

No. 15-1007

IN THE
Supreme Court of the United States

NOVEMBER TERM, 2015

UNITED STATES OF AMERICA
Petitioner,

v.

KOURTNEY LUHV, an individual
Respondent.

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

BRIEF FOR RESPONDENT

COUNSEL FOR RESPONDENT
OCTOBER 20, 2015

ISSUES PRESENTED

- (1) Under the First Amendment is section 2(a) of the Lanham Act constitutional despite prohibiting commercial speech, conditioning the benefits of trademark registration on forgoing free speech, and restricting expression that is not illegal or misleading nor directly advances a substantial government interest?
- (2) Under *In re Geller*, did the Patent Trademark Office correctly reason that a substantial composite of the referenced group would find a trademark disparaging when, taken in context, the trademark recasts an antiquated stereotypes, is embraced by the applicant's fans, and is inclusively humorous?

TABLE OF CONTENTS

QUESTIONS PRESENTED.....i

TABLE OF CONTENTS.....ii

TABLE OF AUTHORITIES.....iii

STATEMENT OF JURISDICTION.....viii

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED.....viii

STATEMENT OF THE CASE.....1

SUMMARY OF THE ARGUMENT.....3

ARGUMENT.....4

I. SECTION 2(A) OF THE LANHAM ACT IS UNCONSTITUTIONAL.....4

A. Section 2(a) Prohibits Protected Commercial Speech.....6

B. Section 2(a) Abridges Speech and Implicates the First Amendment.....9

C. Section 2(a) Fails the Four-Prong *Central Hudson* Test.....12

II. DUMB BLONDE DOES NOT VIOLATE SECTION 2(A).....16

A. DUMB BLONDE has an Empowering Meaning.....18

B. DUMB BLONDE is Not Disparaging to a Substantial Composite of Blonde Women.....24

C. DUMB BLONDE Should be Registered as a Matter of Policy.....28

CONCLUSION.....29

TABLE OF AUTHORITIES

CONSTITUTIONAL PROVISIONS AND STATUTES

U.S. Const. amend. 1.....4

5 U.S.C. § 706(2)(E) (2015).....4

15 U.S.C. § 1052(a) (2015).....4, 17

15 U.S.C. § 1057(b) (2015).....11

15 U.S.C. § 1070 (2015).....viii

15 U.S.C. § 1127 (2015).....viii, 8

28 U.S.C. § 1254 (2015).....viii

28 U.S.C. § 1295(a)(4)(A) (2015).....viii

U.S. SUPREME COURT CASES

B & B Hardware, Inc. v. Hargis Indus., Inc.,
135 S. Ct. 1293 (2015).....10

Bigelow v. Virginia,
421 U.S. 809 (1975).....6

Bolger v. Youngs Drug Prods. Corp.,
463 U.S. 60 (1983).....7, 8, 13, 14

Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm’n,
447 U.S. 557 (1980).....*passim*

Coker v. Georgia,
433 U.S. 584 (1977).....29

Edefield v. Fane,
507 U.S. 761 (1993).....14

Friedman v. Rogers,
440 U.S. 1 (1979).....6, 8

<i>Koontz v. St. Johns River Water Mgmt. Dist.</i> , 133 S. Ct. 2586 (2013).....	9, 10
<i>Korematsu v. United States</i> , 323 U.S. 214 (1944).....	19
<i>Mass. Bd. of Ret. v. Murgia</i> , 427 U.S. 307 (1976).....	19
<i>Park ‘N Fly, Inc. v. Dollar Park & Fly</i> , 469 U.S. 189 (1985).....	10, 11
<i>Perry v. Sindermann</i> , 408 U.S. 593 (1972).....	9, 12
<i>Police Dept. of Chicago v. Mosley</i> , 408 U.S. 92 (1972).....	5
<i>Roth v. United States</i> , 354 U.S. 476 (1957).....	5
<i>Rust v. Sullivan</i> , 500 U.S. 173 (1991).....	9, 10
<i>San Antonio Indep. Sch. Dist. v. Rodriguez</i> , 411 U.S. 1 (1973).....	19
<i>Sorrell v. IMS Health Inc.</i> , 131 S. Ct. 2653 (2011).....	5, 12, 14, 15
<i>Texas v. Johnson</i> , 491 U.S. 397 (1989).....	5
<i>Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council</i> , 425 U.S. 748 (1976).....	6, 7
<i>Ward v. Rock Against Racism</i> , 491 U.S. 781 (1989).....	5
<i>W. Va. State Bd. of Ed. v. Barnette</i> , 319 U.S. 624 (1943).....	5

U.S. CIRCUIT COURT OF APPEALS CASES

<i>Bullfrog Films, Inc. v. Wick</i> , 847 F.2d 502 (9th Cir. 1988).....	11, 12
<i>In re Boulevard Entm't</i> , 334 F.3d 1336 (Fed. Cir. 2003).....	20
<i>In re Geller</i> , 751 F.3d 1355 (Fed. Cir. 2014).....	<i>passim</i>
<i>In re Mavety Media Grp. Ltd.</i> , 33 F.3d 1367 (Fed. Cir. 1994).....	19, 26, 27
<i>In re Pacer Tech.</i> , 338 F.3d 1348 (Fed. Cir. 2003).....	4, 26
<i>In re Tam</i> , 785 F.3d 567 (Fed. Cir. 2015).....	<i>passim</i>
<i>On-Line Careline, Inc. v. Am. Online, Inc.</i> , 229 F.3d 1080 (Fed. Cir. 2000).....	4
<i>Planned Parenthood Ass'n of Hidalgo Cnty. Tex., Inc. v. Suehs</i> , 682 F.3d 343 (5th Cir. 2012).....	9
<i>United States v. Jefferson Cnty. Bd. of Educ.</i> , 372 F.2d 836 (5th Cir. 1966).....	29

U.S. DISTRICT COURT CASES

<i>Pro-Football, Inc. v. Harjo</i> , 284 F. Supp. 2d 96 (D.D.C. Dist. 2003).....	19, 20, 24
---	------------

TRADEMARK TRIAL AND APPELLATE BOARD CASES

<i>Boswell v. Mavety Media Grp. Ltd.</i> , 52 U.S.P.Q. 2d (BNA) 1600 (T.T.A.B. 1999).....	19
<i>Bromberg v. Carmel Self Serv., Inc.</i> , 198 U.S.P.Q. (BNA) 176 (T.T.A.B. 1978).....	27

In re Gourmet Bakers, Inc.,
173 U.S.P.Q. (BNA) 565 (T.T.A.B. 1972).....26, 27

In re S.F. Women’s Motorcycle Contingent Appeal,
No. 000020-007200US (T.T.A.B. 2005).....20, 21, 23

PATENT TRADEMARK OFFICE

In re Heeb Media, LLC,
89 U.S.P.Q.2d 1071 (P.T.O. Nov. 26, 2008).....*passim*

In re Old Glory Condom Corp.,
26 U.S.P.Q.2d 1216 (P.T.O. Mar. 3, 1993).....14, 15

In re In Over Our Heads Inc.,
16 U.S.P.Q.2D (BNA) 1653 (P.T.O. Aug. 28, 1990).....26, 27

In re Squaw Valley Dev. Co.,
80 U.S.P.Q.2d 1264 (P.T.O. May 23, 2006).....*passim*

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734 (N.Y. Springer Publ’r Co. 1984).....28

Christine Haight Farley, *Stabilizing Morality in Trademark Law*,
63 AM. U. L. REV. 1019 (2014).....18

DUMB BLONDE,
Registration No. 2601964.....16

DUMB BLONDE,
Registration No. 3983953.....16

Dumblonde, <https://www.facebook.com/dumblondemusic?fref=ts>
(last visited Oct. 17, 2015).....12

H. Journal, 76th Cong.,
Sess. 1, at 877 (1939).....17

Janet Bing, *Is Feminist Humor an Oxymoron?*,
27 WOMEN & LANGUAGE 22 (2004).....27

Janet Holmes & Meredith Marra, <i>Over the Edge? Subversive Humor Between Colleagues and Friends</i> , 15 HUMOR 1 (2002).....	28
Official Notice of Acceptance and Acknowledgement (Dec. 6, 2005).....	20, 21
Todd Anten, <i>Self-Disparaging Trademarks and Social Change: Factoring the Reappropriation of Slurs into Section 2(a) of the Lanham Act</i> , 106 COLUM. L. REV. 388 (2006).....	21
U.S. Trademark Application Serial No. 78257216 (filed June 2, 2003).....	18
U.S. Trademark Application Serial No. 77796597 (filed Aug. 4, 2009).....	18
U.S. Trademark Application Serial No. 85156230 (filed Oct. 19, 2010).....	18
U.S. Trademark Application Serial No. 85301216 (filed Apr. 21, 2011).....	18

STATEMENT OF JURISDICTION

Kourtney Luhv appealed the Patent and Trademark Office's denial of her trademark application to the Trademark Trial and Appeal Board ("TTAB") pursuant to 15 U.S.C. § 1070 (2015). Kourtney properly appealed the TTAB's decision to the United States Federal Circuit Court pursuant to 28 U.S.C. § 1295(a)(4)(A). This Court's jurisdiction rests on 28 U.S.C. § 1254 (2015).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The following constitutional provision is relevant to this action's determination:

U.S. Const. amend. 1.

The following statutory provisions are relevant to this action's determination:

15 U.S.C. § 1052(a) (2015);

15 U.S.C. § 1057(b) (2015);

15 U.S.C. § 1127 (2015).

STATEMENT OF THE CASE

The Artist. Kourtney Luhv (“Kourtney”) is a self-motivated, independently recorded, blonde music artist who is finally starting to draw a crowd. *In re Kourtney Luhv*, 1337 F.3d 455, 457 (Fed. Cir. 2015). Followers listen to Kourtney on the radio, internet, and in concert, where she assumes her personality, DUMB BLONDE. *Id.* DUMB BLONDE represents power and purpose; it is a calling card and call-to-action. *Id.* at 457. Kourtney has worked three long years to grow her small, loyal fan base. *Id.* at 455. Now, listeners flock to her shows, cheering on DUMB BLONDE and sharing in her positive message. *Id.* The artist and crowd-turned-choir sing about feminism—applauding women’s role in society. *Id.* Today, DUMB BLONDE has over 40,000 followers on Soundpuff and more than 100,000 on uTube (DumbBlondeMusic). *Id.* at 456. Kourtney shares her progressive message with a variety of fans, largely women in their twenties and thirties. *Id.* at 457.

The Message. Fans familiar with Kourtney’s work, “infer a different, more positive meaning for the mark.” *Id.* They have encouraged Kourtney with words like, “[a]s a blonde woman I totally support you . . .” and “[t]here need to be more women like you serving as positive role models for young girls. . .” *Id.* at 458. Kourtney’s website displays whacky album art, including a blonde woman biting fake fruit and one woman seated in the Oval Office as President of the United States. *Id.* at 457–58. In recognition of her potential, Kourtney was offered a \$2,000,000 record deal contingent on registration of the trademark DUMB BLONDE. *Id.* at 456.

Trademark Registration. On July 8, 2014, Kourtney filed an application to register the trademark “DUMB BLONDE” with the Patent and Trademark Office (“PTO”). *Id.* at 456. The examining attorney for the PTO refused to register the mark under 15 U.S.C. § 1052(a) because the mark “may be disparaging” to women. *Id.* Kourtney appealed the PTO’s decision to the Trademark Trial and Appeal Board (“TTAB”) who affirmed the PTO’s refusal to register the mark. *Id.* at 456–57.

Appellate Decision. Kourtney appealed the TTAB’s decision to the Federal Circuit Court, alleging that section 2(a) of the Lanham Act was unconstitutional and that the assumptions made by the PTO’s examining attorney were unrepresentative of a substantial composite of women. *Id.* at 457. On appeal, the Federal Circuit held that the trademark, DUMB BLONDE, may be disparaging to a substantial composite of women, but that section 2(a) is unconstitutional because it infringes upon trademark applicants’ First Amendment rights. *Id.* at 458–60. The court therefore held that the PTO and the TTAB could not rely on this part of the Lanham Act to deny Kourtney’s trademark. *Id.* at 460.

The Government (“Petitioner”) now appeals the Federal Circuit’s holding to the United States Supreme Court. This Court granted certiorari on both issues.

SUMMARY OF THE ARGUMENT

The Federal Circuit Court properly held that the Patent Trademark Office (“PTO”) and the Trademark Trial and Appeal Board (“TTAB”) erroneously denied Kourtney’s application for trademark. While the court incorrectly labeled DUMB BLONDE “disparaging” pursuant to section 2(a) of the Lanham Act, it properly held that section 2(a) unconstitutionally impinges on applicants’ First Amendment rights. First, section 2(a) is used to restrict trademarks which constitute protected commercial speech. Second, section 2(a) abridges speech in a manner that implicates the First Amendment, forcing applicants to exchange their constitutional protections for government benefits. Third, section 2(a) is unconstitutional because it fails the four-prong *Central Hudson* test.

Nevertheless, if this Court finds that section 2(a) passes constitutional muster, DUMB BLONDE is not disparaging to a substantial composite of blonde women. Not only does Kourtney champion DUMB BLONDE as a symbol of empowerment, there is corroborative evidence that women embrace this positive meaning. DUMB BLONDE is not disparaging to a substantial composite of the referenced group because the suspect stereotype is both tired and eradicated by Kourtney’s use. Moreover, DUMB BLONDE is a quintessential example of inclusive humor; it emboldens blondes to laugh at the stereotype without targeting non-blondes. As such, Kourtney prays that this Court affirm the Federal Circuit Court’s reversal and allow DUMB BLONDE the benefits of trademark.

ARGUMENT

The Federal Circuit Court properly reversed the Patent Trademark Office (“PTO”) and Trademark Trial and Appeal Board’s (“TTAB”) erroneous denial of DUMB BLONDE, because section 2(a) of the Lanham Act violates the First Amendment and the PTO offered no more than a scintilla of evidence that a substantial composite of blonde women would find the mark disparaging. 15 U.S.C. § 1052(a) (2015); *In re Geller*, 751 F.3d 1355, 1358 (Fed. Cir. 2014); *In re Pacer Tech.*, 338 F.3d 1348, 1352 (Fed. Cir. 2003). This Court reviews the Federal Circuit’s holding as to the First Amendment issue *de novo*. *On-Line Careline, Inc. v. Am. Online, Inc.*, 229 F.3d 1080, 1084 (Fed. Cir. 2000). However, this Court reviews the disparagement issue under the substantial evidence standard. 5 U.S.C. § 706(2)(E) (2015). This Court can sustain the Circuit Court’s decision one of two ways; either by finding that section 2(a) of the Lanham Act is unconstitutional or that DUMB BLONDE is not disparaging to a substantial composite of blonde women. Conversely, Petitioner has the burden to simultaneously convince this Court that section 2(a) *is* constitutional and that DUMB BLONDE *is* disparaging to a substantial composite of blonde women. Petitioner fails to meet this burden.

I. SECTION 2(A) OF THE LANHAM ACT IS UNCONSTITUTIONAL.

The Federal Circuit Court correctly held that section 2(a) of the Lanham Act is unconstitutional because it stifles Kourtney’s First Amendment right to free speech. The First Amendment prohibits Congress from making laws that abridge the freedom of speech. U.S. Const. amend. 1. To establish a First Amendment

violation, Kourtney must prove that her trademark is protected speech, that the government has taken some action implicating her First Amendment rights, and that such governmental suppression is unconstitutional under the *Central Hudson* test. *Texas v. Johnson*, 491 U.S. 397, 405 (1989); *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm’n*, 447 U.S. 557, 566 (1980); *Roth v. United States*, 354 U.S. 476, 481 (1957). The Court applies a strict scrutiny standard to determine whether there has been a First Amendment violation when the regulation or ban of speech is content-based. *Sorrell v. IMS Health Inc.*, 131 S. Ct. 2653, 2664 (2011) (“The First Amendment requires heightened judicial scrutiny whenever the government creates ‘a regulation of speech because of disagreement with the message it conveys.’”) (quoting *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989)). Furthermore, “[u]nder a commercial speech inquiry, it is the State’s burden to justify its content-based law as consistent with the First Amendment.” *Id.* at 2667.

The First Amendment has long been recognized as one of the most important pillars in American jurisprudence. The Supreme Court described the First Amendment as a “bedrock principle” and a “fixed star in our constitutional constellation.” *Johnson*, 491 U.S. 397, 413 (1989); *W. Va. State Bd. of Ed. v. Barnette*, 319 U.S. 624, 642 (1943). In its application, “above all else, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter or its content.” *Police Dept. of Chicago v. Mosley*, 408 U.S. 92, 95 (1972).

Section 2(a)'s restriction on Kourtney's trademark dares the support of the First Amendment and compromises the foundational integrity of free speech. This Court should affirm the holding that section 2(a) is unconstitutional as applied because, (1) DUMB BLONDE is protected commercial speech, (2) section 2(a) abridges the speech in a manner that defies Kourtney's First Amendment rights, and (3) the regulation fails the four-prong *Central Hudson* test.

A. Section 2(a) Prohibits Protected Commercial Speech.

DUMB BLONDE is deserving of First Amendment protection because it does more than propose a commercial transaction; it is commercial speech by definition, and is evidently commercial when analyzed under this Court's commercial factor test. Until 1975, this Court was unwilling to protect commercial speech. *See Bigelow v. Virginia*, 421 U.S. 809, 822 (1975). However, in *Bigelow*, the Court extended First Amendment protection to commercial speech involving an advertisement for abortion services, since the advertisement "did more than simply propose a commercial transaction." 421 U.S. at 822; *contra Friedman v. Rogers*, 440 U.S. 1, 10 (1979) (holding that a trade name was not commercial speech because it conveyed no information about the services offered and could have been misleading).

The Court has since affirmed the protection of commercial speech. *Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council*, 425 U.S. 748, 765 (1976) ("Free flow of commercial information is indispensable."). A statute may be constitutional if it only restricts the "proper bounds of time, place, and manner," but this Court

has unequivocally struck down statutes that “single[] out speech of a particular content and seek[] to prevent its dissemination completely.” *Id.* at 771.

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.” *Id.* at 765. Some phrases fit neatly into the above definition and others do not. Therefore, this Court must engage in a fact-intensive analysis to determine whether speech is commercial. *Bolger v. Youngs Drug Prods. Corp.*, 463 U.S. 60, 68 (1983). Factors include: classification as an advertisement, traceability to a product, and the existence of an economic motive. *Id.* at 67–68.

On its face, DUMB BLONDE meets the definition of commercial speech because it alerts the public that Kourtney is the artist producing and selling the tagged products. *In re Kourtney Luhv*, 1337 F.3d at 456–57. DUMB BLONDE also informs consumers about Kourtney’s mission to redefine an antiquated stereotype. *See Va. State Bd. of Pharmacy*, 425 U.S. at 765. Simply put, DUMB BLONDE is a brand; it conveys information by which Kourtney can promote her multi-platform product line. *In re Kourtney Luhv*, 1337 F.3d at 456–57.

Still, the Court’s commercial factor test provides even more evidence that DUMB BLONDE is commercial speech. *See Bolger*, 463 U.S. at 67–68. First, DUMB BLONDE is an advertisement for Kourtney’s music and her products. *See id; In re Kourtney Luhv*, 1337 F.3d at 456–57. Music artists are more than just performers; they survive by effectively branding, marketing, and selling non-music products. Each time Kourtney puts her brand on an item, she is advertising, explicitly

endorsing the product and the underlying message. As to the second factor, trademarks are traceable to a product or service by definition. 15 U.S.C. § 1127 (2015) (defining “trademark” as any word “[used] to identify and distinguish his or her goods, including a unique product, from those manufactured or sold by others and to indicate the source of the goods, even if that source is unknown”); *See Bolger*, 463 U.S. at 67–68. For Kourtney, trademarking DUMB BLONDE is absolutely essential because it allows existing and prospective fans to identify her work across multiple platforms. *In re Kourtney Luhv*, 1337 F.3d at 455–56. DUMB BLONDE ties together Kourtney’s stage name, her Soundpuff profile, and her uTube account. *Id.* DUMB BLONDE is commercial speech and warrants a trademark because it acts as a common identifier for Kourtney’s products. As to the final factor, DUMB BLONDE qualifies as commercial speech because it is at very least partially motivated by economics. *Id.* The economic motivation is apparent; a record label has conditioned \$2,000,000 on Kourtney obtaining the trademark. *See Bolger*, 463 U.S. at 67–68; *In re Kourtney Luhv*, 1337 F.3d at 456.

This Court should find section 2(a)’s restriction on commercial speech unconstitutional because it enables the PTO to restrict commercial trademarks without reference to any common law exceptions. *See Friedman*, 440 U.S. at 15 (commercial speech that manipulates or misleads the public). As a result, section 2(a) threatens the structural integrity of the First Amendment.

B. Section 2(a) Abridges Speech and Implicates the First Amendment.

Section 2(a) of the Lanham Act conditions creative expression on applicants' willingness to relinquish constitutional protections, therefore abridging applicants' First Amendment rights. Petitioner will likely argue that the PTO acted consistently with the Constitution and this Court's precedent by merely "regulating" DUMB BLONDE. However, this argument fails because the First Amendment prohibits direct burdens on speech and "indirect burdens that are created when the government conditions receipt of a benefit on foregoing constitutionally-protected speech." *Planned Parenthood Ass'n of Hidalgo Cnty. Tex., Inc. v. Suehs*, 682 F.3d 343, 348 (5th Cir. 2012). This principle is known as the "unconstitutional conditions doctrine." *Perry v. Sindermann*, 408 U.S. 593, 597 (1972).

As recently explained by this Court, the doctrine "vindicates the Constitution's enumerated rights by preventing the government from coercing people into giving them up." *Koontz v. St. Johns River Water Mgmt. Dist.*, 133 S. Ct. 2586, 2594 (2013). The unconstitutional conditions doctrine applies when (1) the condition at issue does not involve federal funding and (2) the depraved bargain actually includes a conference of benefits. *Rust v. Sullivan*, 500 U.S. 173, 193 (1991); *Perry*, 408 U.S. at 597.

First, as properly identified by the Federal Circuit below, the unconstitutional conditions doctrine applies here because the "trademark registration process does not implicate Congress's power to spend, and is in fact a prototypical example of a regulatory regime." *In re Kourtney Luhv*, 1337 F.3d at

460; *see Rust*, 500 U.S. at 193. As explained in *Rust*, “[t]he Government can, without violating the Constitution, selectively fund a program to encourage certain activities it believes to be in the public interest.” *Rust*, 500 U.S. at 193. Trademarks do not receive funds directly from Congress nor indirectly through the PTO; they are privately funded and publically regulated. Therefore, payment of an examining attorney’s salary does not rebut the federal funding consideration. *See id.*

Second, trademark registration confers benefits likely to coerce applicants into forgoing their First Amendment rights. *See Koontz*, 133 S. Ct. at 2594. Contrary to the position taken by the *In re McGinley* court, trademark registration significantly benefits trademark owners by affording them both substantive and procedural rights. 660 F.2d 481 (C.C.P.A. 1981). There, the court addressed the PTO’s denial of a trademark depicting a nude man to be used for a graphic adult magazine. *Id.* at 482. The court found that the PTO’s refusal to register the mark did not affect the applicant’s right to use it, but acknowledged a laundry list of registration benefits, including:

Public notice of the mark in an official government publication and in official records which are distributed throughout the world, maintenance of permanent public records concerning the mark, availability of the Customs Service for blocking importation of infringing goods (e.g., that the mark is not immoral or scandalous), notices to the registrant concerning maintenance of the registration, and to some extent, direct government protection of the mark in that the PTO searches its records and refuses registrations to others of conflicting marks.

Id. at 486; *see B & B Hardware, Inc. v. Hargis Indus., Inc.*, 135 S. Ct. 1293, 1300 (2015) (emphasizing “[r]egistration is significant”); *see also Park ‘N Fly, Inc. v.*

Dollar Park & Fly, 469 U.S. 189, 198 (1985) (explaining registration “provides national protection of trademarks . . . [and] protects the ability of a consumer to distinguish among competing producers”).

In re McGinley should have taken the approach adopted by the Ninth Circuit in *Bullfrog Films, Inc. v. Wick*, 847 F.2d 502 (9th Cir. 1988). There, the court held the United States Information Agency (“USIA”) violated filmmakers’ First Amendment rights by refusing to certify particular films as educational, thereby putting the filmmakers at a competitive disadvantage. *Id.* at 511. Due to the denial of certification, the filmmakers were “entirely ineligible to receive benefits . . . including the waiver of import duties.” *Id.* Relying on Supreme Court jurisprudence, the Ninth Circuit correctly found that “by conditioning a valuable governmental benefit on the basis of speech content, the USIA force[d] film makers to choose between exercising their right to free speech and foregoing benefits.” *Id.*

Finally, the Lanham Act itself unambiguously recognizes the benefits of registration—stating that it “shall be prima facie evidence” of the validity, ownership, and the registrant’s exclusive right to use the registered mark. 15 U.S.C.A. § 1057(b) (2015). Thus, judicial precedent and the plain text of the Lanham Act underline the benefits of trademark registration.

The benefits that would be conferred to Kourtney upon registration of the trademark DUMB BLONDE are undeniable. *See Park ‘N Fly, Inc.*, 469 U.S. at 198. The substantive and procedural protections afforded to Kourtney, as a trademark owner, would prove particularly valuable because there is another music group with

a name nearly identical to DUMB BLONDE.¹ Kourtney’s registration would preempt the other group from using the name in the way that Kourtney uses it, but denial of registration puts Kourtney at a competitive disadvantage. *See Bullfrog Films, Inc.*, 847 F.2d at 511. Section 2(a) of the Lanham Act undeniably implicates the unconstitutional conditions doctrine by forcing applicants like Kourtney to choose between her constitutional right to protest tactless stereotypes and diminishing her message to fit the confines of the Act. The doctrine is meant to prevent this very dilemma—surrendering of constitutional rights in exchange for government benefits. *See Perry*, 408 U.S. at 597. Section 2(a) is unconstitutional because it coerces applicants to abridge their own First Amendment rights.

C. Section 2(a) Fails the Four-Prong *Central Hudson* Test.

Section 2(a) of the Lanham Act is unconstitutional when analyzed under the four-prong *Central Hudson* test. The *Central Hudson* test is used to determine whether a statutory regulation is constitutional in light of the expression’s legality and propensity to mislead, and the statute’s ability to directly advance a substantial governmental interest without being more extensive than necessary. *Cent. Hudson Gas & Elec. Corp.*, 447 U.S. at 564. The test ensures that “the law does not seek to suppress a disfavored message.” *Sorrell*, 131 S. Ct. at 2668.

Heightened judicial scrutiny applies here because section 2(a) “is designed to impose a specific, content-based burden on protected expression.” *Id.* at 2664.

¹ The music group goes by the name “dumblonde” and currently has an album on iTunes. Dumblonde, <https://www.facebook.com/dumblondemusic?fref=ts> (last visited Oct. 17, 2015).

Section 2(a) does not survive strict scrutiny. The *Central Hudson* test has four parts: (1) the speech must not be illegal or misleading; (2) the governmental interest must be substantial; (3) if the interest is substantial, the regulation must directly advance the interest; and (4) the regulation must not be more extensive than necessary. 447 U.S. at 564. As applied, section 2(a) undeniably fails the *Central Hudson* test. First, DUMB BLONDE is neither illegal nor misleading. Second, the government lacks a substantial interest in regulating DUMB BLONDE. Third, whatever interest the government may assert is not directly advanced by section 2(a). Finally, section 2(a) has proven more extensive than necessary.

The *Central Hudson* test was applied in *Bolger*, where the Court struck down a statute that prohibited the unsolicited mailing of contraceptive advertisements. 463 U.S. at 74–75. The two governmental interests rejected by the Court were that recipients might find the materials offensive and that the statute aided in parents’ efforts to control information consumed by their children. *Id.* at 71. As to the first interest, the Court stated, “[a]t least where obscenity is not involved, [the Court has] consistently held that the fact that protected speech may be offensive to some does not justify its suppression.” *Id.* As to the second interest, the Court explained the statute was unnecessary because parents must already cope with a “multitude of external stimuli.” *Id.* at 73.

Similarly, section 2(a) attempts to shield targeted groups from valuable information on the basis that it may be disparaging. However, “the general rule is that the speaker and the audience, not the government, assess the value of the

information presented.” *Edenfield v. Fane*, 507 U.S. 761, 767 (1993). Also, consistent with *Bolger*, section 2(a) fails the second prong because it enables the PTO to regulate non-obscene and widely available speech. *Bolger*, 463 U.S. at 71. Section 2(a) allows the PTO to prohibit speech that actually mitigates the only potential interest in approving DUMB BLONDE—reigning in archaic stereotypes.

In a more recent case, this Court held that a state law restricting the sale, disclosure, and use of pharmacy records in marketing strategies violated the First Amendment because there were no substantial government interests and even if there were, the law did not directly advance them. *Sorrell*, 131 S. Ct. at 2670–72. The Court reasoned that the States’ asserted policy goals (lowering cost of medicine and promoting public health) may have been valid, but the state’s law did not directly advance those goals in a permissible way; the statute “restrained speech by diminishing detailers’ ability to influence prescription decisions.” *Id.* at 2670. Under the Court’s *Sorrell* logic, section 2(a) of the Lanham Act is unconstitutional because it discounts trademarks’ alternative uses and diminishes Kourtney’s ability to communicate with fans. DUMB BLONDE is used to promote a positive message—recasting a worn-out stereotype. *See Sorrell*, 131 S. Ct. at 2670–72; *In re Kourtney Luhv*, 1337 F.3d at 457.

Furthermore, trademarks are not government stamps of approval. *In re Old Glory Condom Corp.*, 26 U.S.P.Q.2d 1216, 1219–20 n. 3 (P.T.O. Mar. 3, 1993). As recognized by the TTAB, “[t]he duty of th[e] Office . . . in reviewing applications for registration is nothing more and nothing less than to register those marks that are

functioning to identify and distinguish goods and services in the marketplace”

Id. In fact, “the act of registration is not a government imprimatur or pronouncement that the mark is a ‘good’ one.” *Id.* Therefore, the government does not have a substantial interest in approving and rejecting specific trademarks.

Finally, even if the Government did have a substantial interest in prohibiting “disparaging” speech, the prohibition does not directly advance that interest and is more extensive than necessary. *See Cent. Hudson Gas & Elec. Corp.*, 447 U.S. at 564. Similar to the restriction in *Sorrell*, the law here completely diminishes the speaker’s ability to influence others and therefore *indirectly* advances the government’s potential interests. 131 S. Ct. at 2670. By prohibiting disparaging language, section 2(a) leaves no room for public interpretation. Consequently, it prevents appreciation of Kourtney’s message, spoiling her ability to engage her audience. *See In re Kourtney Luhv*, 1337 F.3d at 458. Instead of advancing the government’s interests, section 2(a) allows the government to withhold information, which may be of great value to the public. For this same reason, and because section 2(a) abridges Kourtney’s constitutional right to free speech, the regulation is more extensive than necessary. By equating “immoral, deceptive, or scandalous matter” with a “matter which may disparage,” section 2(a) wrongfully extends legitimate concerns about disgraceful content to content which is subject to interpretation. Therefore, the Government fails the third and fourth prongs of the *Central Hudson* test.

Kourtney's trademark constitutes protected commercial speech. That commercial speech has been abridged through the PTO's denial of trademark registration in a manner that implicates Kourtney's First Amendment rights. Finally, section 2(a) does not pass the *Central Hudson* test. Therefore, section 2(a) of the Lanham Act is unconstitutional. However, even if this Court finds that section 2(a) is constitutional, the trademark DUMB BLONDE is not in violation.

II. DUMB BLONDE DOES NOT VIOLATE SECTION 2(A).

DUMB BLONDE is not disparaging, it was not meant to be disparaging, and it should not be found disparaging under section 2(a) of the Lanham Act. Kourtney and scores of her brunette, redheaded, and yes, blonde, fans champion the call-to-action as symbol of power and of pride. *In re Kourtney Luhv*, 1337 F.3d at 457–58. Indeed, the term is not only empowering, it is legally familiar. The PTO has previously registered DUMB BLONDE for a hair product in one instance and an alcoholic beverage in another. DUMB BLONDE, Registration No. 2601964; DUMB BLONDE, Registration No. 3983953. Even recognizing the Circuit Court's holding that, prior registration "does not bind the board," registration of two identical trademarks is overwhelmingly persuasive evidence. *In re Kourtney Luhv*, 1337 F.3d at 458. Nevertheless, this response will argue in the alternative. Purely on its own merits, the latest iteration of DUMB BLONDE is not disparaging to a substantial composite of blonde women. Thus, this Court should approve Kourtney's positive identity, DUMB BLONDE.

Having already contested section 2(a)'s constitutionality, the following will address the PTO's blatant error in applying the regulation to DUMB BLONDE. Assuming the constitutionality of the regulation, section 2(a) authorizes examining attorneys to deny trademarks if the mark, "[c]onsists of or comprises immoral, deceptive, or scandalous matter; or matters which may disparage" 15 U.S.C. § 1052(a). DUMB BLONDE not only passes the smell test, it is legally permissible when analyzed in accordance with the influential *In re Geller* opinion. 751 F.3d 1355, 1358 (Fed. Cir. 2014). There, the court articulated a two-part test used to determine whether a mark may be "disparaging" in the context of Section 2(a):

(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.

Id. DUMB BLONDE envelopes so much more than an antiquated slur; it symbolizes that the days of underestimation are over. As promulgated and consumed, DUMB BLONDE is an empowering statement that is not disparaging to a substantial composite of blonde women. Accordingly, the lower court erred in upholding the examining attorney's non-contextual presuppositions. This Court should reverse the Federal Circuit Court and find—on behalf of Kourtney, her fans, and blonde women everywhere—that DUMB BLONDE should be registered.

A. DUMB BLONDE has an Empowering Meaning.

The Lanham Act was passed as a way of protecting the public against scandalous, immoral, deceptive, and disparaging symbols. 15 U.S.C. § 1052(a); H. Journal, 76th Cong., Sess. 1, at 877, 883 (1939). Since the legislation's enactment, the PTO has evaluated trademarks ranging from McDonald's "I'm Lovin' It" to Paris Hilton's catchphrase "That's Hot." THAT'S HOT, Registration No. 85156230; I'M LOVIN' IT, Registration No. 78257216.

However, despite its extensive registration history, the PTO's application of section 2(a) is oddly unpredictable. The PTO inexplicably refused to register the band name "The Slants," while authorizing a company to print t-shirts with the word "Slut Magnet" sprawled across chest. *In re Tam*, 785 F.3d 567, 571 (Fed. Cir. 2015) reh'g en banc granted, opinion vacated, 600 F. App'x 775 (Fed. Cir. 2015) (finding the term "SLANTS" disparaging to Asian Americans); Christine Haight Farley, *Stabilizing Morality in Trademark Law*, 63 AM. U. L. REV. 1019, 1022 (2014). In fact, the only intelligible consistency in the PTO's recent orders is the agency's careful guarding of constitutionally protected classes. *In re Tam*, 785 F.3d at 571 (finding the term "SLANTS" disparaging to Asian Americans); *In re Heeb Media, LLC*, 89 U.S.P.Q.2d 1071 (P.T.O. Nov. 26, 2008) (determining the historically derogatory term "HEEB," short for Hebrew, is disparaging to Jews); *In re Squaw Valley Dev. Co.*, 80 U.S.P.Q.2d 1264 (P.T.O. May 23, 2006) (finding the term "SQUAW" may be disparaging to Native Americans).

Alternatively, the PTO may be more concerned about the trademarks they deem vulgar. SHANK THE B!T@H, Registration No. 85301216 (“SHANK THE B!T@H” for a board game); WHITE TRASH, Registration No. 77796597 (registration of “WHITE TRASH” for a granola bar).

Either way, “dumb” is not vulgar and “blonde” is not a protected class. *Mass. Bd. of Ret. v. Murgia*, 427 U.S. 307, 314 (1976) (“[A] suspect class is one ‘saddled with such disabilities, or subjected to such a history of purposeful unequal treatment, or relegated to such a position of political powerlessness as to command extraordinary protection from the majoritarian political process.’”) (quoting *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 28 (1973)); see also *Korematsu v. United States*, 323 U.S. 214, 216 (1944). In the disjunctive, the plain meaning of the words are innocuous, and in the conjunctive, demonstrably celebrated. *In re Kourtney Luhv*, 1337 F.3d at 455–58.

Generally, a term is considered disparaging if “by comparison with what is inferior, [the mark] slights, deprecates, degrades, [] affects or injures by unjust comparison.” *In re Geller*, 751 F.3d at 1356. Note that in spite of the PTO’s dated interpretation of DUMB BLONDE, this Court is free to “determin[e] that a mark may be disparaging [a]s a conclusion of law based upon underlying factual inquiries . . . the Board's factual findings are reviewed for substantial evidence. . . .” *Id.*

Fortunately, despite the ambiguities embedded in the *In re Geller* analysis, two principles are clear. First, the TTAB recognizes the limitations of relying on dictionary definitions to govern a mark’s true meaning and whether it refers to a

specific group. *In re Geller* 751 F.3d at 1360; *see also Boswell v. Mavety Media Grp. Ltd.*, 52 U.S.P.Q. 2d (BNA) 1600, 1608 (T.T.A.B. 1999). Second, DUMB BLONDE must be taken in context. *See Pro-Football, Inc. v. Harjo*. 284 F. Supp. 2d 96, 130 (2003). Inarguably, DUMB BLONDE specifically refers to blonde women. *In re Kourtney Luvv*, 1337 F.3d at 458. Even if this Court chooses to utilize dictionary definitions as an analytical launchpad, proper analysis requires that the Court land in reality. *Compare In re Geller*, 751 F.3d at 1361, *with In re Boulevard Entm't*, 334 F.3d 1336, 1340 (Fed. Cir. 2003). Context includes the mark's audience, "and the manner in which the mark is used in the marketplace in connection with the goods or services." *In re Geller*, 751 F.3d at 1358.

The trademark DUMB BLONDE is not disparaging because it always has and always will promote women's independence—evidenced by Kourtney's lyrics, album art, and emboldened fan base. *Harjo*, 284 F. Supp. 2d at 130 (requiring that the trademark "Redskins" be evaluated as perceived by Native American at the time of registration); *In re Kourtney Luvv*, 1337 F.3d at 458–59. The purpose of DUMB BLONDE is to celebrate modern, intelligent, and nevertheless, blonde women. *In re Kourtney Luvv*, 1337 F.3d at 457–58. To this end, the PTO is at fault for blindly relying on the dictionary definition of "dumb" and the non-contextual connotation of "dumb blonde." *Id.* at 457. Correspondingly, the Circuit Court's dependence on dictionary definitions and preconceived stereotypes resulted in an all-too-rudimentary dismissal of DUMB BLONDE. *See In re Boulevard Entm't*, 334 F.3d at 1340; *In re Kourtney Luvv*, 1337 F.3d at 457.

The TTAB has explicitly recognized alternative meanings of terms. Applicant's Request to Remand for Additional Evidence at 5, *In re S.F. Women's Motorcycle* Contingent Appeal, No. 000020-007200US (T.T.A.B. Sep. 15, 2005); Official Notice of Acceptance and Acknowledgement (Dec. 6, 2005) (on file with the United States Patent and Trademark Office). "Self-definition" or "self-disparagement" is a practice whereby conventional slurs are transformed into empowering expressions by intentional repurposing. Targeted groups often "self-define" terms that would otherwise degrade the group's members; the process allows targeted groups to outwit ostracization. *Id.*; see Todd Anten, *Self-Disparaging Trademarks and Social Change: Factoring the Reappropriation of Slurs into Section 2(a) of the Lanham Act*, 106 COLUM. L. REV. 388, 422 (2006). Perhaps most illustrative is the TTAB's opinion concerning the trademark "Dykes on Bikes." Applicant's Request to Remand for Additional Evidence at 5–121, *In re S.F. Women's Motorcycle* Contingent Appeal, No. 000020-007200US; Official Notice of Acceptance and Acknowledgement.

The applicants were a group of lesbian motorcycle enthusiasts unashamedly labeling themselves "Dykes on Bikes." *Id.* at 9–121. After the PTO denied "Dykes on Bikes," the registrants brought forth evidence representing an alternative, self-cast interpretation of the term; one that did not have a different literal meaning, but a completely different contextual meaning. See Todd Anten, *Self-Disparaging Trademarks and Social Change: Factoring the Reappropriation of Slurs into Section 2(a) of the Lanham Act*, 106 COLUM. L. REV. 388, 427–29 (2006). The TTAB reversed

the PTO's decision in light of evidence that the group openly embraced "Dykes on Bikes" as "a symbol of power and pride." Applicant's Request to Remand for Additional Evidence at 9–121, *In re S.F. Women's Motorcycle Contingent Appeal*, No. 000020-007200US.

Admittedly, the PTO and TTAB have rejected applications that set out to self-define a previously disparaging term. *In re Heeb*, 89 U.S.P.Q.2d, at *9. For example, in *In re Heeb*, the applicant argued that the magazine titled "HEEB"—traditionally a derogatory slur aimed at Jewish people—was not disparaging and was embraced by many progressive Jews. *Id.* Nevertheless, the TTAB affirmed the PTO's refusal in light of damning evidentiary findings including: (1) the fact that anti-Semitism is flourishing, (2) that usual sensitivities should presumptively control, and (3) that the word HEEB is on par with the "N-word." *Id.*, at *2.

DUMB BLONDE should not face the same fate as marks like HEEB, SLANTS, and SQUAW because it is patently distinguishable. Both in context and out, DUMB BLONDE does not rise to the same level of disparagement as does HEEB. *Id.*, at *7–8. Indeed, DUMB BLONDE fails to invoke any sort of maligned historical oppression; anti-blonde groups have not and do not exist. *Id.*; see *In re Kourtney Luhv*, 1337 F.3d at 457–58. Further, DUMB BLONDE is simply not in the same league as words like Heeb and the "N-word;" finding otherwise would implicate a garden-variety of harmless phrases. See *id.*, at *2. Similarly, DUMB BLONDE does not possess a historically derogatory connotation recognized by cultural and historical experts like *In re Tam*. See 785 F.3d at 571; *In re Kourtney*

Luhv, 1337 F.3d at 455–59. At most, DUMB BLONDE has only bothered a handful of people. *In re Kourtney Luhv*, 1337 F.3d at 457. In contrast, over twenty academic, statutory, and expert sources identified the term SQUAW disparaging. *In re Squaw Valley Dev. Co.*, 80 U.S.P.Q.2d, at *10–13. In the present case, the examining attorney did not rely on any sources of such caliber. *See id.*; *In re Heeb Media, LLC*, 89 U.S.P.Q.2d, at *7–8; *In re Kourtney Luhv*, 1337 F.3d at 457–59. As such, DUMB BLONDE is not beyond repair. Instead, DUMB BLONDE is ripe for self-definition.

However, theoretical musings about self-definition are one thing, in the present appeal, Kourtney has *actually* redefined DUMB BLONDE. Compare *In re Kourtney Luhv*, 1337 F.3d at 457–58, with Applicant’s Request to Remand for Additional Evidence at 9–121, *In re S.F. Women’s Motorcycle Contingent Appeal*, No. 000020-007200US. As the record indicates, DUMB BLONDE is “display[ed] prominently alongside a woman with a successful career and through musical lyrics that shed light on crucial issues faced by women.” *In re Kourtney Luhv*, 1337 F.3d at 458. Moreover, Kourtney’s album art hysterically contrasts worn out jokes with realistic possibilities. *Id.* at 456–57 (picturing a blonde woman gnawing on fake fruit and a blonde woman in the White House).

Even still, if Kourtney’s intended alteration is not wholly determinative, the response of her fan base most certainly is. *Id.* at 457–58. DUMB BLONDE is embraced by hundreds of thousands of women who attend Kourtney’s shows and post emancipated images of blonde women on her Soundpuff and uTube profiles. *Id.* at 458–59. DUMB BLONDE is a positive and progressive call-to-action. Holding

otherwise would allow a group of examining attorneys to define DUMB BLONDE on behalf of all blonde women.

B. DUMB BLONDE is Not Disparaging to a Substantial Composite of Blonde Women.

If this Court mistakes DUMB BLONDE for a slur rather than a progressive symbol, then, pursuant to the second prong of *In re Geller*, the PTO's examining attorney is required to consider whether a "substantial composite" of the reference group may find DUMB BLONDE disparaging. 751 F.3d at 1358. Though it is hard to approximate the number of women who do not understand Kourtney's message, it is certainly less than a substantial composite of all blonde women. While the term is certainly ambiguous, the *Harjo* court found that substantial composites are determined by the facts of the case. *Harjo*, 284, F. Supp. 2d at 124. The court also found that thirty-seven percent of a reference group is not necessarily a substantial composite. *See id.* at 119. Meanwhile, the TTAB has stated that a substantial composite does not have to be a majority. *In re Heeb Media, LLC*, 89 U.S.P.Q.2d, at *8 ("While case law does not provide a fixed number or percentage, it is well established that a 'substantial composite' is not necessarily a majority"). Therefore, it is reasonable to assume that a substantial composite of a reference group ranges between thirty-eight and forty-nine percent of the whole. *Id.* at 119; *see In re Heeb Media, LLC*, 89 U.S.P.Q.2d, at *8.

Unlike the marks HEEB, SLANTS, and SQUAW, the examining attorney's determination that DUMB BLONDE is disparaging to a substantial composite of the referenced group is not supported by any expert opinions, historical analysis, or

surveys. *In re Tam*, 785 F.3d at 571; *In re Heeb Media, LLC*, 89 U.S.P.Q.2d, at *6–8; *In re Squaw Valley Dev. Co.*, 80 U.S.P.Q.2d, at *10–16. The Petitioner will likely rely on the aforementioned cases, but in each of these instances the examining attorney explicitly sought expert opinions and thoroughly investigated the term. For instance, the court in *In re Heeb* found that HEEB had different meaning among different generations. 89 U.S.P.Q.2d, at *7. This overt “generational divide” assisted the court in identifying a substantial composite; alternative meanings of HEEB fit neatly into quantifiable factions. *Id.*

The Federal Circuit in *In re Tam* took a similar approach. 785 F.3d at 571. There, the court relied on a multitude of articles and testimony from the preeminent Japanese-American civil rights group who found the use of SLANTS derogatory. *Id.* Additionally, the court explained that a survey of the composite group was unnecessary, because other trustworthy evidence was present. *See generally id.*

Lastly, the court in *In re Squaw Valley Development Company* specifically stated that, “[t]he numerous quotations from Native Americans in the excerpted portions of Nexis articles . . . and the fact that several states have taken the drastic step of changing the names of geographic sites containing the word ‘squaw,’ [was] sufficient” to prove that a substantial composite of the referenced group found the term disparaging. 80 U.S.P.Q.2d, at *3.

Each of these courts relied on the examining attorneys’ investigation and evidence *outside* of his or her personal opinion. *In re Tam*, 785 F.3d at 571; *In re Heeb Media, LLC*, 89 U.S.P.Q.2d, at *6–8; *In re Squaw Valley Dev. Co.*, 80

U.S.P.Q.2d, at *10–16. It is critical for this Court to recognize the *absence* of any such evidence in the present case. *In re Kourtney Luhv*, 1337 F.3d at 456–59.

The only evidence in the record relating to the reference group’s reaction to DUMB BLONDE are a few rants posted on Kourtney’s uTube page. *In re Kourtney Luhv*, 1337 F.3d at 457. There is no evidence that the women posting on Kourtney’s uTube account were in fact blonde. Although the PTO has limited resources to conduct market research, Kourtney has rebutted the PTO’s prima facie case in light of the overwhelming support she has received from all types of women. *See In re Pacer Tech.*, 338 F.3d at 1352; *In re Kourtney Luhv*, 1337 F.3d at 458–59.

The onus is on the Petitioner to prove that DUMB BLONDE is disparaging to a substantial composite of the reference group. *In re Pacer Tech.*, 338 F.3d at 1352. To that end, Petitioner’s appeal requires that this Court make two extrajudicial assumptions: (1) that the women mistaking Kourtney’s message are in fact blonde, and (2) that those one-off comments somehow capture the feelings of a substantial composite of blonde women. The TTAB relies on one examining attorney’s interpretation and a few comments taken out of context; clearly inapposite to the hundreds of thousands of DUMB BLONDE followers—many of whom are blonde. *In re Kourtney Luhv*, 1337 F.3d at 456–58. Petitioner asks this Court to assume what is not in the record and not established on appeal.

Even accepting Petitioner’s assumptions, courts have repeatedly held that examining attorneys should not hesitate to approve marks that are considered “close calls.” *In re Mavety Media Grp. Ltd.*, 33 F.3d 1367, 1374 (Fed. Cir. 1994); *In re*

In Over Our Heads Inc., 16 U.S.P.Q.2D (BNA) 1653, 1654–55 (P.T.O. Aug. 28, 1990); *cf. In re Gourmet Bakers, Inc.*, 173 U.S.P.Q. (BNA) 565, 565 (TTAB 1972) (determining that where "no easy applicable objective test exists to determine whether a mark is merely descriptive or merely 'suggestive,' the frequent manner of disposition is resolved in favor of the applicant on the theory that any person believed damaged by the registration would have the opportunity to oppose registration and present evidence usually not present in the ex parte application").

Courts justify this deference to applicants as a matter of policy. If an individual feels disparaged by the mark they still have legal standing to file suit and cause approval to be withdrawn. *In re Mavety Media Grp. Ltd.*, 33 F.3d at 1374; *Bromberg v. Carmel Self Serv., Inc.*, 198 U.S.P.Q. (BNA) 176, 178–79 (T.T.A.B. 1978); *In re Gourmet Bakers, Inc.*, 173 U.S.P.Q. (BNA) at 565. Thus, in light of the deference given to applicants and so as to avoid subsequent judicial action, the TTAB typically will not deny a mark unless it is certainly disparaging. *In re Mavety Media Grp., Ltd.*, 33 F.3d at 1374; *In re In Over Our Heads Inc.*, 16 U.S.P.Q.2D (BNA) at 1654–55; *In re Gourmet Bakers, Inc.*, 173 U.S.P.Q. (BNA) at 565. DUMB BLONDE is quite the opposite of disparaging—it is feminist expression on display. *In re Kourtney Luhv*, 1337 F.3d at 457–59. Even if taken out of context, DUMB BLONDE is not “certainly disparaging.” The lower court erred in upholding the examining attorney’s subjective and uninformed opinion of DUMB BLONDE. Therefore, DUMB BLONDE is not disparaging to a substantial composite of blonde women and should have been approved.

C. DUMB BLONDE Should be Registered as a Matter of Policy.

DUMB BLONDE should be registered as a matter of public policy because it has a real chance of spurring social change in a way that is self-contained and not aggressive. DUMB BLONDE is not only an assertive call-to-action, it is funny and ironic; a brilliant use of inclusive humor. Inclusive humor “target[s] inequitable systems without attacking putative mean-spirited oppressors.” Janet Bing, *Is Feminist Humor an Oxymoron?*, 27 *WOMEN & LANGUAGE* 22, 28 (2004). As the renowned linguistic professor Janet Holmes stated, “humor can be a double-edged weapon, providing a legitimate means of subverting authority. . . [it] challenges existing power relationships, whether informal or formal, explicit or implicit; it subverts the status quo.” Janet Holmes & Meredith Marra, *Over the Edge? Subversive Humor Between Colleagues and Friends*, 15 *HUMOR* 1, 65–87 (2002). Humor helps to establish a feeling of group solidarity. In fact it has been observed that “[t]he odds of women using humor to create or maintain solidarity are more than twice as high as men.” AVNER ZIV, *PERSONALITY AND SENSE OF HUMOR*, 734 (N.Y. Springer Publ’r Co. 1984). DUMB BLONDE is an effective use of inclusive humor because it implicates and reaffirms the intelligence of blonde women, all while remaining inoffensive to non-blonde outsiders. *In re Kourtney Luhv*, 1337 F.3d at 456. DUMB BLONDE exposes a stereotype that is laughably inaccurate.

DUMB BLONDE reaps all the benefits of comedic relief without encouraging the purported anti-blonde jokesters. The trademark is a witticism created by blondes, for blondes, eliminating a stereotype uniquely cast on blondes. DUMB

BLONDE disarms an absurdity by overextending the joke—blondes are free to laugh alongside their critics. The trademark involves no supposition that brunettes and redheads are spiteful or that they consciously try to oppress blondes. In fact, the assumption in DUMB BLONDE seems to be that if outsiders really understood blondes' potential, they would change their attitudes. Blondes control the narrative; the mark is funny because it is so far removed from the truth.

Admittedly, registering one trademark can only make so much of an impact. Nevertheless, this Court has recognized that, “[s]ocial change on great issues generally reveals itself in small increments” and that the Courts must lean on the community to bring about such change. *Coker v. Georgia*, 433 U.S. 584, 618 (1977); *United States v. Jefferson Cnty. Bd. of Educ.*, 372 F.2d 836, 847 (5th Cir. 1966). Therefore, this Court ought to permit registration of DUMB BLONDE as a matter of policy because the tag skillfully emboldens blonde women by including them in the joke rather than by criticizing opponents. This Court should lean into Kourtney’s progressive social agenda rather than preventing its distribution.

CONCLUSION

The Federal Circuit Court correctly held section 2(a) of the Lanham Act is unconstitutional in application, because section 2(a) targets protected commercial speech, implicates the unconstitutional conditions doctrine, and is unsupported by the four-prong *Central Hudson* test. Moreover, even if this Court finds section 2(a) constitutional, it may still affirm the decision of the Circuit Court upon review of the evidence, which proves that DUMB BLONDE has a positive meaning, is not

disparaging to a substantial composite of the reference group, and brilliantly disrupts a hurtful stereotype by allowing blondes to laugh along. Accordingly, Kourtney Luhv prays that this Court affirm the Federal Circuit Court's reversal.

Respectfully Submitted,

TEAM NO. 115
COUNSEL FOR RESPONDENT
OCTOBER 20, 2015