LUHV,
Respondent,

Appeal From the United States Court of Appeals,
Federal Circuit,
Case No. 90263-2015
The Honorable Judge Gilmore Presiding

**BRIEF OF
RESPONDENT, KOURTNEY LUHV**

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STATEMENT OF JURISDICTION

This case presents a trademark issue brought by Respondent to the Patent and Trademark Office. The judgment of the Court of Appeals for the Federal Circuit was entered on June 6, 2015. This Court granted Petitioner's writ of certiorari thereafter. Jurisdiction in this Court rests on 28 U.S.C. § 1254(1).

SUMMARY OF THE ARGUMENT

In both her individual and professional career, Ms. Luhv deserves the protections inherent in registering the name “Dumb Blonde” as a trademark. Stripping her of the benefits and protections associated with obtaining the mark would be unjust. This Court should reverse the lower court’s holding with respect to the TTAB’s refusal to register the trademark, but affirm the court’s holding that Section 2(a) is unconstitutional. First, the lower court erred in finding that the term “Dumb Blonde” may be disparaging to a particular group of people. Second, even if the TTAB did not err in refusing the mark pursuant to Section 2(a), that portion of the Lanham Act is unconstitutional because it restricts speech in violation of the First Amendment. Any equitable resolution of this dispute must end in Ms. Luhv obtaining the trademark for the name “Dumb Blonde.”

Section 2(a) of the Lanham Act allows the PTO to refuse registration of any trademark that may disparage a group of people. This Court should reverse the holding of the lower court here that the term “Dumb Blonde” may disparage certain persons, namely, women with blonde hair. The lower court erred, specifically, when it conducted its analysis of the two-prong disparagement test and did not lean in favor of publication during examination.

Here, the mark “Dumb Blonde” would not disparage women, in part, because Ms. Luhv explicitly stated that she wishes to embrace gender stereotypes and work toward defeating negative connotations associated with those types of names. Similarly, given the mark’s direct association with Ms. Luhv’s professional career, the term is used as a distinguishing mark that creates a positive association as Ms. Luhv’s career progresses. Under the facts of this case and prior holdings by the TTAB, Ms. Luhv’s mark should be approved under Section 2(a).

However, even if the TTAB did correctly refuse registration of the mark, Section 2(a) is unconstitutional such that it cannot be relied upon to refuse such registration. The First Amendment directly prohibits Congress from creating a law that abridges speech. Section 2(a) of the Lanham Act, on its face, violates the First Amendment in that it restricts speech. Registering a trademark is recognized as speech for First Amendment purposes and deserves Constitutional protection. Under this Court’s First Amendment jurisprudence, a First Amendment violation occurs when speech is recognized as protected speech, the government takes action to restrict that speech, and the restriction is determined unconstitutional when analyzed under the *Central Hudson* framework.

The speech in question is protected speech and Section 2(a) is a restriction on that speech that implicates the First Amendment. Further, the restriction Section 2(a) creates is unconstitutional under the *Central Hudson*

analysis. First, Ms. Luhv's speech is not misleading nor concerns illegal activity. Next, the government does not have a substantial interest in restricting speech that could possibly be disparaging or offensive to any group of people. However, even if the government did have a substantial interest, the restriction fails scrutiny because it fails to directly advance that interest. Finally, the government cannot meet its burden that Section 2(a) is no more extensive than necessary to advance any interest it has in abridging any potentially disparaging or offensive speech.

For these reasons, this Court should reverse the lower court's holding with respect to the TTAB's decision to deny the mark's registration, but affirm the decision as to the unconstitutionality of Section 2(a). The lower court's first holding should be reversed because the term "Dumb Blonde" does not disparage a substantial composite of women, and Section 2(a) should be held unconstitutional because it restricts speech in violation of the First Amendment.

STATEMENT OF THE CASE

This case was brought to the United States Court of Appeals for the Federal Circuit from a judgment of the United States Patent and Trademark Office, Trademark Trial and Appeal Board. The Court of Appeals heard arguments for this case on May 17, 2015, and the case was decided on June 6, 2015. Chief Judge Gilmore of the Court of Appeals for the Federal Circuit held that the Trademark Trial and Appeal Board did no err in rejecting Respondent's application to register the name "Dumb Blonde" as her professional name on the ground that the name could be disparaging to women under Section 2(a) of the Lanham Act, 15 U.S.C. § 1052(a).

Factual Background

Respondent, Ms. Luhv, is a widely recognized singer and solo musical artist who is known by her stage name, "Dumb Blonde." Ms. Luhv has been using the stage name "Dumb Blonde" for three years, performing all over the country. Ms. Luhv incorporates elements from Grindcore, Neurofunk, and American folk into her music. In addition to her vast following while she is on tour, Ms. Luhv also has a substantial following of fans on the Internet. She submit here music for public enjoyment on www.soundpuff.com ("Soundpuff") and has a www.utube.com ("uTube") account where her identifying name is "DumbBlondeMusic." Ms. Luhv uses these websites to

communicate with her fans and share music-related tips to those who are interested.

In June 2014 Ms. Luhv had over 40,000 followers on her Soundpuff account and over 100,000 followers on her uTube account. At that time, Ms. Luhv negotiated an agreement with a record label whereby she would receive \$2,000,000 in exchange for performing a recording contract. However, this agreement was contingent on Ms. Luhv obtaining a trademark for her name, “Dumb Blonde.” Therefore, Ms. Luhv sought to register the name “Dumb Blonde” as a trademark to protect her great interest in her professional career.

Procedural Background

Ms. Luhv filed an application to register “Dumb Blonde” as a trademark on July 9, 2014 with the Patent and Trademark Office. She sought to register the mark for “Entertainment, namely, live performances by a musical band,” as well as “clothing, namely, sweatshirts, t-shirts, tank tops, and headwear.” The examining attorney at the PTO found the mark could be disparaging to women under Section 2(a) of the Lanham Act. On this basis, he refused to register “Dumb Blonde.”

Ms. Luhv contested her application’s denial with the Trademark Trial and Appeal Board (TTAB). The TTAB affirmed the refusal for registration. In so affirming, the TTAB concluded that the mark “may be disparaging to a

substantial composite of the referenced group, namely women who have a blonde hair color.” The TTAB used images of women with blonde hair from Ms. Luhv’s professional website as supporting evidence. It also looked to dictionary definitions of the mark’s words to show its potential disparagement to women. Ms. Luhv contends, however, that the name “Dumb Blonde” is a way for her to associate with women who share her traits, allows her to help fight stereotypes associated with women, and raises awareness regarding challenges associated with gender discrimination.

On appeal to the Court of Appeals for the Federal Circuit, Ms. Luhv argued that the TTAB’s decision as to refusing registration of her trademark should be reversed. She also argued, alternatively, that Section 2(a) of the Lanham Act is unconstitutional in that it prohibits registering marks that may be disparaging.

The Court of Appeals rejected Ms. Luhv’s first argument, but ultimately found Section 2(a) to be in violation of the United States Constitution’s First Amendment. First, the court held that even though there are positive opinions surrounding the use of the mark “Dumb Blonde,” the TTAB’s prior holdings persuaded the court that in light of Ms. Luhv’s personally blonde hair, paired with the use of blonde haired women on her website and in conjunction with her music, the mark referred to women with blonde hair and could be found disparaging. Thus, the court affirmed the TTAB’s decision to refuse registration of the mark under Section 2(a).

The lower court concluded that Section 2(a) violates the United States Constitution, however, in that it unconstitutionally restricts speech. The court first found that trademark registration constitutes protected speech and that restricting that speech implicates the First Amendment. The court then analyzed the constitutionality of the restriction under the *Central Hudson* framework in determining that the restriction violates the First Amendment.

First, the court noted that the speech in question is not misleading and does not concern illegal activity. The court then noted that under *Central Hudson*, to uphold the restriction on speech, it must find that the government has a substantial interest in abridging the speech, that the restriction directly advances that interest, and finally, that the restriction is not more extensive than necessary to serve that interest. The court determined that there was no substantial government interest present, so the government could not meet its burden in showing that section 2(a) is constitutional. The court therefore found that Section 2(a) is unconstitutional.

ARGUMENT

I. The Federal Circuit Erred When It Held That The Trademark Trial And Appeal Board Properly Refused To Register The Trademark Dumb Blonde Because The Trial And Appeal Board Did Not Follow The Proper Procedure To Determine If The Trademark May Disparage Persons.

The Dumb Blonde Trademark is not disparaging according to Section 2(a) of the Lanham Act and should have originally been approved by the examining attorney. Section 2(a) of the Lanham Act states that the Patent and Trademark Office (PTO) may refuse to register a trademark that “[c]onsists of or comprises immoral, deceptive, or scandalous matter; or matter which may disparage or falsely suggest a connection with persons, living or dead, institutions, beliefs, or national symbols, or bring them into contempt, or disrepute.” 15 U.S.C. § 1052(a). The term “disparage” is not defined in any portion of the Lanham Act, so the ordinary and common meaning is applied. *Pro-Football, Inc. v. Harjo*, 284 F. Supp. 2d 96, 124 (D.D.C. 2003). Looking to dictionary definitions published at the time the Lanham Act was passed, The Trademark Trial and Appeal Board (TTAB) has determined that a trademark is disparaging if it may “dishonor by comparison with what is inferior, slight, deprecate, degrade, or affect or injure by unjust comparison.” *Harjo v. Pro-Football, Inc.*, 50 U.S.P.Q.2d (BNA) 1705, 1738 (T.T.A.B. Apr. 2, 1999). The Federal Circuit has looked to the TTAB’s definition to determine disparagement cases. *In re Geller*, 751 F.3d 1355, 1358, 110 U.S.P.Q.2d 1867 (Fed. Cir. 2014).

To determine if a trademark “may disparage” a substantial composite of a group, The Trademark Trial and Appeal Board (TTAB) uses a two-prong test that asks

“(1) [W]hat is the likely meaning of the matter in question, taking into account not only dictionary definitions, but also the relationship of the matter to the other elements in the mark, the nature of the goods or services, and the manner in which the mark is used in the marketplace in connection with the goods and services; and

(2) [I]f the meaning is found to refer to identifiable persons, whether that meaning may be disparaging to a substantial composite of the referenced group.”

Geller, 751 F.3d at 1358.

Essentially, the first part of the test examines the probable meaning of the trademark in question. *Blackhorse v. Pro-Football, Inc.*, 111 U.S.P.Q2d 1080 (T.T.A.B. 2014). For the first part of the test, to find the probable meaning the examiner must look to the full context of the trademark and then determine whether the trademark is reasonably understood by the group allegedly being disparaged. *Geller*, 751 F.3d at 1358-59. To determine the probable meaning of a word trademark, an examiner can look to dictionary definitions, but “must also consider the relationship between subject matter in question and the other elements that make up the mark in its entirety; the nature of the goods and/or services; and the manner in which the mark is used in the marketplace in connection with the goods and/or services.” *Harjo*, 284 F. Supp. 2d. at 125. Dictionary definitions are useful,

but are not enough to sufficiently determine the meaning. *Boswell v. Mavety Media Group*, 52 U.S.P.Q.2d 1600, 1608 (T.T.A.B. 1999). During the first prong of the test, the examiner does not determine if the trademark is disparaging, this is a separate question. *Harjo*, 284 F. Supp. 2d. at 125.

The second prong of the test examines the probable meaning of the trademark in question. *Blackhorse*, 111 US.P.Q2d at 1080. The second part of the test looks to see if the meaning of the trademark is, or was, disparaging to a **substantial composite** of the relevant group allegedly being disparaged. *Id.* The relevant group is determined on a case by case basis. *Harjo*, 50 U.S.P.Q.2d at 1739. There is currently no clear definition determining the meaning of “substantial composite,” but the number has to be a substantial amount, not necessarily a majority, that finds the mark disparaging. *In re Beck*, 114 U.S.P.Q2d (BNA) 1048 (T.T.A.B. 2015). The trademark will be judged from the relevant group allegedly being disparaged. *Harjo*, 50 U.S.P.Q2d (BNA) at 1738-39. While the examiner will view the trademark from the prospective of the relevant group allegedly being disparaged, the understanding of the trademark by the general public will be persuasive in determining if the trademark is disparaging. *Id.* at 1739.

Respondent challenges the Federal Circuit’s ruling to affirm the PTO’s rejection of her application to register the trademark Dumb Blond for “Entertainment, namely live performances by a musical band” and “Clothing, namely, sweatshirts, t-shirts, tank tops, and headwear” on the grounds that

the trademark may be disparaging to women. The Federal Circuit erred when it held that the TTAB properly refused to register the trademark Dumb Blonde for two reasons: (1) When the two-prong test to determine if a trademark is disparaging is properly performed, the Dumb Blonde trademark would be deemed non-disparaging; and (2) the PTO erred when determining if Dumb Blonde is disparaging because they did not err on the side of publication. For these reasons, this Court must reverse the Federal Circuit's ruling and approve the Respondent's application to register the trademark Dumb Blonde.

A. The Trademark and Trial Board's Legal Decisions Are Reviewed *De Novo* And Its Factual Findings Are Reviewed For Substantial Evidence.

Courts review the TTAB's "legal decisions *de novo* and its factual findings for substantial evidence." *In re Bose*, 476 F.3d 1331, 1334 (Fed. Cir. 2007). The Federal Circuit and TTAB incorrectly construed the two-prong test by not reviewing the full context of the Dumb Blonde trademark to determine the likely meaning, and by not looking to the substantial composite of women to determine if the likely meaning of the mark refers to and disparages them. Since there is a question to how the Federal Circuit construed the law, this Court should review *de novo* how to review the application for the Dumb Blonde trademark under the two-prong test, and should review its factual findings for substantial evidence.

B. Under The Two-Prong Disparagement Test, The Full Context Of The Dumb Blonde Trademark Shows That Dumb Blonde Is Not Disparaging To A Substantial Composite Of The Referenced Group.

According to the Two-Prong disparagement test, the Dumb Blonde trademark is not disparaging to a **substantial composite** of the reference group. Under the Two-Prong disparagement test established by the TTAB, the examiner is to (1) inspect the probable meaning of the trademark in question; and (2) look to see if the meaning of the trademark is disparaging to a **substantial composite** of the group at issue. *Geller*, 751 F.3d at 1358.

1. After Reviewing The Full Context Of The Dumb Blonde Trademark According To The First Prong, The Likely Meaning Of The Trademark Would Not Be Reasonably Understood As Disparaging By Women, The Group Allegedly Being Disparaged.

The first part of the two-prong disparagement test examines the apparent meaning of the trademark in question. *Blackhorse*, 111 U.S.P.Q2d at 1085. What the trademark refers to establishes the meaning of the trademark. *Boswell*, 52 U.S.P.Q.2d at 1608. To determine meaning, an examiner can look to dictionary definitions, but dictionary definitions alone will not be sufficient. *Id.* In addition to dictionary definitions, to determine meaning an examiner “must also consider the relationship between the subject matter in question and the other elements that make up the mark in its entirety; the nature of the goods and/or services; and the manner in which the mark is used in the marketplace in connection with the goods and/or services.” *Harjo*, 284 F. Supp. 2d at 125 (quoting the T.T.A.B. decision).

The term in question must be reviewed with its perceived connection with the goods and services listed in the application. In *In re Heeb Media, LLC*, the court was trying to determine the meaning behind the term HEEB, which the applicant was trying to trademark. *In re Heeb Media, LLC*, 2008 TTAB LEXIS 65, *1 (T.T.A.B. 2008). The applicant's, Heeb Media, application to register Heeb was for "clothing, namely, jackets, jerseys, sweat pants, sweat shirts, track suits, t-shirts, tank tops and pants; headwear" and "entertainment, namely, conducting parties." *Id.* Heeb Media contended that the term Heeb was in reference to their magazine, which their application for the term Heeb was approved for. *Id.* at 2-3. The court determined that the goods and services the term would be on could be interpreted to mean it's offensive meaning against the Jewish community. *Id.* at 13. The court stated "that Heeb has no other meaning pertinent to clothing or entertainment services." *Id.* at 13-14.

Trademark applications attempting to reclaim a term for a group will not obtain trademark approval if they do not contain enough evidence supporting a positive meaning, but can suggest the meaning behind the term in question. In *In re Tam*, the applicant, Mr. Tam, was a member of the band The Slants. *In re Tam*, 785 F.3d 567, 568 (Fed. Cir. 2015). The examining attorney found the trademark disparaging citing material picturing the band name set against Asian motifs. *Id.* The TTAB reviewed the application and also declined the approval of The Slants. *Id.* at 569. The TTAB found that

the trademark was disparaging to a substantial composite of people of Asian descent based on dictionary definitions and the record of evidence tying the trademark to a negative connotation of the slants in the Asian community.

Id. To determine the likely meaning of The Slants, the court found that there was substantial evidence supporting the trademark referred to individuals of Asian descent. The court found that there was little evidence suggesting the trademark was not referring to people of Asian descent. *Id.* at 570. Mr. Tam argued that there were alternative definitions to the term and the PTO had granted a number of unrelated trademark applications containing the term slant, but the court did not find his argument convincing. *Id.* The court pointed to a quote from Mr. Tam where he stated that the band name The Slants was trying to reclaim the term for the Asian community. The court used this to determine that The Slants was referring to the Asian Community. *Id.* at 570-71.

The number of individuals who relate a particular term to a meaning is strong evidence of the term's meaning. In *Pro-Football, Inc. v. Harjo*, the court found that the term REDSKIN clearly has two meanings, one referencing the respondent's professional football team and the other alluding to Native Americans. *Harjo*, 284 F. Supp 2d at 126. There was evidence pointing to the large use of the term Redskins by the media and press to refer to the football team, but the court also pointed to the substantial amount of evidence displaying the meaning of the term to be a reference to Native

Americans. *Id.* Some of the evidence pointing to the meaning of the term Redskins as referring to Native Americans included images the team supported. *Id.* at 126-27. Since there was substantial evidence pointing to the term Redskins meaning Native Americans, the court concluded that the term could be construed as meaning Native American. *Id.* at 127.

The meaning of Dumb Blond is to refer to musician Kourtney Luhv's stage name. The dictionary definitions of dumb and blond offer little help to make this determination. The dictionary definition of "dumb" typically applies to the intelligence or silence of an individual.¹ The dictionary definition of "blonde" typically applies to a woman's hair color.² The dictionary definitions of the two words combined would give the word the meaning an unintelligent or silent woman of golden hair color, but this does not give the term Dumb Blonde its full context. The full context of the Dumb

¹ Merriam-Webster's Dictionary defines dumb as: "(1)(a) lacking the human power of speech; (1)(b) lacking the ability to speak; (2) temporarily unable to speak (as from shock or astonishment); (3) not expressed in uttered words; (4) silent; (5) lacking some usual attribute or accompaniment; (6)(a) lacking intelligence; (6)(b) showing a lack of intelligence; (6)(c) requiring no intelligence; (7) not having the capability to process data." *Dumb*, Merriam-Webster's Dictionary, <http://www.merriam-webster.com/dictionary/dumb>.

² Merriam-Webster's Dictionary does not have a definition for blonde, but does mention the spelling in the definition for blond. The definitions it lists for blond are "of a flaxen, golden, light auburn, or pale yellowish-brown color; also: having blond hair <a blond man> —spelled *blond* when used of a by or man and often *blonde* when used of a girl or woman." *Blond*, Merriam-Webster's Dictionary, <http://www.merriam-webster.com/dictionary/blond>. (last visited Oct. 12, 2015).

Blonde trademark shows the meaning of the term is to refer to Kourtney Luhv's stage name. Ms. Luhv has been performing under the Dumb Blonde name since 2012. She has developed a devoted fan base who attend her concerts by the hundreds of thousands, mostly women, and has a large online following. Ms. Luhv, at the time of application for the trademark, had 40,000 "followers" on an online streaming service and about 100,000 active subscribers to her uTube channel which is under the name "DumbBlondeMusic."

The respondent has a substantial number of individuals who are familiar with her and the stage name Dumb Blonde. The reason this is significantly different from *In re Heeb* and *In re Tam* is because the Respondent has shown the significant number of individuals who understand the relation between the term Dumb Blonde and Ms. Luhv's stage name. In addition, this case is not similar to *Harjo* because while there were a substantial amount of individuals who related the term to meaning for the football team, there was substantial evidence showing the petitioner related the meaning of the term Native Americans by having a number of trademarks depicting Native Americans in conjunction with the term Redskins. Ms. Luhv has no trademarked references to the term Dumb Blonde referring to unintelligent women. For this reason, the Court should determine that the meaning of Dumb Blonde applies to Ms. Luhv's stage name.

If the court does not believe the meaning of Dumb Blonde applies to Ms. Luhv's stage name, the Court should determine that the meaning of Dumb Blonde applies to women. The Federal Circuit references *The Handbook of Gender, Sex, and Media*, to make its determination on dumb blond jokes, and the book states that these jokes are targeted towards women, not just blonde women. While blonde women may be the subject of the joke, the jokes are target at women.³ Similar to *In re Tam*, this court could take statements made by Ms. Luhv stating that she is trying to take the term Dumb Blonde and reclaim it for women, to determine the meaning of the term Dumb Blond to refer to women. Ms. Luhv has a number of images on her website promoting positive images of women, or images that mock the negative perception of women. In addition, Ms. Luhv has promoted women's rights in her songs by shedding a light on issues faced by women. If the Court does not believe the meaning of Dumb Blonde applies to Ms. Luhv's stage name, the Court should interpret the term to have a meaning referring to women.

2. Under The Second Prong Of The Disparagement Test, The Substantial Composite Of The Group At Issue Would Not Find The Likely Meaning Of Dumb Blonde As Disparaging.

³ The book states that women are the targeted group, not just blonde women. "The main thesis found in popular group of blonde women, their real target of mockery is women in general." KAREN ROSS, *THE HANDBOOK OF GENDER, SEX, AND MEDIA* 90 (John Wiley & Sons, Sept. 7, 2011).

If the Court determines the meaning of the term Dumb Blonde refers to Ms. Luhv, then the substantial composite of the group at issue would be her fans, and would not find the term disparaging under the second prong of the disparagement test. If the Court determines the meaning of the term Dumb Blonde does not refer to Ms. Luhv's stage name, but to women, the substantial composite of women would not find the likely meaning of Dumb Blonde as disparaging.

To determine if a trademark is disparaging, the second prong of the disparagement test asks the examiner to look to a **substantial composite** of the relevant group allegedly being disparaged. *In re Beck*, 114 U.S.P.Q.2d at 1052. There is no settled way to determine what is **substantial composite**, but courts have found that the number has to be a substantial amount, but not necessarily a majority, that finds the trademark disparaging. *Id.*

To determine if a trademark, while the views of the general public's take on a disputed term will be taken into consideration, ultimately it is how the relevant group allegedly being disparaged views the term that is the deciding factor. In *In re Lebanese Arak Corp.*, the Lebanese Arak Corporation was appealing the refusal to register KHORAN as a trademark for a wine or other alcoholic beverage. *In re Lebanese Arak Corp.*, 94 U.S.P.Q.2d (BNA) 1215 (T.T.A.B. 2010). The court determined that the term at issue was closely related to the sacred Islamic text, the Koran, and for this reason the relevant group allegedly being disparaged were Muslims. *Id.* at

1216. The court determined that according to their evidence, the term was disparaging when viewed by Muslims. *Id.* at 1218.

A trademark that appears to be blatantly disparaging, with enough evidence, can be found to be non-disparaging since it is not disparaging to a substantial composite of the group at issue. The Trademark DYKES ON BIKES was approved by the TTAB following an initial rejection of the trademark. *McDermott v. S.F. Women's Motorcycle Contingent*, 240 F. App'x 865, 866 (Fed. Cir. 2007). In 2003, the San Francisco Women's Motorcycle Contingent (SFWMC) applied to register Dykes On Bikes for education and entertainment services. *Id.* The examiner initially rejected the trademark Dykes On Bikes because the word "dyke" was disparaging to lesbians. *Id.* The SFWMC provided additional evidence after the TTAB remanded the trademark for examination. *Id.* After reviewing the additional evidence, the examiner approved the trademark Dykes On Bikes for publication. *Id.* The individuals looking to obtain approval of the trademark were a part of the group allegedly being disparaged. Jessica M. Keiser, *How Dykes on Bikes Got It Right: Procedural Inequities Inherent in the Trademark Office's Review of Disparaging Trademarks*, 46 U.S.F. L. REV. 1, 10 (2011). The SFWMC provided hundreds of pages of supplemental evidence showing the positive connotations associated with dyke within the lesbian community and how a substantial part of the lesbian community has used the word in an effort to reclaim the term for their own in an effort to redefine the meaning of dyke.

Id. at 10-11. Following the reconsideration and approval of the Dykes on Bikes trademark, the PTO reconsidered trademark applications involving other lesbian slurs that were looking to reclaim the term for the lesbian community. *Id.* at 11.

If the Court determines that the relevant group is Ms. Luhv's fan base, then the substantial composite of her fan base would not find the term Dumb Blonde as disparaging. Many of Ms. Luhv's fan base, mostly composed of women, view Dumb Blonde as a positive term. The Petitioner has only pointed to a couple individuals who posted on the Respondent's uTube videos that deem the term Dumb Blonde as disparaging. Similar to *S.F. Women's Motorcycle Contingent*, the applicant is a member of the relevant group, and there is a substantial amount of evidence showing the positive connotation associate to the term Dumb Blonde.

If the Court determines that the relevant group are women, even then there is not a substantial composite of the relevant group that deems the term Dumb Blonde to be disparaging. If it is simply some women who are offended by the term Dumb Blonde, this would not make up the substantial composite of women. According to Dr. C. George Boerree, only two percent of the world's population has blonde hair.⁴ Under any interpretation of

⁴ Dr. C. George Boerree, *Hair*, [http://webpace .ship.edu/cgboer/race.html](http://webpace.ship.edu/cgboer/race.html) (last visited Oct. 10, 2015).

“substantial composite,” there is no way a two percent would be considered a substantial composite. There is little evidence point to a substantial composite of women have viewed the term Dumb Blonde as disparaging. The Petitioners have only provided a few negative blog posts and one book that discusses the negative connotations surrounding the term Dumb Blonde. The Respondent has provided evidence showing support from hundreds of thousands of individuals, mostly women, who support Ms. Luhv’s efforts in reclaiming the term “Dumb Blonde” for women. Similar to *S.F. Women’s Motorcycle Contingent*, there is such a substantial amount of evidence, such as the support of hundreds of thousands of individuals in the Calidonia region and various other states and the positive imagery Ms. Luhv associates with the term in her music, that the Court should determine that Dumb Blonde is not disparaging in the eyes of women.

C. When Determining If A Trademark Is Disparaging, The Examiner Should Err On The Side Of Publication.

In determining if the trademark Dumb Blonde is disparaging, the examiner must err on the side of publication. Though the Landham Act is absent of any language stating the way examiners should review applications, it has been well accepted through recent court decisions and scholars that an examiner should lean in favor of publishing, and bears the burden of proving a disparagement case. Todd Anten, *Self-Disparaging Trademarks and Social Change: Factoring the Appropriation of Slurs Into Section 2(a) of the Lanham Act*, 106 COLUM. L. REV. 388, n.119.

Determining disparagement is a very vague process, and for this reason, the examiner should err on the side of publication. In *In re In Over Our Heads*, the TPO review the application for the trademark MOONIES. *In re In Over Our Heads, Inc.*, 16 U.S.P.Q.2d (BNA) 1653, 1654 (T.T.A.B. 1990). The examiner determined that the term could be disparaging to the members of the Unification Church who's members are known as Moonies. *Id.* at 1654. The court determined that the examiner should rule in favor of publication, and reversed the TPO's refusal of the trademark. *Id.* at 1654-55.

The Circuit Court and the TTAB erred in determining Dumb Blonde is disparaging, because there is so much vagueness surrounding the disparagement analysis. The examining attorney, the TTAB, and the Circuit Court did not mention that they were examining in favor of publication. This void, along with the limited information used to make the determination that the term Dumb Blond is disparaging shows all prior examination of this application for the Dumb Blond trademark were not reviewed in favor of publication. The Court should review this application in favor of publication, and should deem the term Dumb Blond as not disparaging.

This Court will review the lower court's second holding with regards to the unconstitutionality of Section 2(a) under a de novo standard, but

benefiting from the lower court's analysis. *See Peel v. Attorney Registration and Disciplinary Ass'n of Ill.*, 496 U.S. 91, 108 (1990).

II. Section 2(a) Of The Lanham Act Violates The First Amendment Of the United States Constitution Because It Restricts Speech Deserving of The Highest Protection From Government Interference By Allowing The Patent And Trademark Office To Refuse Registration Of A Trademark Based On Potentially Disparaging Content.

The government asks this Court, in essence, to afford it the right to restrict anybody's speech that could potentially disparage anyone. This country's Founding Fathers made clear that Congress shall not make any law that restricts a citizen's freedom of speech. The United States Constitution's plain text, paired with this Court's jurisprudence surrounding this issue and the importance of upholding this fundamental right, should lead this Court to affirm the decision of the Court of Appeals for the Federal Circuit that Section 2(a) of the Lanham Act is unconstitutional.

The First Amendment unequivocally provides that "Congress shall make no law ... abridging the freedom of speech." U.S. CONST. amend. I. The First Amendment is a fundamental right, enjoyed by American citizens in their everyday life, deserving of the greatest protection. *See Roth v. United States*, 354 U.S. 476, 484 (1957). Stricter restrictions on speech such that the government could sensor any speech it deemed inappropriate—leading to a society where the only words spoken were those the government wanted its people to hear—denies American citizens of their inherent interests and

rights. *See Turner Broad. Sys., Inc. v. F.C.C.*, 512 U.S. 622, 641 (1994).

Section 2(a) of the Lanham Act directly conflicts with the intentions the Constitution's drafters had when the United States prospered to independence, free from government oppression, and allowed all people the privileges of life, liberty, and the pursuit of happiness.

Section 2(a) gives the PTO the power to refuse registration of any trademark which “[c]onsists of or comprises immoral, deceptive, or scandalous matter; or matter which may disparage or falsely suggest a connection with persons, living or dead, institutions, beliefs, or national symbols, or bring them into contempt, or disrepute.” 15 U.S.C. § 1052(a). By its plain language, Section 2(a) clearly allows a federal agency to restrict speech. *Id*; *See also Simon & Schuster, Inc. v. Members of N.Y. State Crime Victims Bd.*, 502 U.S. 105, 115 (1991) (noting that a statute presumptively violates the First Amendment when it creates a financial burden because of speech's content). Ms. Luhv and others who seek to express themselves will be greatly burdened by the financial exploitation in other people using their names or marks for personal benefit.

Further, this Court has long held that fundamental rights such as the First Amendment deserve heightened protection from government restriction. *See Neb. Press Ass'n v. Stuart*, 427 U.S. 539, 570 (1976); *see also Ashcroft v. Am. Civil Liberties Union*, 533 U.S. 564, 573 (2002) (“[A]s a general matter, the First Amendment means that the government has no

power to restrict expression because of its message, its ideas, its subject matter, or its content.”). After nearly seventy years of power vested in the PTO, it is time to reinvigorate fundamental constitutional rights by finding Section 2(a) unconstitutional.

This Court has stated time and again that restraints on speech and publication are “the most serious and the least tolerable infringement on First Amendment rights.” *Neb. Press*, 427 U.S. at 559; *see also Members of City Council of L.A. v. Taxpayers for Vincent*, 466 U.S. 789, 804 (1984) (“[T]he First Amendment forbids the government to regulate speech in ways that favor some viewpoints or ideas at the expense of others.”). Restrictions on content-based speech, like that at issue here, are subject to strict scrutiny analysis by this Court. *Consolidated Edison Co. v. Public Service Comm’n of N.Y.*, 447 U.S. 530, 537 (1980) (noting that the First Amendment generally prohibits restrictions based on a message’s content); *Turner Broad.*, 512 U.S. at 642 (noting that content-based restrictions on speech will receive strict scrutiny analysis). The free flow of ideas and speech throughout the country is one of the many aspects that makes this country so special and must be considered in light of the First Amendment. *Friedman v. Rogers*, 440 U.S. 1, 8 (1979); *Roth*, 354 U.S. at 484 (“The protection given speech and press was fashioned to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people.”).

Although commercial speech may in some instances receive less

protection than non-commercial speech, it still falls within the First Amendment's protections when it is not misleading. *See Bolger v. Youngs Drug Prods. Corp.*, 463 U.S. 60, 69 (1983) (stating that protection for commercial speech depends on the nature and expression and the government's interest in regulating the speech); *But see Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council*, 425 U.S. 748, 762 (1976) (determining that commercial speech still receives First Amendment protection).

This Court may benefit from the decisions of lower federal appellate courts analyzing Section 2(a)'s constitutionality. *See, e.g., McGinley*, 660 F.2d at 484 (suggesting that since refusing to register specific trademark does not prohibit applicant from still using the trademark, the applicant's First Amendment rights are not infringed); *See also Pro-Football v. Blackhorse*, 115 U.S.P.Q.2d (BNA) 1524, 1529 (E.D. Va. 2015); (holding recently that cancelling a trademark for the name "Redskins" help by a professional football team did not violate team's free speech rights). The Federal Circuit agreed in *In re Mavety Media Grp. Ltd.* that Section 2(a) is constitutional, facially and as applied, where a pornographic magazine publisher sought to register the mark "BLACK TAIL" for content consisting of African Americans. 33 F.3d 1367, 1375 (Fed. Cir. 1994).

Those holdings failed to consider any framework or analyses set forth by this Court. Moreover, those decisions miss the mark. In a day and age

where protecting oneself against both financial and public exploitation is of great importance, refusing the registration of a trademark indeed violates the First Amendment and should be scrutinized as a law abridging a person's freedom of speech.

Section 2(a) fails constitutional scrutiny on its face and as applied to Ms. Luhv. A three-part test is used to determine whether a First Amendment violation has occurred such that a restriction on speech cannot stand. *In re Luhv*, 1337 F.3d at 459. First, the restricted speech must be protected. *Roth*, 354 U.S. at 481. Next, the restriction must implicate the First Amendment. *Texas v. Johnson*, 491 U.S. 397, 405 (1989). Lastly, the restriction must be deemed unconstitutional when analyzed through the appropriate framework. *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of N.Y.*, 447 U.S. 557, 566 (1980).

This Court created a test in *Central Hudson* to determine whether the First Amendment has been violated through restricted speech to satisfy the third prong listed above. *Id.* at 564. This final test contains four parts. *Id.* First, the one challenging the statute must prove the speech does not concern illegal activity and is not misleading. *Id.* at 566. Next, the government has the burden of proving (1) its asserted interest in restricting such speech is substantial, (2) the restriction directly advances that interest, and finally, (3) the restriction is not more extensive than necessary to serve the asserted government interest. *Id.*; *See also Bolger*, 463 U.S. at 70 (noting that the

party seeking to uphold a statute has the burden of showing it should be upheld). The restriction on speech Section 2(a) creates meets the standard set forth by this Court. Section 2(a) is therefore unconstitutional.

Several policy considerations also weigh in favor of affirming the lower court's decision as to Section 2(a)'s constitutionality. The government would save vast time and resources in connection with litigating these disputes. Further, while American citizens will receive deserved protection from Constitutional infringement, removing Section 2(a) from the Lanham Act will place trademark law more in line with other intellectual property laws, while still allowing the government to regulate trademarks. Lastly, the slippery slope that will ensue if the federal government is permitted to continue restricting speech in this manner contradicts basic principles on which this country was founded.

This Court should affirm the decision of the Court of Appeals for the Federal Circuit with respect to Section 2(a) as an unconstitutional restriction on speech because Section 2(a)'s restriction violates the First Amendment.

A. This Court Reviews Constitutional Questions Of Law Under A *De Novo* Standard.

This Court will review the lower court's second holding with regards to the unconstitutionality of Section 2(a) under a *de novo* standard, but benefiting from the lower court's analysis. *See Peel v. Attorney Registration and Disciplinary Ass'n of Ill.*, 496 U.S. 91, 108 (1990).

B. Section 2(a)'s Plain Text Provides For A Restriction On Speech Directly Contrary To The First Amendment By Allowing The PTO To Refuse Trademark Registration For Potentially Disparaging Marks.

The federal government, through the PTO, seeks for the continued authority to deny applicants' trademark registration based on matter that may be deemed disparaging. This restriction directly violates the First Amendment. The First Amendment explicitly states that Congress may not create any law "abridging the freedom of speech." U.S. CONST. amend. I. After the Lanham Act's enactment in 1947 many lower courts have analyzed the constitutionality of separate sections of the law. *See, e.g., McGinley; In re Mavety*, 33 F.3d at 1374. While this Court has yet to directly address Section 2(a)'s constitutionality, it benefits from extensive analyses of both the Lanham Act itself and First Amendment violations generally. Examining the text and purpose of the First Amendment should lead this Court to find Section 2(a) unconstitutional.

The First Amendment plainly states "Congress shall make no law ... abridging the freedom of speech." U.S. CONST. amend. I. Admittedly, some forms of speech are given less protection, allowing government restrictions in rare circumstances. *See, e.g., Turner Broad.*, 512 U.S. at 681. However, it remains true that exceptions to the First Amendment must be narrowly tailored. *Cent. Hudson*, 447 U.S. at 564. Reasons for this include that the exchange of ideas and fostering of diverse points of view are critical for the

growth of our society. *See Johnson*, 491 U.S. at 408-09 (“[A] principal function of free speech under our system of government is to invite dispute. It may indeed best serve its high purpose when it induces a condition of unrest, creates dissatisfaction with conditions as they are, or even stirs people to anger.”). Given that the First Amendment is a fundamental right, it should be afforded the highest protections. *Neb. Press*, 427 U.S. at 589.

This Court has stated content-based speech, as opposed to content-neutral speech, deserves heightened protections. *See, e.g., Turner Broad.*, 512 U.S. at 642. The speech at issue here is content-based speech in that it is being rejected solely because of the message it conveys. Content-based speech deserves heightened protection because by discriminating against speech strictly based on its content, such discrimination inherently abridges such expression in violation of the First Amendment. *Id.* at 65.

Similarly, this Court has noted a difference between commercial speech and non-commercial speech. *See, e.g., Va. State Bd.*, 425 U.S. at 760-61. Commercial speech is speech that “proposes a commercial transaction.” *Bolger*, 463 U.S. at 66 (quoting *Va. State Bd.*, 425 U.S. at 762). Ms. Luhv’s proposed mark “Dumb Blonde” is at least partially commercial speech because it is associated with her professional career and would be used in conjunction with business opportunities and profit-seeking activity.

While free speech protections under the First Amendment are not

necessarily an absolute freedom, barriers to restraint must remain high and a presumption exists against restrictions on speech. *Neb. Press*, 427 U.S. at 561. The Court there acknowledged throughout the case the First Amendment’s “vital constitutional guarantee” in finding restrictions on media outlets publishing comments made to law enforcement officers unconstitutional. *Id.* at 570. It also noted “prior restraints on speech and publication are the most serious and the least tolerable infringement on First Amendment rights.” *Id.* at 559. A prior restraint on speech is a restraint that has “an immediate and irreversible sanction.” *Id.* Rejecting Ms. Luhv’s trademark application under Section 2(a) constitutes a prior restraint in that it freezes her ability to use the mark for a specified period of time. *See id.*

The Court took another step toward constitutional fairness seven years later when it ruled that restrictions on mailing advertisements for contraceptives were unconstitutional. *Bolger*, 463 U.S. at 75. There, the Court noted at the outset that restrictions on commercial, content-based speech may be permissible if, for example, the message sought to be delivered is deceiving or misleading. *Id.* at 65. However, content-based restrictions are reserved for “the most extraordinary circumstances.” *Id.* The Court further articulated that speech which is neither misleading nor concerning illegal activity will be afforded First Amendment protection. *Id.* at 68.

This Court took yet another positive step in defining where First Amendment restrictions will be acceptable in *Johnson*. The Court there held

burning the American flag was expressive enough to implicate the First Amendment such that a restriction on that expression is unconstitutional. *Johnson*, 491 U.S. at 420. While the subject matter there has no direct bearing on this case, the Court’s insistence on First Amendment principles is guiding. The Court left no doubt that a “principal function of free speech under our system of government is to invite dispute.” *Id.* at 408. In light of that landmark case, it bears the question why the federal government should still seek to censor any type of speech that a person may deem disparaging.

If the free flow of speech invites dialogue and diverse viewpoints among Americans, any registered trademarks bearing minimally offensive terms should be invited, not rejected, by the government. In a day and age where progressive thinking ultimately prevails, and minority viewpoints are uniformly invited—not dismissed—it seems backwards that one is allowed to publicly engage in offensive or disparaging speech so long as the government does not approve it through a federal agency, but that same person would be restricted from obtaining a trademark for use with her professional career. This Court has noted throughout its jurisprudence that discrimination relating to the speaker’s viewpoint is especially egregious, and regulating that type of private speech based on a particular viewpoint is disfavored. *See Members of L.A.*, 466 U.S. at 804 (holding restrictions on speech that favor certain viewpoints over others inherently violate the First Amendment); *See Child Evangelism Fellowship of Md., Inc. v. Montgomery Cty. Pub. Schs.*, 457

F.3d 376, 384 (4th Cir. 2006) (explaining that the government is not only required to refrain from viewpoint discrimination, but also that it must provide adequate safeguards to prevent exclusion of viewpoints).

Furthermore, the constitutional presumption against view-point discrimination applies in full force where the government does not necessarily ban private speech, but hinders it or refuses to fund it based simply on the government's disagreement with the speech's content. *See Legal Servs. Corp. v. Velazquez*, 531 U.S. 533, 548-49 (2001) (noting that when private speech is at issue, a resulting consequence with regard to funding cannot aim to suppress ideas in the interest of the government). In light of these holdings, it becomes troubling that the plain language of Section 2(a) actually requires the viewpoint discrimination prohibited by this Court. In allowing the PTO to refuse registration of any trademark that may be disparaging, it is given the power to be completely at odds with the First Amendment by restricting speech that *may* be disparaging.

Lower courts have ignored those constitutional safeguards for years. *See McGinley*, 660 F.2d at 484 (holding First Amendment not implicated because no "tangible form" of expression was suppressed); *In re Mavety*, 33 F.3d at 1374 (holding First Amendment rights are not implicated when trademark registration is refused); *Pro-Football, Inc. v. Blackhorse*, 115 U.S.P.Q2d (BNA) 1524 (holding that First Amendment is not violated when trademark is cancelled because it does not restrict former holder's ability to

discuss or use term in a general manner). However, to reason that First Amendment rights are not violated simply because the applicant could still technically use the term blatantly ignores any financial safeguards associated with trademark registration or practical protections associated with obtaining a trademark. *Simon & Schuster*, 502 U.S. at 115.

A trademark applicant has her First Amendment rights violated by the PTO when she is refused registration of a mark that references a specific group of people any time the PTO or the reviewing attorney thinks the trademark may disparage any group of people. Refusing to register a trademark indeed implicates the First Amendment. *See Members of L.A.*, 466 U.S. at 804 (noting that the First Amendment is implicated when speech is regulated simply because of its content).

As a practical matter, just because someone has other available options does not mean that his or her constitutional guarantees are not infringed: a public university prohibiting verbal use of a rival school's name violates the First Amendment although a student could still, in a literal sense, move to a different school and utter the words making up the rival school's name.

The plain text of the First Amendment provides that Section 2(a) of the Lanham Act is unconstitutional.

C. Section 2(a) Fails Constitutional Muster Under This Court's Framework Because Trademark Registration Is Protected Speech, The Restriction Of Which Implicates The First Amendment, And The Government Has No Substantial Interest In Restricting Such Speech.

This Court has articulated a framework to determine whether a First Amendment violation has occurred. *See In re Luhv*, 1337 F.3d at 459. First, the speech in question must be protected. *Roth*, 354 U.S. at 481. Second, the government must take action to restrict speech in a manner that implicates the First Amendment. *Johnson*, 491 U.S. at 405. Finally, the abridgement must be construed as unconstitutional when analyzed under *Central Hudson*. 447 U.S. at 566. All three prongs are met here. Thus, Section 2(a) is unconstitutional.

If the government implicates the First Amendment by restricting protected speech, the *Central Hudson* framework dictates that the restriction will only be deemed constitutional if four elements are met. First, the trademark applicant must show the commercial speech neither concerns illegal activity nor is misleading. *See Va. State Bd.*, 425 U.S. at 771 (noting that the government may restrict speech referencing illegal activity); *see also Friedman*, 440 U.S. at 9 (acknowledging that commercial speech shall not be misleading to consumers). If the speech passes that standard, the next step requires the government to assert a substantial interest. *Cent. Hudson*, 447 U.S. at 566. Then, the restriction must directly advance the substantial

government interest. *Id.* Lastly, the regulation must not be more extensive than necessary to serve that interest. *Id.* Under this framework, the lower court correctly ruled that Section 2(a) violates the First Amendment.

1. Trademark Registration Is Considered Protected Speech For First Amendment Purposes.

The restricted speech at issue is protected. *See Forsyth Cty. v. Nationalist Movement*, 505 U.S. 123, 134-35 (1992) (noting that First Amendment protections are triggered when a statute creates a financial burden for speech in addition to punishment or ban imposed on speech). Ms. Luhv's trademark application implicates both her personal and professional identity. One aspect of the trademark for "Dumb Blonde" is the financial protection inherent in obtaining a trademark, in that other people could not capitalize off the name. *Am. Commc'ns Ass'n v. Douds*, 339 U.S. 382, 402 (1950). Similarly, obtaining the mark protects Ms. Luhv from other people dictating her public image by purporting to be her through the unauthorized use of the mark. Another important feature is the connection with Ms. Luhv's fans, as "Dumb Blonde" highlights gender stereotypes and potentially women's capabilities as they pertain to current culture. *In re Luhv*, 1337 F.3d at 459. The lower court correctly determined that the special meaning behind the mark, paired with the connection between the name and her musical career, constitutes its use as protected commercial speech. *Id.*

2. Section 2(a)'s Restriction On Protected Speech Implicates The First Amendment.

The next step requires this Court to analyze whether Section 2(a) implicates the First Amendment. *Johnson*, 491 U.S. at 406. The PTO contends that since Ms. Luhv is still technically able to use the term “Dumb Blonde” in conjunction with her career, her First Amendment rights are not implicated. But trademark registration “confers substantive and procedural rights and benefits on trademark owners who register their marks.” *In re Luhv*, 1337 F.3d at 459. For example, absent a registered trademark, any person could use the name “Dumb Blonde” as a stage name, or to sell merchandise and reap financial benefits. These considerations significantly implicate the First Amendment.

Ms. Luhv's First Amendment rights are further implicated insofar as she is unconstitutionally stripped of benefits inherent in trademark registration. The benefits conferred on trademark owners are significant enough, and the burdens associated with restriction are severe enough, that the First Amendment is undoubtedly implicated. *In re Luhv*, 1337 F.3d at 459 (“[T]he government may not deny a benefit to an individual on a basis that infringes a constitutionally protected interest.”). The registration process is funded by trademark owners' registration fees, not by taxpayers or the federal treasury, illustrating the application of the unconstitutional conditions doctrine. *Id.*

It follows that the unconstitutional conditions doctrine applies here because “the trademark registration process does not implicate Congress’ power to spend, and is in fact a prototypical example of a regulatory regime.” *Id.* at 459-60; *See Bd. of Cty. Comm’rs, Wabaunsee Cty. v. Umbehr*, 518 U.S. 668, 674 (1996) (explaining that unconstitutional conditions doctrine prohibits the government from denying a benefit to someone on a basis that infringes constitutionally protected freedom of speech). Under this doctrine, the First Amendment is implicated because Ms. Luhv’s receiving financial benefits are conditioned upon abridging of her speech.

3. Under The *Central Hudson* Framework Articulated By This Court, Section 2(a) Should Be Deemed Unconstitutional.

After determining that trademark registration is protected speech or expression, and refusing a trademark under Section 2(a) implicates the First Amendment, the final consideration is whether Section 2(a)’s restriction is unconstitutional under *Central Hudson*. The term “Dumb Blonde” is not misleading, nor does it concern illegal activity.

a. The government does not have a substantial interest in restricting potentially disparaging speech under Section 2(a).

Although the government would argue that it has a substantial interest in promoting non-offensive speech to those who presumably wish to be free from such speech, this justification lacks basis. *Fed. Commc’ns*

Comm'n v. League of Women Voters of Cal., 468 U.S. 364, 383-84 (1984); *see Cent. Hudson*, 447 U.S. at 564 (stating the government must establish a substantial interest to place restriction on protected speech); *see Bolger*, 463 U.S. at 71 (stating that the government cannot rely on offensiveness to justify restriction on speech). The lower court correctly determined that the government failed to meet its burden with respect to establishing any appreciable interest. Even if an interest were present, the restriction fails to advance any interest. The vagueness and over breadth of Section 2(a) also leads to a conclusion that it is unconstitutional.

b. Even if the government could establish a substantial interest in having such a restriction, Section 2(a) does not directly advance any interest.

Section 2(a) fails to advance any government interest even if this Court found the government could establish a substantial interest. The test for this prong is that of strict scrutiny. *Turner Broad.*, 512 U.S. at 658. This means that the restriction must be directly related to a compelling government interest. *Id.* at 653. Section 2(a) does not directly advance any interest, in that Ms. Luhv can still use “Dumb Blonde” in association with her musical career. The problem, again, is that Section 2(a) allows the PTO to refuse Ms. Luhv and other applicants rights and benefits associated with trademark registration. People, and musicians in particular, all over the country will continue to speak and express themselves as they choose. The public with or

without trademark registration will observe this speech and expression; denying registration simply subjects the applicant to financial exploitation and degraded control over his or her image.

c. Section 2(a)'s scope is more extensive than necessary to serve any substantial government interest if one could be established.

Even under the last prong of the *Central Hudson* test, Section 2(a) still fails constitutional scrutiny because it is more extensive than necessary to achieve any government interest. Section 2(a) is unconstitutionally overbroad and facially vague. Statutes that are too vague or overbroad are subject to overruling by this Court. *See Smith v. Goguen*, 415 U.S. 566, 572-73 (1974) (holding that a statute may be ruled unconstitutionally vague if it fails to set reasonably clear guidelines to follow); *Schad v. Borough of Mount Ephraim*, 452 U.S. 61, 66 (1981) (noting that overbroad laws deter protected activities, and may thus be unconstitutional).

Section 2(a) is unconstitutionally vague in that it provides no guidelines for what constitutes a “disparaging” mark. Rather, a statute listing specific words or phrases would be better equipped to withstand constitutional scrutiny. Likewise, Section 2(a) is overbroad such that it encompasses essentially all speech that could potentially be found offensive. In a forward looking and ever changing society, Section 2(a) provides no guidance for what terms may be disparaging now or in the future. Reasoning

for Section 2(a)'s over breadth is reflected in many cases. *See, e.g., City of Houston v. Hill*, 482 U.S. 451, 458 (1987). For these reasons, Section 2(a) fails to pass the tests outlined by this Court for determining when a statute violates the First Amendment.

Therefore, the analysis under *Central Hudson* provides that Section 2(a) is unconstitutional.

D. The Decision To Find Section 2(a) Unconstitutional Would Not Fundamentally Change The Scope Of Trademark Law, But Would Instead Bring The Lanham Act More In-Line With Trademark Law Generally And Would Save The Federal Government Time And Resources.

Affirming the lower court's decision that Section 2(a) violates the First Amendment will not fundamentally alter the Lanham Act's overall application to trademarks. To the contrary, by excluding the current Section 2(a) from the Lanham Act the government will no longer have to litigate these types of matters. The government would save valuable time and resources associated with litigating these types of disputes if Section 2(a) is struck down. *See* Stephen R. Baird, *Moral Intervention in the Trademark Arena: Banning the Registration of Scandalous and Immoral Trademarks*, 83 Trademark Rep. 661, 793 (1993). Further, people around the country will have the protections they deserve against restricted speech and the free flow of ideas and expressions. By looking forward, as opposed to backward at potentially disparaging speech, the government will see that trademark law

will benefit from removing Section 2(a) from the Lanham Act.

Excluding Section 2(a) from the Lanham Act's entire scope will not materially change its affect. *See Regan v. Time, Inc.*, 468 U.S. 641, 653 (1984) (noting that the severability doctrine is presumed to govern such that any unconstitutional portion of a statute may be struck down but remainder of statute can stand). It would merely follow that for the PTO to decline trademark registration, it would have to do so through another portion of the statute. Furthermore, eliminating the PTO's power granted in Section 2(a) will bring trademark law more in line with copyright and patent law. *See Jendi B. Reiter, Redskins and Scarlet Letters: Why "Immoral" and "Scandalous" Trademarks Should Be Federally Registrable*, 8 Fed. Cir. B.J. 191, 200 (1976). These policy considerations weigh in favor of removing Section 2(a) from the Lanham Act's equation.

Finally, this Court should consider the slippery slope that comes with allowing the PTO to refuse registration of any offensive or disparaging trademark. Rarely, in other areas of law, may the government censor speech strictly because of its content. *See, e.g., Ex parte Murphy*, 200 U.S.P.Q. (BNA) 801, 802-03 (1977). The lack of definite standards in conjunction with Section 2(a) will lead to continued warrantless regulation of individuals' speech, endangering one of the fundamental principles this country was founded on. As former President Harry S. Truman eloquently stated:

Once a government is committed to the principle of silencing the voice of opposition, it has only one way to go, and that is down the path of increasingly repressive measures, until it becomes a source of terror in all its citizens and creates a country where everyone lives in fear.

Manfred F.R. Kets de Vries, *Lessons on Leadership by Terror* 117 (2004).

For the foregoing reasons, this Court should affirm the lower court's decision that Section 2(a) of the Lanham Act violates the First Amendment.

CONCLUSION

For the foregoing reasons, this Court should hold that the TTAB erred in refusing the registration of the mark “Dumb Blonde,” and that, alternatively, Section 2(a) of the Lanham Act is unconstitutional such that the PTO may not rely on it to refuse registration of a mark.

CERTIFICATION OF COMPLIANCE

We the students using the below pseudonyms certify that this brief complies with the format requirements of the Pepperdine University School of Law Eighteenth Annual National Entertainment Law Moot Court Competition. In particular, we certify that this brief is in 12-point Century Schoolbook font with margins of at least one inch on all sides and does not exceed 10,000 words excluding the cover pages, questions presented, table of contents, table of authorities, and statement of jurisdiction.

Dated at Team 111 October, 20, 2015.

Respectfully submitted,

/s Team 111
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