No.

In the

Supreme Court of the United States

KOURTNEY LUHV,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Writ of Certiorari from the Supreme Court of

Team # 113
Counsel for Petitioner

This 20 day of October, 2015

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QUESTION PRESENTED

1. DID THE TRADEMARK TRIAL AND APPEAL BOARD ERR IN REJECTING A SOLO MUSIC ARTIST'S APPLICATION TO REGISTER THE TRADEMARK "DUMB BLONDE" AS HER STAGE NAME ON THE GROUNDS THAT THE MARK MAY BE DISPARAGING TO WOMEN WITHIN THE MEANING OF SECTION 2(a) OF THE LANHAM ACT?
2. DOES SECTION 2(a)'s PROHIBITION ON REGISTERING MARKS THAT MAY BE DISPARAGING VIOLATE THE FIRST AMENDMENT OF THE UNITED STATES CONSTITUTION?

TABLE OF AUTHORITIES

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CONSTITUTIONAL PROVISIONS

The First Amendment of the United States Constitution provides "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or the press; or the right of the people peaceably to assemble, and to petition the government for the redress of grievances." U.S. Const. amend. I

STATEMENT OF THE CASE

On July 9, 2014, Appellant filed with the Patent and Trademark Office seeking to register the mark DUMB BLONDE for "Entertainment, namely live performances by a musical band". The examining attorney refused to register this mark, pursuant to 15 U.S.C. § 1052 (a), and Appellant appealed. The Trademark Trial and Appeal Board affirmed the refusal on basis that this mark was disparaging to a substantial composite of women with Blonde hair. Appellant appealed the TTAB's decision claiming that it erred in finding this mark to be disparaging, and secondly that section 2(a) of the Lanham Act's prohibition on registering marks that may be disparaging is unconstitutional.

STANDARD OF REVIEW

The petitioner believes that this refusal should similarly be reviewed *de novo*, with underlying fact findings reviewed for substantial evidence. *In re Pamela GELLER and Robert B.*

Spencer., 2013 WL 6632192 (C.A.Fed.), 15. Substantial evidence is something less than the weight of the evidence but more than a mere scintilla. *Id.* Evidence is substantial if a reasonable person might find that the evidentiary record supports the agency's conclusion. *Id.* "Where two different conclusions may be warranted based on the evidence of record, the Board's decision to favor one conclusion over the other is the type of decision that must be sustained ... as supported by substantial evidence." *Id.*

STATEMENT OF THE FACTS

Vocalist, Kourtney Luhv (Petitioner) is a solo artist who has performed at various venues in the southern Calidonia region and other states under the name "Dumb Blonde" since 2012. During this time, she developed a fan base who attend her concerts and follow her music on the internet on various websites such as soundpuff.com and UTube.com. Petitioner has a registered account under the name "DumbBlondeMusic", which she uses to post videos to communicate with her fans and share music-production-related tips with other aspiring artists. In June 2014, Petitioner recorded several pieces of music with the intention to release the music as an extended-play format record via a record label. Petitioner was able to negotiate a deal with a record label for a recording contract that would include a $2,000,000 advance

upon execution of the agreement. However, this deal was contingent upon Peitioner's ability to register a trademark for "Dumb Blonde".

On July 9, 2014, Petitioner applied to register the mark Dumb Blonde with the Patent and Trademark Office for entertainment and clothing purposes. The mark was deemed disparaging by the examining attorney pursuant to 15 U.S.C. § 1052(a), which lead to the refusal to register the mark. This denial was appealed and brought before the Trademark Trial and Appeal Board. The Trademark and Appeal Board affirmed the examining attorney's refusal on the basis that the mark "may be disparaging to a substantial composite of the referenced group, namely women who have a blonde hair color." The Trademark Trial and Appeal Board cited to images from Petitioner's website which illustrated a blonde woman eating plastic fruit. Petitioner argued that she chose the mark to reclaim the stereotype associated with blonde woman as well as raise awareness of the challenges stemming from gender discrimination and negative stereotypes faced by all women. The Trademark Trial Appeal Board further justified the refusal of the mark because a number of dictionary definitions and articles support the assertion that women find the phrase "dumb blonde" to be offensive.

Next, Petitioner appealed the Trademark Trial Appeal Board's decision contending that it erred in affirming the examining attorney's rejection of her application for registration on the basis that the mark may be disparaging. Petitioner relied on two contentions on her appeal. First, Petitioner argued that the views of the women cited do not accurately represent the views held by Respondent's fans or substantial composite of women. Second, Petitioner argued that section 2(a) of the Lanham Act prohibition on registering marks that may be disparaging is unconstitutional.

Argument

In determining whether a mark "may disparage" persons, the TTAB used the following two part test involving the following questions: (1) what is the likely meaning of the matter in question, taking into account not only dictionary definitions, but also the relationship of the matter to the other elements in the mark, the nature of the goods or services, and the manner in which the mark is used in the marketplace in connection with the goods or services; 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* (Fed. Cir. 2014) 751 F.3d 1355, 1358.

a. The dictionary meaning to the term "Dumb Blonde" is disparaging.

It is in connection with the first prong of the test, i.e., the likely meaning of the matter in question, that the real disagreement exists between applicant and the examining attorney, and between the majority and the dissent. *In Re Lebanese Arak Corp.* (P.T.O. Mar. 4, 2010) 94 U.S.P.Q.2d 1215. Courts consider dictionary evidence when determining whether a term "may disparage" a substantial composite of the referenced group. *Pro-Football, Inc. v. Blackhorse*, 1-14-CV-01043-GBL, 2015 WL 4096277, at *21 (E.D. Va. July 8, 2015).

The petitioner respectfully asks this court to view the dictionary meaning to the phrase "dumb blonde". Pursuant to several dictionary sources, the term "dumb blonde" is defined as "A pretty but rather stupid young blonde woman." http://dictionary.reference.com/browse/dumb-blonde?s=t. These sources include but are not limited to; www.macmillandictionary.com, www.dictionary.com. www.urbandictionary.com, http://onlineslangdictionary.com, www.wordnik.com, and www.google.com. The identification of the term "dumb blonde" by the dictionary should be evidence of how this term used in the marketplace. The dictionary term of a word can be considered "more reflective of the public's current

understanding of the term." *In re Geller*, 751 F.3d 1355, 1357 (Fed. Cir. 2014).

In *Pro-Football, Inc.*, evidence established that a professional football team's registered "REDSKINS" trademarks may disparage a substantial composite of Native Americans. As basis under Lanham Act for canceling the registrations, 11 dictionaries defined "redskins" as referring to North American Indians and contained usage labels characterizing "redskins" as offensive or contemptuous. *Pro-Football, Inc.* 1-14-CV-01043-GBL. However, Pro-football argued that the term "redskins" has lost its dictionary meaning in the world of football due to the impact the team has on society. *Id.* However, the court in *Pro-Football, Inc.* held that the record evidence of eleven dictionary definitions and their usage labels describing "redskins" as "offensive" or "contemptuous," weighed in favor of finding that these marks "may disparage" a substantial composite of Native Americans. *Id.*

This case is similar to *Pro-Football Inc.* because numerous dictionary definitions refer to the phrase at issue as offensive and contemptuous. Similar to *Pro-Football Inc.*, the dictionary meaning of the matter in question is where the disagreement exists between the applicant and the examining attorney. In the present case, the term "dumb blonde" implies a negative

stereotypical view on women that the examining attorney and the TTAB characterize as offensive or insulting. Therefore, this court should rule like the courts in *Pro-Football Inc.* and weigh the dictionary definitions in favor of finding that these marks "may disparage" a substantial composite of individuals.

Furthermore, "this is not a case where, through usage, the word 'redskin(s)' has lost its meaning, in the field of professional football, as a reference to Native Americans in favor of an entirely independent meaning as the name of a professional football team… [Here] 'Redskins' clearly both refers to respondent's professional football team and carries the allusion to Native Americans inherent in the original definition of that word."). *In Re Heeb Media, LLC*, 89 U.S.P.Q.2d 1071 (Trademark Tr. & App. Bd. Nov. 26, 2008). This differs from the present case because the term "dumb blonde" does not refer to another group or have alternate meanings.

b. The relationship between the term "dumb blonde" and the other elements in the mark

To ascertain the meaning of the matter in question, we must not only refer to dictionary definitions, but we 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. *Pro-Football, Inc. v. Harjo*, 415 F.3d 44 (D.C. Cir. 2005).

In *Geller*, the TTAB refused to register mark STOP THE ISLAMISATION OF AMERICA in connection with the recited services of "understanding and preventing terrorism." *In re Geller*, 751 F.3d 1355 (Fed. Cir. 2014). The court held that these marks were disparaging to the American Muslims and refused the trademark on these grounds. *Id.* In viewing the meaning of this disparaging term, the court viewed the dictionary meaning as well as other elements in the mark such as certain essays posted on the website. *Id.* The court held these essays to be reflective of the meaning behind the disparaging term and affirmed the refusal of the trademark. *Id.*

In the present case, the courts should consider other elements in the mark to be reflective of the dictionary definition of "dumb blonde". The record indicates that the TTAB cited several photographs from the Appellant's website depicting a blonde woman eating plastic fruit and applying "Wite-Out"® to text displayed on her computer monitor. These photographs on Appellant's website are reflective of the dictionary meaning of the term "dumb blonde" because these images portray a pretty but rather stupid young blonde woman trying to eat plastic fruit and erase words on a computer screen by applying "Wite-out".

This case is similar to *Geller* because the TTAB has other elements associated with the mark that are reflective of the mark. In *Geller,* the court found essays posted to the website sufficient to support the definition of a disparaging term. Similarly, this Court should find the photographs posted to the Appellant's site to be reflective of the disparaging definition associated with the term "dumb blonde". Therefore, we respectfully ask this Court to find the relationship between the term "dumb blonde" and the other elements in the mark to be disparaging.

c. The manner in which the mark is used in the marketplace in connection with the goods or services.

Under the *Harjo* test we must first determine, based on the evidence of record, the "likely meaning" of HEEB, taking into account the nature of the goods and services and the manner in which it is used in the marketplace. *In Re Heeb* Media, LLC, 89 U.S.P.Q.2d 1071 (Trademark Tr. & App. Bd. Nov. 26, 2008).

In *Heeb,* Applicant, has filed an application to register the mark HEEB (in standard character form) for "clothing, and headwear" in International Class 25 and "entertainment, namely, conducting parties" in International Class 41. *Id.* The application includes a claim of ownership of Registration No. 2858011 issued on June 29, 2004 for the mark HEEB for "publication of magazines" in International Class 41. *Id.*

However, registration was finally refused under Section 2(a) of the Trademark Act, 15 U.S.C. §1052(a), on the ground that applicant's mark "is disparaging to a substantial composite of the referenced group, namely, Jewish people." *Id.*

The court held that the word "HEEB" is a highly disparaging reference to Jewish people, that it retains this meaning when used in connection with applicant's goods and services, and that a substantial composite of the referenced group finds it to be disparaging. *Id.* It reasoned that the fact that applicant has good intentions with its use of the term does not obviate the fact that a substantial composite of the referenced group find the term objectionable. *In Re Heeb Media, LLC*, 89 U.S.P.Q.2d 1071 (Trademark Tr. & App. Bd. Nov. 26, 2008).

In the present case, Appellant negotiated a deal with a record label that required her to register a trademark "Dumb Blonde". This trademark would allow Appellant to provide goods and services on "uTube" and on her "Soundpuff" account. These goods and services will be provided to everyone but focused on women in today's society. However, Appellant argues that her lyrics focus on the issues faced by women in today's society.
This case is similar to *Heeb* because they both involve disparaging terms that will be associated with goods and services. This Court should rule as the court in *Heeb* and find

that the term at issue has several disparaging definitions and that approval of this trademark would be disparaging as it relates to goods and services. Furthermore, this Court should find that the intentions of Appellant do not obviate the fact that a substantial composite of the referenced group would find this term offensive. Therefore, this Court should find that the term "Dumb Blonde" is disparaging in the dictionary meaning and associated with goods and services in the marketplace.

d. **The meaning of "Dumb Blonde" is disparaging to a substantial composite of women.**

The second prong of the disparagement analysis will inquire if the likely meaning of the mark "is found to refer to identifiable persons, institutions, beliefs or national symbols," we next consider "whether that meaning may be disparaging to a substantial composite of the referenced group." *In re Tam*, 785 F.3d 567, 571 (Fed. Cir. 2015).

In *Tam*, trademark applicant sought review of the TTAB decision that affirmed an examining attorney's refusal to register the trademark "THE SLANTS" for a musical band, on grounds that the mark was disparaging to people of Asian descent. *Id.* The court found evidence that dictionaries, brochures, and blogs universally characterize the word "slant" as disparaging, offensive, or an ethnic slur when used to refer to a person of Asian descent. *Id.* The court held this evidence to be

substantial to prove the second prong, even without a marketing survey or some other quantitative measure of the term's offensiveness. *Id.*

Although the term "Dumb Blonde" is typically referenced to women with blonde hair, all women may fall victim to this negative stereotype. A Harvard journalist quoted that "blonde discrimination is real—even, and especially, at a place like Harvard." http://www.thecrimson.com/article/2004/12/2/having-a-blonde-moment-i-am/. This author conducted an experiment where she urged the reader to think of five blondes everybody knows. *Id.* She then quoted "first five that come to mind for me are Marilyn Monroe, Britney Spears, Hillary Clinton, Lisa Kudrow and Barbie. Four out of five of these women are famous for playing dumb." *Id.*

Throughout this article, the author discusses the challenges that blonde women face due to the dumb blonde stereotype. Furthermore, she shows statistics from facebook.com that show a "Women against Blonde Discrimination" group counts 84 members. *Id.* This is evidence that the "dumb blonde" stereotype has hit the academe. *Id.*

Although women with blonde hair are offended by this stereotype, women as a whole are affected by this disparaging term. Pursuant to the American Jurisprudence Trials, the

disparaging term “dumb blonde” refers to women and can be viewed as discrimination based on sex. 33 Am. Jur. Trials 257 (Originally published in 1986). For example: “the language used by employer, including calling employee a ‘dumb blonde’… established that employer discriminated against employee "because of" her sex.” *Id.* Therefore, a woman does not need blonde hair to be offended by the term ”dumb blonde”.

This case is similar to *Tam* because the Court has ample evidence to show that the term at issue is offensive to a substantial composite of people. However, this case differs from *Tam* because this case provides articles of testimony stating that these women find the term at issue to be offensive. Therefore, this Court should rule as the court in *Tam* and find that the evidence presented is sufficient to prove that a substantial composite of women are offended by the term “Dumb Blonde”.

e. **Cancellation of Trademark Registration implicates Petitioner’s First Amendment Rights**

The First Amendment provides that Congress shall make no law abridging the freedom of speech, or of the press. U.S. Const. amend. I Section 2(a) of the Lantham Act states that a trademark shall be refused registration if it “consists of or comprises immoral, deceptive, or scandalous matter, or matter which my disparage or falsely suggest a connection with persons,

living or dead, institutions, beliefs or national symbols, or bring them in contempt, or disrepute. . .” 15 U.S.C. § 1052(a) Section 2(a) of the Lanham Act implicates the First Amendment because as applied, it prohibits the ability to express protected speech under the Constitution.

There must be three requirements for a finding a First Amendment violation in connection with a restriction placed on speech. First, the speech in question must be protected speech. Second, the government must take some action which abridges that speech in a manner that implicates the First Amendment. Third, the abridgement of must be construed as unconstitutional when analyzed under the appropriate framework set out by this Court in *Central Hudson*.

To the first requirement, trademark is considered protected commercial speech. In *Roth v. United States,* this Court required the speech in question to be considered protected speech. *Roth v United States*, 354 U.S. 476, 481 (1957) Commercial speech is defined as the “dissemination of information as to who is producing and selling what product, for what reason, and at what price.” *Va. State Bd. Of Pharmacy v. Va. Citizens Consumer Council*, 425 U.S. 748, 765 (1976) In *Virginia State Board of Pharmacy*, this Court held “Commercial speech is not wholly

outside the protection of the First and Fourteenth Amendments." *Id.* at 748

The mark "Dumb Blonde" falls within the category of commercial speech because it promotes customers to purchase items associated with the mark. Petitioner uses this name to attract customers to purchase her music and solicit clothing as well. Additionally, Petitioner attempts to use the name "Dumb Blonde" not only to promote her music career but to promote a positive message. The mark "Dumb Blonde" seeks to editorialize on an important cultural subject, namely issues pertaining to women and gender difference. (Rp. 3)Petitioner uses the mark to bring to light the issues faced by women in today's society. Petitioner's message attracts an audience of supporters who ultimately purchase her music and clothing promoting her message.

In regards to the second requirement, the enforcement of this act abridges speech that requires implication of the First Amendment. It is true that this Court has held in several cases that the refusal of a mark does not prohibit an applicant from use of the mark, only from registering it. However, the "disparaging marks" exclusion is unconstitutional due it its viewpoint discrimination against speech in what should be considered as a limited public forum.

Limited public forums are defined as "a place which the Government intentionally opens for public discourse." *Cornelius v. NAACP Legal Def. & Educ. Fund, Inc.*, 473 U.S. 788, 825 (1985) Trademark regulations extends to only those who are "entities of similar character." *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 46 (1983) Trademark regulations should be viewed as a limited public forum because any member of the public has the ability to apply for a trademark but the regulations are limited to those who seek protection of a mark.

The trademark registration system should be seen as a form of limited public forum, in which the government may impose content-based limits but not viewpoint based limitations.

Moving to the final requirement, this Court must use the test set out in *Central Hudson* to determine whether regulations that affect commercial speech violate the First Amendment. *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of New York*, 447 U.S. 557 (1980) Regulations do not violate the First Amendment if: (1) the regulated speech concerns an illegal activity or the speech is misleading, (2) the government's interest in restricting the speech is substantial, (3) the regulation in question directly advances that interest, and (4) the regulation is narrowly tailored to serve the governments interest. *Id.*

There is nothing illegal or misleading about disparaging a trademark and therefore the first prong is satisfied. However, TTAB must identify a substantial government interest in order to justify its regulation. The government may argue that the mark may be offensive to a certain audience; however, this Court held the offensiveness of protected speech does not justify its suppression. *Bolger v. Youngs Drug Prods. Corp*. 463 U.S. 60, 71 (1983). Without satisfying these two prongs, the government cannot show section 2(a) of the Lanham Act satisfies the test this Court has set out in *Central Hudson* and thus its regulation is in violation of the First Amendment.

CERTIFICATION OF INDEPENDENT WORK

I,_____, certify that I have not received any assistance from any other person or impermissible source, in the preparation of this assignment. My research and writing is my individual work product.

This day of October, 2015.

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