

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

Counsel for Petitioner

QUESTIONS PRESENTED

- I. 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 after the examining attorney found the mark may disparage a substantial composite of the referenced group, mainly women, within the meaning of Section 2(a) of the Lanham Act, after reviewing dictionary definitions, the nature of the goods and services, and the manner in which the mark is used in the marketplace?

- II. Does Section 2(a) of the Lanham Act, a viewpoint neutral statute which prohibits the federal government from registering marks that may disparage and offend its American citizens, violate the United States Constitution when registering trademarks is government speech, the unconstitutional-conditions doctrine does not apply because the federal trademark system is protected under the Spending Clause, and the regulation of speech passes constitutional muster under the *Central Hudson* test?

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OPINIONS BELOW

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

STATEMENT OF JURISDICTION

The decision of the United States Court of Appeals for the Federal Circuit was entered on June 6, 2015. *Id.* The petition for the writ of certiorari was granted by this Court. This Court has jurisdiction under 28 U.S.C. § 1254(1) (1988).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The constitutional and statutory provisions relevant to the determination of this case include the following:

U.S. Const. art. I, § 8, cl. 1;

U.S. Const. amend. I; and

15 U.S.C. § 1052(a) (2006).

STATEMENT OF THE CASE

Respondent is a vocalist and solo artist, who performs under the name, DUMB BLONDE. *In re Kourtney Luhv*, 1337 F.3d 455, 455 (Fed. Cir. 2015). Respondent's musical talent incorporates elements from other genres such as Grindcore, Neurofunk, and American Folk music; however, what Respondent prides herself on is the ability to focus on a few of the issues faced by women through her lyrics. *Id.* Respondent has stated that she chose the mark DUMB BLONDE, as a way to reclaim the stereotype associated with blonde women. *Id.* at 458. She also seeks to raise awareness of the challenges stemming from gender discrimination, and the negative stereotypes faced by all women. *Id.* at 457.

Respondent has performed under the alias, DUMB BLONDE, at some locations and venues, where she has created a fan base who frequent concerts and follow her music on the online streaming service at www.soundpuff.com ("Soundpuff"). *Id.* at 455–56. Respondent also uses the video hosting website, www.uTube.com ("uTube"), to interact with her fan base under the name DumbBlondeMusic. *Id.* at 466. On this video hosting website, Respondent has posted videos to communicate with her fans and share music-production-related tips. *Id.*

In June 2014, Respondent had recorded several pieces of music she wished to release as an extended play format record via a record label. *Id.* Respondent was able to strike a deal with a record label for a recording contract that would include a \$2,000,000 advance upon execution of the agreement. *Id.* This life-changing deal,

however, required that Respondent trademark DUMB BLONDE through the federal trademark registration system. *Id.* When Respondent filed her application for trademark registration, she had a decent amount of followers and subscribers. *Id.* at 456.

On July 9, 2014, Respondent filed with the Patent and Trademark Office (“PTO”) Application No. 99/989,052 (‘052 application), seeking to register the mark DUMB BLONDE for “Entertainment, namely live performance by a musical band” and “clothing, namely, sweatshirts, t-shirts, tank tops, and headwear.” *Id.* The examining attorney found the mark “may be disparaging” to women under Lanham Act, 15 U.S.C. § 1052(a) (2006) (hereinafter Section 2(a)), by citing to materials submitted within the ‘052 application. *Id.* The examining attorney refused to register the trademark. *Id.*

Respondent appealed the PTO’s decision, and was brought before the Trademark Trial and Appeal Board (“TTAB”). *Id.* The TTAB affirmed the examining attorney’s refusal to register the mark. *Id.* TTAB held that the mark “may be disparaging to a substantial composite of the referenced group, namely women who have blonde hair color,” after citing to substantial evidence which included photographic images from Respondent’s website which depicted a blonde woman eating plastic fruit while applying Wite-Out® to text displayed on her computer monitor. *Id.* at 457. Additionally, the TTAB found that the mark may disparage a substantial composite of women after reviewing dictionary definitions, numerous articles, and user comments on Respondent’s uTube videos, which all

supported the conclusion that women may find the mark DUMB BLONDE offensive. *Id.* Respondent, however, alleges that the examining attorney erred in finding the mark may disparage, due to her good-natured intentions in raising awareness for women's issues. *Id.* Respondent further argues her fans enjoy her music and do not find the mark offensive. *Id.*

Respondent has appealed the TTAB's decision on two grounds. *Id.* First, Respondent alleges the TTAB erred in affirming the examining attorney's rejection of her application for registration because the mark may disparage. *Id.* Second, Respondent argues Section 2(a)'s prohibition on registering disparaging marks is unconstitutional because it violates her Freedom of Speech. *Id.*

SUMMARY OF THE ARGUMENT

This case presents issues concerning the Legislature's means in regulating the federal trademark registration system in the United States, and the delicate balance between protecting innocent American citizens from disparaging marks in the marketplace, and an individual's Freedom of Speech. The PTO, TTAB, and Federal Circuit Court of Appeals did not err when they found the mark, DUMB BLONDE, may disparage a substantial composite of women. The Federal Circuit Court of Appeals erred, however, in finding Section 2(a) of the Lanham Act unconstitutional for violating a trademark owner's Freedom of Speech.

I.

The court of appeals correctly denied Respondent's application to federally register DUMB BLONDE because it may disparage women.

The federal government has a substantial interest in denying disparaging marks from entering the Principal Register to protect the public. After reviewing the appropriate tests, the PTO and TTAB obtained sufficient evidence, including dictionary definitions, literary references, and the manner in which the mark is used in commerce, to support the conclusion that DUMB BLONDE likely means an unintelligent woman with blonde-colored hair, with the intention to refer to all women. The court of appeals correctly affirmed the conclusions of the PTO and TTAB by holding the mark, DUMB BLONDE, may disparage women, and denied the disparaging mark's entrance into the Principal Register.

This Court should affirm the judgment of the court of appeals and hold the mark, DUMB BLONDE, may disparage women and does not conform to Section 2(a) of the Lanham Act.

II.

The court of appeals erred in disregarding this Court's precedence by holding Section 2(a) of the Lanham Act is unconstitutional for violating an applicant's First Amendment right. In making its decision, the court of appeals confused the fundamental purpose of trademark law, and mistakenly broadened the First Amendment's reach.

First, trademarks are protected speech. When the applicant applies to register a trademark into the Principal Register to receive procedural benefits, however, the decision to deny or allow a trademark is government speech. The applicant's First

Amendment right to Freedom of Speech, however, does not affect or reach government speech.

Second, when a government creates and manages a program, the government may determine the content and limits of that program, and by doing so, does not abridge an applicant's Freedom of Speech. Consequently, the government has the right to prohibit disparaging marks from being included in its government program. Furthermore, the unconstitutional-conditions doctrine does not apply to the federal trademark registration system, because the federal government has not funded a program that prohibits a mark's owner from using their mark on their "own time and dime" outside the limits of the government program. An applicant is able to use their mark in commerce despite not being federally registered, and is not "compelled" to change their mark.

Lastly, even if this Court were to analyze federally registered trademarks as protected commercial speech, Section 2(a)'s prohibition on denying disparaging marks is still not an invalid restriction of speech under the *Central Hudson* test. After a disparaging mark has proven that it is not illegal and does not mislead a consumer, this Court will find the government has a substantial interest, and duty, in protecting its citizens from being disparaged and offended. The government also has a substantial interest in remaining viewpoint neutral by not taking any organization or individual's side on a public issue. Finally, the federal government has created a fundamentally fair program that is narrowly tailored to both protect

individuals who have registered an eligible mark, and not punish or penalize any individuals who submitted applications that were denied following Section 2(a).

This Court should reverse the judgment of the court of appeals and hold Section 2(a) is constitutional and does not violate an individual's Freedom of Speech.

STANDARD OF REVIEW

The determination that a mark may disparage is a conclusion of law. The TTAB's factual findings are reviewed for substantial evidence, while its ultimate conclusion as to registrability is reviewed de novo. *In re Geller*, 751 F.3d 1355, 1358 (Fed. Cir. 2014) (quoting *In re Fox*, 702 F.3d 633, 636 (Fed. Cir. 2012)).

ARGUMENT AND AUTHORITIES

Under Section 2(a) of the Lanham Act, the PTO may not register any marks that may be disparaging. *In re Mavety Media Grp. Ltd.*, 33 F.3d 1367, 1374 (Fed. Cir. 1994). A disparaging mark "dishonors by comparison with what is inferior, slights, deprecates, degrades, or affects or injures by unjust comparison." *In re Geller*, 751 F.3d at 1358 (quoting *In re Lebanese Arak Corp.*, 94 U.S.P.Q.2d (BNA) 1215, 1217 (T.T.A.B. 2010)). Upon reviewing dictionary definitions, this Court will find the mark, DUMB BLONDE, most likely means an unintelligent woman with blonde-colored hair. Additionally, this Court will find, through substantial evidence, this mark is intended to reference all women, regardless of their hair color. Thus, the PTO and the TTAB did not err when they denied Respondent's application to

trademark DUMB BLONDE, because the mark may disparage all women by degrading and dishonoring them.

Furthermore, Section 2(a) of the Lanham Act's prohibition on registering marks that may disparage does not violate the United States Constitution and the applicant's Freedom of Speech. U.S. Const. amend. I. Following this Court's decision in *Walker v. Texas Division, Sons of Confederate Veterans, Inc.*, the federal trademark registration program is government speech, and is therefore exempt from First Amendment scrutiny. 135 S. Ct. 2239, 2247 (2015).

Next, the regulations of the federal trademark system does not abridge an applicant's Freedom of Speech because the applicant may continue to use the mark, without any penalties, in commerce. *In re McGinley*, 660 F.2d 481, 484 (C.C.P.A. 1981). Additionally, the unconstitutional-conditions doctrine does not apply because the government, who created and manages this program, can decide what marks should not occupy the "time, services, and use of funds of the federal government" under the Spending Clause. U.S. Const. art. I, § 8, cl. 1.

Lastly, Section 2(a) is constitutional because the regulation of speech passes the *Central Hudson* test. *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n*, 447 U.S. 557 (1980). If a disparaging mark is not misleading, then the government may regulate the federal trademark system without violating the First Amendment, because it has a substantial interest in protecting its citizens, and its interests are achieved in a narrowly tailored and non-extensive way through Section 2(a). *Id.*

Accordingly, the Federal Circuit Court of Appeals erred when it disregarded this Court's precedence and held Section 2(a) is unconstitutional.

I. THE TRADEMARK TRIAL AND APPEAL BOARD DID NOT ERR IN REJECTING RESPONDENT'S APPLICATION TO REGISTER THE TRADEMARK, DUMB BLONDE, ON THE GROUND THAT THE MARK MAY BE DISPARAGING TO WOMEN WITHIN THE MEANING OF SECTION 2(a) OF THE LANHAM ACT.

Respondent argues in her first issue that the Trademark Trial and Appeal Board erred when it rejected her application to trademark DUMB BLONDE because the trademark contains matter that "may disparage" a substantial composite of the referenced group. Section 2(a) of the Lanham Act states,

No trademark by which the goods of the applicant may be distinguished from the goods of others shall be refused registration on the principal register on account of its nature unless it—

(a) Consists of or compromises 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). Congress' insertion of "may" before "disparage" was done purposefully. *In re Lebanese Arak Corp.*, 94 U.S.P.Q.2d at 1217. To refuse registration of an immoral, deceptive, or scandalous mark, Section 2(a) requires that the mark contain matter that is *actually* "immoral, deceptive, or scandalous." 15 U.S.C. § 1052(a) (emphasis added). The applicant need not *intend* to disparage a group. *Id.* As long as the mark consists of "matter, which may disparage," the PTO may refuse an application. *Id.*

To determine whether a mark contains matter that "may disparage" persons, the TTAB has established a two-part test:

- (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 and services; and
- (2) If the meaning is found to refer to identifiable persons, whether that meaning may be disparaging to a substantial composite of the referenced group.

In re Geller, 751 F.3d at 1358. This Court must first determine the “likely meaning” of DUMB BLONDE; and then, if there is a meaning that invokes a group of persons, consider whether that meaning may disparage a substantial composite of the referenced group, although not necessarily a majority in context of contemporary attitudes. *In re Heeb Media, LLC*, 89 U.S.P.Q.2d (BNA) 1071, 1074 (T.T.A.B. 2008) (quoting *In re McGinley*, 211 U.S.P.Q. (BNA) 668, 673 (C.C.P.A. 1981)).

A. Substantial Evidence Supports the Board’s Determination That the Mark Is Likely Intended to Reference Women with Blonde-Colored Hair.

The TTAB correctly concluded that the mark, DUMB BLONDE, is likely intended to refer to women with blonde hair. When answering the first prong of the test, the court starts by examining dictionary definitions, as “dictionary definitions represent an effort to distill the collective understanding of the community with respect to language and thus clearly constitute more than a reflection of individual views.” *In re The Boulevard Entm’t, Inc.*, 334 F.3d 1336, 1340 (Fed. Cir. 2003) (also holding that if the mark has only one pertinent meaning then dictionary evidence may be enough). An examining attorney must first use dictionary definitions and personal knowledge to determine how the general public would interpret a

trademark, and then must adopt the mindset of a member of the referenced group to determine whether a substantial composite of the referenced group would feel disparaged. *Pro-Football, Inc. v. Harjo*, 284 F. Supp. 2d 96, 124 (D.D.C. 2003).

1. Dictionary definitions support the PTO's and TTAB's conclusion that DUMB BLONDE has an offensive, promiscuous, and negative meaning towards women who have blonde hair color.

There is no question the phrase, "dumb blonde," implies a negative and stereotypical view of women, as found by the examining attorney and the TTAB. *In re Luhv*, 1337 F.3d at 457. "Dumb blonde" is defined by Google as, "a blond-haired woman perceived in a stereotypical way as being attractive but unintelligent." Google, https://www.google.com/?gws_rd=ssl#q=define+dumb+blonde. The *MacMillan Dictionary* defines "dumb blonde" as an "insulting word for a woman with blonde hair who is considered to be sexually attractive but not very intelligent." *MacMillan Dictionary*, <http://www.macmillandictionary.com/us/dictionary/british/dumb-blonde>. Lastly, *Urban Dictionary* defines "dumb blonde" as "essentially blonde with the addition of 'dumb' for clarification," and "a person who cannot really do anything right." *Urban Dictionary*, <http://www.urbandictionary.com/define.php?term=Dumb+Blonde>. These three dictionaries show just a few of the many definitions associated with the term "dumb blonde."

Furthermore, *Merriam-Webster* defines "dumb," as "lacking the ability to speak," "lacking intelligence," and is "often found offensive." *Merriam-Webster*, <http://www.merriam-webster.com/dictionary/dumb>. *Merriam-Webster* also defines "blonde" as "of a flaxen, golden, light auburn, or pale yellowish-brown color."

Merriam-Webster, <http://www.merriam-webster.com/dictionary/blonde>. The dictionary also clarifies that “blonde” is spelled “blond” when used of a boy or man and often “blonde” when used of a girl or woman. *Id.*

After reviewing dictionary definitions, the examining attorney may consider whether there is another pertinent meaning to the mark when used in commerce. In the case of *In re Heeb*, an applicant attempted to trademark the mark HEEB for mainly entertainment and clothing purposes. 89 U.S.P.Q.2d at 1075. When the examining attorney reviewed the likely meaning of the term, the PTO concluded there was no dispute that HEEB was likely intended to reference Jewish persons. *Id.* The PTO also held HEEB had no other meaning pertinent to the manner in which they would use the goods and services in commerce, mainly for clothing and entertainment. *Id.*

Similarly, dictionary definitions and the manner in which the mark DUMB BLONDE will be used in commerce, mainly entertainment and clothing purposes, has no other meaning but of an unintelligent woman. The TTAB and PTO correctly concluded that “dumb blonde” implies a negative connotation towards women with blonde-colored hair, and is characterized as offensive or insulting.

2. The use of the mark as it appears in the marketplace in connection with the goods and services, support the TTAB’s finding that the mark is likely intended to refer to women.

The evidence provided and cited by the PTO and TTAB support the conclusion that DUMB BLONDE, as it appears in the marketplace, may disparage a substantial composite of the referenced group, namely women. *In re Luhv*, 1337

F.3d at 457. The TTAB cited to photographic images from Respondent’s website, which depicted a blonde woman eating plastic fruit and applying Wite-Out® to text displayed on her computer monitor, images of women attending her concerts, images of Respondent who is also a blonde-haired woman, and also cited to Respondent’s lyrics, which discuss women and gender discrimination. *Id.* Thus, the TTAB and PTO properly concluded that DUMB BLONDE, as it will be used in commerce, is likely intended to reference women.

B. The Mark, DUMB BLONDE, May Be Disparaging to a Substantial Composite of Women.

In deciding the second question, whether the meaning of the mark is one that may disparage a substantial composite of the referenced group, the TTAB looks to the views of the referenced group. *In re Geller*, 751 F.3d at 1360. A “substantial composite” of the referenced group does not mean a majority of the group must find that the mark is disparaging. *In re Luvv*, 1337 F.3d at 458. The TTAB has repeatedly explained that the term, “substantial composite,” may refer to a minority within the referenced group. *In re Heeb Media, LLC*, 89 U.S.P.Q.2d at 1074.

In today’s society, “dumb blonde” jokes are extremely popular, and significant evidence have suggested women view these “dumb blonde” jokes negatively, primarily because the vast majority of dumb blonde jokes are predominantly about women, with just a negligible portion focusing on men. Limor Shifman & Dafna Lemish, *The Handbook of Gender, Sex, and Media* 89 (2011). Scholars all agree that these offensive jokes surfaced around the time women joined the workforce, and

that stupidity and promiscuity were the two main features that constructed the “dumb blonde” joke. *Id.*

Since their creation, these jokes have embodied a sexist and discriminatory view of the female gender altogether. *Id.* These jokes literally depict the blonde woman’s purpose as that of merely a sex object for men, with nothing more to offer due to their lack of intelligence. Conversely, the term, “dumb blonde” inadvertently, allows for the brunette woman (or any other color hair) to be viewed as the slightly more intelligent, but asexual and undesirable, counterpart. This mindset has raised an unnecessary rivalry amongst women, and has indirectly supported the male’s superficial belief in women. This issue, thus, affects women of every hair color, of every race, and of every ethnicity, in today’s world. *Id.*

As Respondent herself states, the mark DUMB BLONDE is about bringing light to gender and women discrimination. However, by portraying herself as DUMB BLONDE, Respondent has created this euphemism that directly negates her so-called “good intentions,” and directly offends a substantial amount of females who already suffer from this discrimination daily. Nonetheless, the applicant’s intent, whether good or bad, is not a factor considered when deciding if a “substantial composite” of the referenced group may find the mark disparaging. *In re Heeb Media, LLC*, 89 U.S.P.Q.2d at 1077.

Respondent’s argument that her fans are enough to fill the “substantial composite” requirement are also not enough to stop a mark from being disparaging in the eyes of the PTO. *In re Luhv*, 1337 F.3d at 458. Perceptions of the general

public are irrelevant. *In re Hines*, 31 U.S.P.Q.2d (BNA) 1685, 1688 (T.T.A.B. 1994). Rather, the relevant perceptions are those of persons or groups who are “referred to, identified, or implicated in some recognizable manner by the involved mark.” *Id.* The use of the mark, mainly for entertainment and clothing, is presumed to be “public use, viewable by any member of the referenced group, including those members of the group who may be offended by the term.” *In re Heeb*, 89 U.S.P.Q.2d at 1075. The voice of women who find the phrase “dumb blonde” offensive, will not be discounted, even though Respondent may find individuals with disparate views. *In re Shiao Tam*, 108 U.S.P.Q.2d (BNA) 1305, 1310 (T.T.A.B. 2013).

Furthermore, Respondent contends that her mark should get registered because other more offensive marks, such as DYKES ON BIKES, have been registered. *In re Luhv*, 1337 F.3d at 458. (referencing *In re S.F. Women’s Motorcycle Contingent Appeal*, No. 000020-007200US (T.T.A.B. Sep. 15, 2005)). This argument has no merit. Prior registration of marks with similar characteristics should not bind the board, and Respondent’s argument does not change this analysis. *In re Heeb Media, LLC*, 89 U.S.P.Q.2d at 1077.

Having found DUMB BLONDE most likely means an unintelligent woman with blonde-colored hair, and that this meaning degrades and refers to women of all hair colors, this Court should conclude that a substantial composite of women may find the term DUMB BLONDE disparaging, and that the mark was properly denied according to Section 2(a).

II. SECTION 2(a)'S PROHIBITION ON REGISTERING MARKS THAT MAY BE DISPARAGING DOES NOT VIOLATE THE FIRST AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES.

A refusal to register a trademark does not have bearing on the applicant's ability to use the mark. *In re McGinley*, 660 F.2d at 484. Therefore, the First Amendment has not been implicated. *Id.* The PTO's refusal to register DUMB BLONDE does not "proscribe any conduct or suppress any form of expression," because it does not affect Respondent's right to continue to use the mark in the manner she chooses. *Id.* Trademark law does not authorize expressive activity, but works to avoid consumer confusion and prevent misappropriation of the economic goodwill associated with a mark and its owner. *Pro-Football, Inc. v. Blackhorse*, 115 U.S.P.Q.2d (BNA) 1524, 1538 (E.D. Va. 2015). Thus, Respondent's First Amendment Freedom of Speech has not been violated.

Conversely, the Federal Circuit Court of Appeals has been persuaded by an evolution of First Amendment Jurisprudence, and has held Section 2(a) is unconstitutional. *In re Luhv*, 1337 F.3d at 459. The court states there are three requirements for finding a First Amendment violation for a restriction placed on speech:

1. The speech in question must be protected speech. *See, e.g., Roth v. United States*, 354 U.S. 476, 481 (1957).
2. The government must take action, which abridges that speech in a manner that implicates the First Amendment, such as a government ban on flag burning. *Texas v. Johnson*, 491 U.S. 397, 405 (1989).
3. The abridgment must be construed as unconstitutional when analyzed under the appropriate framework. *Cent. Hudson Gas & Elec. Corp.*, 477 U.S. at 566.

In re Luhv, 1337 F.3d at 459.

Respondent cannot satisfy any of the above three requirements for a First Amendment violation. First, the speech in question is *not* protected speech. The registration of a trademark in the Principal Register is government speech, and does not pass the first requirement. *Walker*, 135 S. Ct. at 2247. Second, the government has taken no action that may abridge speech in a manner that implicates the First Amendment, because this is permissible government regulation of a government-funded program supported by the Spending Clause. *Rust v. Sullivan*, 500 U.S. 173, 193 (1991). Lastly, the government has a substantial interest in keeping disparaging marks from receiving the stamp of approval granted by the Federal Register’s time and dime, and does so in a narrowly tailored fashion. Consequently, Section 2(a)’s prohibition will pass the *Central Hudson* test, and should be held constitutional. *Cent. Hudson Gas & Elec. Corp.*, 477 U.S. at 557.

A. Issuing a Trademark Registration Is Government Speech Which Is Not Subject to a First Amendment Challenge.

The Federal Circuit incorrectly held trademark registration could be construed as protected commercial speech. *In re Luhu*, 1337 F.3d at 459 (quoting *Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council*, 425 U.S. 748, 765 (1976)). In the case of *Walker v. Texas Division, Sons of Confederate Veterans, Inc.*, this Court held that under the government speech doctrine, “when the government speaks, it is not barred by the Free Speech Clause from determining the content of what it says.” 135 S. Ct. at 2247. The Government’s decision to take, or not take, a position in its own speech does not violate the First Amendment rights of those who take an

opposing view. *Id.* The Free Speech Clause restricts government’s regulation of private speech; however, it does not regulate government speech. *Pleasant Grove City v. Summum*, 555 U.S. 460, 467–68 (2009).

1. Trademark registration is government speech as established in *Summum* and followed in *Walker*.

In *Summum*, this Court considered a religious organization’s request to erect a monument containing the organization’s Seven Aphorisms in a 2.5-acre city park. *Id.* The park already had fifteen other permanent displays, including a Ten Commandments monument, and at least eleven were donated by private groups or individuals. *Id.* The organization argued that the government had violated the Free Speech Clause by accepting the Ten Commandments monument, and rejecting their organization’s monument. *Id.*

This Court held the Free Speech Clause has no application when the government engages in their expressive conduct, and that a government entity has the right to “speak for itself.” *Id.* (quoting *Bd. of Regents of Univ. of Wis. Sys. v. Southworth*, 529 U.S. 217, 229 (2000)). To discover whether the government was speaking, this Court looked to various factors. This Court first concluded that history has shown that governments have long used monuments to speak to the public. *Id.* at 470. “When a government entity arranges for the construction of a monument, it does so because it wishes to convey some thought or instill some feeling in those who see the structure.” *Id.* at 471. A monument that is commissioned and financed by a government body for placement on public land constitutes government speech. *Id.* at 470. Additionally, this Court held monuments

that are privately financed and/or donated, and that the government accepts and displays to the public on government land, is also government speech. *Id.* This Court rejected the argument the city had provided a forum for private speech with respect to monuments. *Id.* Thus, this Court held that the city, even when it accepted privately donated monuments and placed it on city property, had engaged in expressive conduct that was best viewed as a form of government speech, and was not subject to First Amendment scrutiny. *Id.*

Second, this Court held that when an individual views a donated monument they interpret them as conveying a message on the property owner's behalf. *Id.* This Court reasoned it was not common for property owners to open up their property for the installation of permanent monuments that convey a message with which they do not wish to be associated with. *Id.* at 471. Thus, as a result, individuals “who observe donated monuments routinely—and reasonably—interpret them as conveying some message on the property owner's behalf.” *Id.* Thus, this is viewed as government's expressive activity in favor of government speech. *Id.*

Lastly, this Court found that the city maintained control over the selection of monuments. *Id.* at 473. This Court reasoned that the government has the general practice, with respect to donated monuments, as one of selective receptivity. *Id.* at 471. The city government had “effectively controlled” the messages sent to the public through the monuments in the park by exercising “final approval authority” over their selection. *Id.* at 473. Thus, this Court held the Free Speech Clause was not violated, because the city's decision to accept certain privately donated

monuments, while rejecting the organization's monument, was best viewed as expressive activity of government speech. *Id.*

Similarly, in *Walker*, this Court rejected a First Amendment challenge to the State of Texas's refusal to issue specialty license plates that featured the Confederate battle flag. 135 S. Ct. at 2243–44. A Texas Statute permits a State agency to refuse a design for a specialty license plate, “if the design might be offensive to any member of the public.” *Id.* This Court ruled that the refusal to issue a possibly offensive specialty license plate exercised government speech not subject to a challenge on the First Amendment and Free Speech Clause grounds. *Id.* While this Court did not establish that the factors considered in *Summum* created a bright-line test, the Court held, however, that whether the test applies to a certain case will depend on a case-by-case basis, and may be determined by applying the same three factors. *Id.* at 2247.

This Court first found in *Walker* that license plates had historically communicated government messages, because states have used license plate slogans to urge action, to promote tourism, and to tout local industries. *Id.* at 2248. This Court also found the public closely associated the messages on license plates with the government, in part because the name of the state is on every license plate. *Id.* Additionally, the Texas license plate is a government article serving the governmental purposes of vehicle registration and identification. *Id.* Thus, the average citizen could assume the issuers of the identification (the state government) typically would not permit the placement of messages with which it does not wish to

be associated on their identifications, and as such, would not endorse improper messages. *Id.* at 2249.

Lastly, this Court found the state had “effectively controlled” the messages it conveyed by having “final approval authority” over the messages. *Id.* The state Board must approve every specialty license plate design proposal before the design can appear on a Texas plate, and the Board has actively exercised this authority. *Id.* Thus, this Court found the state, when accepting or denying a specialty license plate, was engaging in government speech not subject to First Amendment strict scrutiny. *Id.* at 2250.

Applying these factors to the present case shows that trademark registration follows the government speech doctrine found in *Sumnum* and *Walker*. First, a federal trademark has historically communicated government messages to the public. The Federal Register was originally created for multiple reasons; however, an important reason for creating Federal Register of trademarks was to unify all the trademarks, make it easier for the American public to discover what trademarks had already been claimed, and give the public constructive notice of a prior claim for a mark. *Park 'N Fly, Inc. v. Dollar Park & Fly, Inc.*, 469 U.S. 189, 198 (1985). The Federal Register efficiently validates the mark, identifies the owner, and supports the owner’s exclusive right to use the mark, subject to any limitations listed in the registration certificate. 15 U.S.C. § 1057(b). Therefore, federal trademark registration communicates the message that the Federal

Government has approved the trademark. *Pro-Football, Inc. v. Blackhorse*, 115 U.S.P.Q.2d (BNA) 1524, 1525 (E.D. Va. 2015).

Second, the public associates the registration certificate with the federal government. The Lanham Act requires a USPTO registration certificate be issued in the name of the United States of America, under the seal of the USPTO, and also requires the registration certificate be signed by the Director of the USPTO. 15 U.S.C. § 1057(a) (2010). The registration certificate must reproduce the mark, and state the mark is registered on the Principal Register. 15 U.S.C. § 1057(b) (2010). Furthermore, the public closely associates federal trademark registration with the Federal Government as the insignia for federal trademark registration, ®, is a manifestation of the Federal Government's recognition of the mark. *Pro-Football, Inc. v. Blackhorse*, 115 U.S.P.Q.2d (BNA) at 1536. Thus, the public associates the registration certificate with the federal government.

Lastly, the government, through the USPTO, administers and “effectively controls” the messages it conveys. The government has final approval of authority over what certificates are issued, and what marks become included in the Principal Register. 15 U.S.C. § 1052(a). Thus, the case at hand has passed the test created by *Sumnum* and *Walker*. This Court held in *Walker*, that the State of Texas had the right to deny a specialty license plate that might be offensive to members of the public when displayed; accordingly, this Court should find the Government has the right to deny the application of marks which “may disparage” from being included in the Principal Register. *Walker*, 135 S. Ct. at 2247. Denying the application of

marks is expressive activity and government speech, which is not barred by the First Amendment. *Id.*

2. Federal trademark registration is government speech under the Fourth Circuit Court of Appeals' four-factor test.

The Fourth Circuit Court of Appeals, by following the recent approaches of other sister circuits, developed a flexible standard for analyzing the government speech doctrine. *Sons of Confederate Veterans, Inc. v. Comm'r of the Va. Dep't of Motor Vehicles*, 288 F.3d 610, 618 (4th Cir. 2002). There are four instructive factors to consider when deciding whether something is government speech or private speech:

1. The central purpose of the program in which that speech occurs;
2. Degree of editorial control exercised by the government or private entities over the content of the speech;
3. The identity of the literal speaker; and
4. Whether the government or the private entity bears the ultimate responsibility for the content of the speech.

Id. These factors are not exhaustive or always uniformly applicable. *Id.*

These four factors, when applied to this case, weigh in favor of finding trademark registration is government speech. The “central purpose” of the trademark registration program is to advance the government function of protecting consumers and owners of property. *Park 'N Fly, Inc.*, 469 U.S. at 198. In regards to the second factor, the government has an absolute “degree of editorial control” because the PTO gets to accept and reject applicant’s applications. 15 U.S.C. § 1052(a). Third, the Government is the literal speaker of what mark does, and does

not, get published in the Principal Register. *B&B Hardware, Inc. v. Hargis Indus., Inc.*, 135 S. Ct. 1293, 1300 (2015). Lastly, the Government bears the ultimate responsibility for the content of the registration certificate and Principal Register. 15 U.S.C. § 1052(a). By enacting the Lanham Act, Congress gave the PTO and all of their employees control to decide which marks will, or will not, be registered based on the Lanham Act's criteria. *Id.*

B. Even if Trademark Registration Is Protected Commercial Speech, the Government Has Not Abridged Any Manner of Speech That Implicates the First Amendment by Prohibiting Disparaging Marks from Being Included in the Principal Register.

The government has not abridged any manner of speech that implicates the First Amendment, because trademark registration is not private commercial speech, but is instead government speech. *Walker*, 135 S. Ct. at 2245. When the Government creates and manages a program, the Government may determine the content and limits of that program. *Rust*, 500 U.S. at 193. Thus, the Government may prohibit disparaging marks from being included in its program. *Id.*

1. This Court should continue to follow this Court's precedence as established in the case of *In re McGinley*.

The arguments that Section 2(a)'s restrictions on registrations violates the First Amendment have been rejected by every court to consider it, and no court has declared this rule as invalid. *In re Shiao Tam*, 108 U.S.P.Q.2d (BNA) 1305, 1310 (T.T.A.B. 2013). As stated in the case of *In re McGinley*, "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." 660 F.2d at 484. As Judge McCartney states in the dissent, this statement should not be lightly ignored. *In re Luhv*, 1337 F.3d at 461 (McCartney, J., dissenting).

An individual who has tried to register a mark, and who has failed, has never been denied the right to continue the use of that mark. *In re McGinley*, 660 F.2d at 484. The right to use that mark is protected by the owner's established common law rights. *Id.* The owner of the mark may continue to use the disparaging mark in any manner they like. *Id.* Accordingly, there has been no abridgement of speech.

2. The unconstitutional conditions doctrine does not apply because the recipient of the governmental benefits has not been restricted "outside the contours" of the federally funded trademark program.

The Federal Circuit Court of Appeals holds that under the unconstitutional conditions doctrine, the government may not deny a benefit to an individual on a basis that infringes a constitutionally protected interest. *In re Luhv*, 1337 F.3d at 459 (quoting *Perry v. Sindermann*, 408 U.S. 593, 597 (1972)). The unconstitutional-conditions doctrine provides that the government is not free to attach an unconstitutional condition, such as an individual's First Amendment rights, to receive governmental benefits; however, this Court has explained,

Limitation on the receipt of public benefits may constitute an unconstitutional condition where "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."

Rust, 500 U.S. at 193.

As stated in the case of *In re McGinley*, and all cases since, the government has placed no restriction on the individual from continuing to use the mark. 660 F.2d at 484. The government has restricted no form of speech. *Id.* Congress may permissibly specify the activities Congress wants to subsidize, as long as it does not impose “conditions that seek to leverage funding to regulate speech outside the contours of the program itself” *Agency for Int’l Dev. v. Alliance for Open Soc’y Int’l, Inc.*, 133 S. Ct. 2321, 2331 (2013). The government is not leveraging with American citizens on what marks they can and cannot use *outside* of the Principal Registry. Rather, the government asks that an applicant submit a permissible mark as a source identifier to obtain a federal trademark registration. 15 U.S.C. § 1052(a).

In *Agency for International Development*, organizations sued federal agencies seeking a declaration that a requirement to expressly oppose prostitution to receive federal funds to fight the spread of HIV/AIDS violated the organizations’ Freedom of Speech. 133 S. Ct. at 2231. This Court reasoned the policy requirement would require individuals to pledge allegiance to the government’s policy of eradicating prostitution outside the federally funded program on the individual’s “own time and dime.” *Id.* This Court held that the policy requirement violated the First Amendment by compelling, as a condition of federal funding, the affirmation of a belief that could not be confined within the scope of the government program. *Id.*

In this case, Section 2(a) only references the particular *mark* that Respondent has tried to federally register with the trademark registration. *Pro-Football, Inc. v. Blackhorse*, 115 U.S.P.Q.2d (BNA) at 1532 (emphasis added) (citing *Blackhorse v.*

Pro-Football, Inc., 111 U.S.P.Q.2d (BNA) 1080, 1080 (T.T.A.B. 2014)). Section 2(a) is not *compelling* Respondent to stop using the mark, DUMB BLONDE, on her “own time and dime.” *Agency for Int’l Dev.*, 133 S. Ct. at 2231. The Government has not leveraged with Respondent, or restricted Respondent’s speech “outside the contours” of the federally funded government program, because Respondent remains free to do whatever she wants with her mark. *Id.* Thus, the government has justifiably created these lawful requirements to remain viewpoint neutral on its expressive activity of its speech.

3. The unconstitutional conditions doctrine does not apply because no unconstitutional condition on free speech is enforced when the Government exercises its Spending Clause authority to register only non-disparaging marks.

This Court held in *Rust* that “when the Government appropriates public funds to establish a program it is entitled to define the limits of that program.” 500 U.S. at 193. The Government 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,” and not violate the Constitution. *Id.*

The Federal Circuit Court of Appeals accurately states that since 1991 the trademark registration process has become funded through trademark owners’ registration fees, rather than by taxpayers. *In re Luvv*, 1337 F.3d at 459. However, Congress’ ability to determine how appropriated funds are spent and kept does not depend on how the public funds have been collected. *Cf.* U.S. Const. art. I, § 9, cl. 7; *see also Figueroa v. United States*, 466 F.3d 1023, 1028 (Fed. Cir. 2006). The Government expends resources in evaluating, registering, and in including marks in

the Principal Register. *In re Luhv*, 1337 F.3d at 459. The governing statute states that, “although the USPTO collects money through user fees, those fees are deposited into the Treasury, and the agency may expend funds only ‘to the extent and in the amounts provided in advance in appropriations Acts.’” 35 U.S.C. § 42(c)(1)–(2) (2013).

In *Regan v. Taxation with Representation of Washington*, the Government did not violate the First Amendment when it conditioned the benefit of 501(c)(3) tax-exempt status on forbearance from lobbying activities. 461 U.S. 540, 546 (1983). This Court noted that organizations were still free to accept tax-deductible contributions for their non-lobbying activities, and that the tax code provision did not “deny [an organization] any independent benefit on account of its intention to lobby.” *Id.* Like the organizations in *Regan* that remained free to speak as lobbyists even though they would have to forego tax-exempt status as result, Respondent remains free to use the particular disparaging mark she used as her stage name, even though she will have to forego the benefits of federal registration. *Id.*

This Court has previously recognized that the Lanham Act represents a “judgment by Congress that [certain] marks not occupy the time, services, and use of funds of the federal government.” *In re McGinley*, 660 F.2d at 484. This judgment will be made regardless of how the federal trademark registration is paid for, whether it be by fees or by taxpayers. The significant point is that the Government can elect to provide assistance and to spend its resources as it sees fit, and the unconstitutional-conditions doctrine does not apply.

4. Trademarks by their very nature restrict other's speech.

Lastly, the Government has not abridged any individual's Freedom of Speech by denying a mark that "may be disparaging" from entering the Principal Register, because trademark law is more similar to an exception of the First Amendment. The government may restrict certain words for certain reasons, but the First Amendment suggests a "profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open." *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964). Trademark law reflects the opposite principle. For debate to remain robust and wide-open, the words of debate cannot be restricted to any one speaker. *Id.* Federal trademark law does the exact opposite.

When the trademark system applies to a mark, the federal government protects the mark, and when the government acts to protect the owner of the mark's rights through enforcement of the mark, the government is hurting the speech rights of every other individual except for the "owner" of the mark. The Government restricts the rights of the second, third, fourth, and fifth users of the mark from registering it based on the mark's content. The government may do so because somebody else has already claimed it.

Arguments that the prohibiting of a mark from entering the Principal Registry because the mark "may be disparaging" are premature, and should not be raised. These individuals' "loss" of statutory benefits, does not amount to the loss of that of a second party in time. First Amendment complaints may be valid; however, these complaints should be raised *after* a mark has been registered. This is because a

second user's "speech" has truly been prohibited and abridged due to another party's trademarks.

An applicant whose mark has been denied because it "may disparage" is not restricted from continuing to use that mark in any manner, in any forum, for any purpose. *In re McGinley*, 660 F.2d at 484. The mark's owner has established common law rights, through use of the mark, and those rights are not taken away from them. *Id.* Thus, the Government has not abridged Respondent's Freedom of Speech.

C. Even if Analyzed as a Regulation of Protected Speech, the Government's Regulations of the Federal Registration System Are Not Unconstitutional Under the *Central Hudson* Test.

If Section 2(a) is held as protected commercial speech, Section 2(a) will still not be unconstitutional under the *Central Hudson* test. The Federal Circuit Court of Appeals used the *Central Hudson* test, a four-part analysis, to evaluate the constitutionality of governmental restrictions on commercial speech. *Cent. Hudson Gas & Elec. Corp.*, 447 U.S. at 566. Applying this four-part test to Section 2(a), this Court will find that Section 2(a) is constitutional.

The *Central Hudson* test asks four questions:

1. Does the speech concern illegal activity or is it misleading?; if not,
2. Is the asserted governmental interest substantial; and if so,
3. Does the regulation directly advance the interest; and if so,
4. Is the regulation more extensive than necessary to serve that interest?

Id. If the mark is illegal or misleading, then the analysis stops there. *Id.* The Government has the right to regulate speech that may be illegal or mislead the

consumer. If, however, the mark passes the first prong of the test, this Court will find that the government has a substantial interest in keeping disparaging marks out of the Principal Register, and that the government does so in a narrowly tailored fashion that directly advances its substantial interest.

1. A disparaging mark on its own may mislead and should not pass the first element of the *Central Hudson* test, so Section 2(a) is not invalid.

The first element of the *Central Hudson* test requires that this Court determine whether the expression is protected by the First Amendment. *Id.* at 566. For commercial speech to come within this test, the speech must concern lawful activity and not mislead. *Id.* While DUMB BLONDE is not illegal, it can be argued that the mark DUMB BLONDE may mislead consumers. First Amendment protection is accorded to non-misleading commercial speech to enable businesses to advertise or convey factual information to consumers, such as the goods and services being offered, price information, price comparisons, etc. *Id.* at 563. If commercial speech is misleading, then the First Amendment does not prevent the government from regulating speech. *Id.* at 566.

According to the USPTO, marks fall into one of four categories: fanciful or arbitrary, suggestive, descriptive, or generic. United States Patent and Trademark Office, *Protecting Your Trademark: Enhancing Your Rights Through Federal Registration* 5 (2015). Fanciful marks are invented words with no dictionary or other known meaning. *Id.* An example would be Exxon. *Id.* Because this mark is

creative and unusual, it is less likely that others are using them, and is less likely to be misleading. *Id.* at 6.

Descriptive marks are words or designs that describe the goods and/or services. *Id.* These are harder to register because they need to be used for a while in commerce so as to acquire “distinctiveness.” *Id.* An example would be CREAMY for a yogurt brand. *Id.* Suggestive marks suggest, but do not describe, qualities or a connection to the goods or services. *Id.* GLANCE-A-DAY is an example of a suggestive mark for calendars. *Id.* Generic words are the weakest marks and cannot be registered. *Id.* An example would be BICYCLE for “bicycles.” *Id.* at 7.

Arbitrary marks, however, are actual words with a known meaning that have no association or relationship with the goods protected. *Id.* at 5. An example would be APPLE for “computers.” *Id.* If a consumer saw the word APPLE advertised for the first time, the consumer could automatically assume that the product is a red or green-sphered fruit that most people are familiar with, not the computer company. It is easy to see how an arbitrary mark can easily mislead a consumer who knows only of its ordinary definition. *Id.*

The mark, “Redskins” for a sports team could be deemed misleading under the *Central Hudson* test, if all the players of the team were not Native Americans. The First Amendment analysis under the *Central Hudson* test would end there. A team name such as the “Houston Rockets” is misleading unless the team consists of spaceship rockets playing basketball; however, the mark “Houston Rockets” is not

disparaging, and does not raise First Amendment arguments, unlike the “Washington Redskins.”

In the present case, Respondent would like to trademark DUMB BLONDE. If Respondent wore a blonde wig and portrayed herself as a blonde, this mark would have been misleading, and would not have been protected under the First Amendment. Would the First Amendment protect Respondent if she were originally a brunette who had dyed her hair blonde? Would the First Amendment protect Respondent if she were not a female, but a male instead, trying to trademark DUMB BLONDE purposefully knowing the term refers to women? What if after granting the application and getting DUMB BLONDE trademark, Respondent dyes her hair brunette or red? Would these scenarios be misleading under the *Central Hudson* test? Unlike *In re Tam*’s use of self-disparaging marks about their race (something that cannot be changed), Respondent is using a “self-disparaging” mark for a superficial quality (her hair color) that can easily be changed. *In re Tam*, 785 F.3d 567, 571 (Fed. Cir. 2015) (rehearing en banc).

When there can be different treatment for two applicants’ use of the same mark for the same services, this may show that a “self-disparaging” mark requires that a First Amendment analysis go further than the first element of the *Central Hudson* test. *Id.* Many disparaging marks, however, may never get past the first requirement of the *Central Hudson* test because they are misleading. Because this mark is self-disparaging, this Court must consider the second prong of the *Central*

Hudson test, and establish the government has a substantial interest to restrict this speech. *Cent. Hudson Gas & Elec. Corp.*, 447 U.S. at 566.

2. The Government has a substantial governmental interest to keep disparaging marks from being included in the Principal Register.

The second element of the *Central Hudson* test requires that the Government identify a substantial governmental interest that is independent of disapproving the speech's message to justify the regulation. *Id.* The Federal Circuit Court of Appeals has incorrectly argued that the offensiveness of protected speech does not justify speech suppression, and the government cannot argue a substantial interest. *In re Luhv*, 1337 F.3d at 459. This argument by the court improperly widens the scope of the First Amendment. If this argument were true, then the government would have been prevented from regulating heinous and offensive speech inherent in fighting words, obscenity, or defamation. *R.A.V. v. City of St. Paul*, 505 U.S. 377, 377 (1992) (clarifying that even fighting words may be prohibited by the Government only in viewpoint neutral ways).

While Respondent alleges that she is advocating for women issues, it is important to not forget the purpose why Respondent seeks to register DUMB BLONDE. *In re Luhv*, 1337 F.3d at 456. Respondent has negotiated a two million dollar recording contract for a record label, on the condition she trademark the mark DUMB BLONDE. *Id.* Respondent might have all the best intentions in using this mark to bring positive light to women's issues; however, the government should not have to risk the chance that after granting this disparaging mark into the

Principal Register, and spending money to protect it, Respondent be offered another five- or ten-million-dollar contract on the condition she changes her image, hair color, or lyrics to something more offensive. *Id.*

The government absolutely has a substantial interest in disassociating itself from commercial trademarks that may disparage fellow American citizens or other individuals internationally. By creating Section 2(a), Congress desired that the United States Government not associate itself with disparaging trademarks through the registration process. 15 U.S.C. § 1052(a). Thus, the government has a substantial interest to both regulate whether the government may include disparaging marks in the Principal Register, and to remain viewpoint neutral on issues of public debate.

3. Section 2(a)'s prohibition of self-disparaging marks is viewpoint neutral, directly advances the Government's interest, and does not drive ideas or viewpoints from the marketplace through its regulations.

The third element this Court must consider is whether the government's regulation directly advances the government's substantial interest. *Cent. Hudson Gas & Elec. Corp.*, 447 U.S. at 566. There is no question that "dumb blonde" suggests a negative stereotype of women with blonde hair, of women in general, and if looked at broadly enough, even males who have blonde hair. Respondent has argued she chose the mark DUMB BLONDE as a way to reclaim the stereotype associated with blonde women, and to raise awareness of the challenges stemming from gender discrimination and negative stereotypes faced by all women; however, this does not allow the government to be viewpoint discriminatory. *In re Luhv*, 1337

F.3d at 458. Viewpoint neutrality requires that the PTO and TTAB treat Respondent, and all applicants, who seek to use this disparaging mark to lessen the stigma and raise awareness of an issue, just as it would treat an applicant who seeks to use the same mark for an offensive and derogatory purpose. *Christian Legal Soc’y Chapter of the Univ. of Cal., Hastings Coll. of the Law v. Martinez*, 561 U.S. 661, 685 (2010).

The federal trademark program does not remove disfavored ideas or disfavored viewpoints from the marketplace. The fundamental purpose of a trademark is to transmit a single message: the identity and desirability of the commodity on which the mark appears. *Mishawaka Rubber & Woolen Mfg. Co. v. S.S. Kresge Co.*, 316 U.S. 203, 205 (1942). The federal trademark registration system facilitates the use of trademarks, so that one may identify the source of goods and services. *Id.* A trademark need not deliver any other information than that. Section 2(a) has neither the intention, nor the effect, of promoting or eliminating any viewpoint from the marketplace of ideas. *R.A.V.*, 505 U.S. at 377. Section 2(a) is “viewpoint neutral: it operates in the same way as to persons who would use the same disparaging term to promote diametrically opposed viewpoints.” *Id.* Remaining viewpoint neutral directly advances the Government’s substantial interest in not openly taking a side, and not openly defending a side either, when it comes to a disparaging mark that may cause offense to its American citizens.

4. Section 2(a) is narrowly tailored to serve the Government's interest.

Under the *Central Hudson* test, the last element to consider is whether the regulation is more extensive than necessary to serve the government's interest. 447 U.S. at 566. It was established that the government has a substantial interest in keeping marks that may disparage from entering the Principal Register. It was concluded that Section 2(a)'s prohibition directly advances the Government's interest in remaining viewpoint neutral. The third and fourth elements addressed in the *Central Hudson* test try to distinguish the connection between the legislature's ends and the legislature's means chosen to accomplish those ends. *Posadas de P.R. Assocs. v. Tourism Co. of P.R.*, 478 U.S. 328, 341 (1986). Section 2(a) does not prohibit or restrict any individual's speech, nor does it limit the owner's right or ability to continue to use the disparaging mark for their goods or services. *In re McGinley*, 660 F.2d at 484. There is absolutely no penalty, harm, fee or any other punishment for continuing to use the disparaging mark in any manner that owner chooses. *Id.* There are many other, more restrictive and more "extensive than necessary" means of accomplishing this interest to remain viewpoint neutral and prohibit disparaging terms. Section 2(a) has proven it is the most narrowly tailored manner to meet Legislature's ends. For these reasons, Section 2(a) should be held as narrowly tailored, and is no "more extensive than necessary" to serve the Government's substantial interest. *Cent. Hudson Gas & Elec. Corp.*, 447 U.S. at 566. This final element of the *Central Hudson* test is confirmed. Thus, this Court

should hold Section 2(a) is constitutionally valid, and does not prohibit any of Respondent's First Amendment complaints.

CONCLUSION

Petitioner respectfully requests that this Court AFFIRM in part the judgment of the Federal Circuit Court of Appeals and hold that the mark DUMB BLONDE is disparaging, and REVERSE in part the judgment of the Federal Circuit Court of Appeals and hold that Section 2(a) of the Lanham Act is constitutional.

Respectfully submitted,

TEAM NO. 114
COUNSEL FOR PETITIONER