

No. 15-1007

IN THE
Supreme Court of the United States

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

Team 119
Counsel for Petitioner
October 20, 2015

QUESTIONS PRESENTED

- I. Did the Trademark Trial and Appeal Board correctly find the brand owner could not attain federal registration for the trademark DUMB BLONDE for clothing on the ground the mark could not overcome the disparagement provision within section 2(a) of the Lanham Act?
- II. Does the denial of a federal trademark registration on the grounds of the mark being disparaging, violate the constitutional right of an applicant?

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OPINION BELOW

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

STATEMENT OF JURISDICTION

The Court of Appeals for the Federal Circuit entered its judgment on June 6, 2015. This Court granted the Petition for the writ of certiorari. This Court has jurisdiction pursuant to 28 U.S.C. § 1253 (2015).

STANDARD OF REVIEW

A reviewing court reviews an agency's reasoning if a conclusion of law is based upon underlying factual inquiries, to determine whether it is supported by substantial evidence. *Dickinson v. Zurko*, 527 U.S. 150, 164, 119 S. Ct. 1816, 1823, 144 L. Ed. 2d 143 (1999).

STATUTORY PROVISIONS

The relevant statutory provision is section 2(a) of the Lanham Act, 15

U.S.C. § 1052(a) (2006), which provides:

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 comprises immoral, deceptive, or scandalous matter; or matter which may disparage or falsely suggest a connection with persons, living or dead, institutions, beliefs, or national symbols, or bring them into contempt, or disrepute; or a geographical indication which, when used on or in connection with wines or spirits, identifies a place other than the origin of the goods and is first used on or in connection with wines or spirits by the applicant on or after one year after the date on which the WTO Agreement (as defined in section 3501(9) of Title 19) enters into force with respect to the United States.

STATEMENT OF THE CASE

Statement of the Facts

Kourtney Luhv (Respondent) is a vocalist and solo artist who is known by her stage name, Dumb Blonde. Respondent has been performing under her stage name since 2012. She has appeared at various venues in the Southern California region and various other states.

Respondent's music incorporates various elements from genres including Grindcore, Neurofunk, and American Folk music. Her lyrics focus on issues faced by women in today's society. Respondent has a devoted fan base along with a sizeable number of online users who follow Respondent and her music via an online streaming service at www.soundpuff.com ("Soundpuff").

Respondent has a registered account on www.uTube.com ("uTube") under the name DumbBlondeMusic. She uses this account to post videos as a way of communicating with her fan base and sharing music-production-related tips with other uTube users.

Respondent filed with the Patent and Trademark Office ("PTO") on July 09, 2014. Her application number was 99/989,052 ('052 application). Respondent sought to register the mark DUMB BLONDE for "Entertainment, namely live performances by a musical band" and "clothing, namely, sweatshirts, t-shirts, tank tops, and headwear."

At the of the trademark registration filing, Respondent had over 40,000 followers on Sounpuff and over 100,000 subscribers on her uTube channel.

In June of 2014, Respondent recorded several pieces of music that she hoped to release as an extended play format record via a record label. She negotiated a deal with a record label for a contract that included a \$2,000,000 advance upon the execution of the agreement. The deal required that Respondent be able to register a trademark for Dumb Blonde.

Due to various materials submitted to the examining attorney, Respondent's mark was refused registration on the basis that the mark "may be disparaging to a substantial composite of the referenced group, namely women who have a blonde hair color."

Procedural History

On July 09,2014 Respondent filed to register DUMB BLONDE with the PTO under application number 99/989,052. The examining attorney found that Respondent's mark, DUMB BLONDE, may be disparaging to women under 15 U.S.C §1052(a) (the "Lanham Act"). On these merits, the examining attorney refused to register Respondent's mark and her federal trademark registration was denied.

Respondent contested the application's denial and brought an appeal before TTAB. Upon review, TTAB affirmed the examining attorney's refusal for Respondent's mark.

The United States Court of Appeals, Federal Circuit reviewed the Trademark Trial and Appeal Board's (TTAB) factual findings for substantial evidence and its ultimate conclusion regarding registration of Respondent's mark DUMB BLOND de novo. The United States Court of Appeals, Federal Circuit found that, while Respondent's mark, DUMB BLONDE, may be disparaging, TTAB and the PTO could not rely on section 2(a) of the Lanham Act as their basis for denying Respondent's trademark application.

The United State's Solicitor General filed a petition for writ of certiorari and it was granted.

SUMMARY OF THE ARGUMENT

The Court of Appeals correctly held that Respondent's mark is disparaging to a substantial composite of women, which warranted the examining attorney's refusal to register the mark, DUMB BLONDE, under section 2(a) of the Lanham Act.

However, the Court of Appeals incorrectly held that it was unconstitutional for federal trademark registration to be denied on the grounds that the mark be disparaging. Furthermore, the Court of Appeals was in correct in reversing TTAB's refusal of Respondent's trademark application.

This Court, thus, should affirm the Court of Appeals first ruling and reverse the second.

ARGUMENT

A. Issue Preclusion Applies Because The Patent And Trademark Office Has Established A Fair And Effective Registration System For Trademark Owners.

The role of the United States Patent and Trademark Office (“PTO”) is to grant patents and register trademarks. Not every trademark owner, however, elects to seek the additional advantages of federal registration. If a trademark owner does apply with the PTO, the PTO’s examining attorneys review applications in order to determine whether a trademark meets certain federal provisions. Trademark Manual of Examining Procedure § 100 (2015).

When registration matters arise, the neutral Trademark Trial and Appeal Board (“TTAB”) functions like a court to resolve said matters. Trademark Trial and Appeal Board Manual of Examining Procedure Introduction (2015). The TTAB consists of a three-judge panel that independently reviews the application file to make a determination. *Id.* Because the Board reviews the same legal record and applies the same legal standard as the PTO examining attorneys, applicants are forewarned of the difficulty in winning an appeal. *Id.*

In an effort to reduce costs and time, courts deter relitigation of the same issue when there is little likelihood the result will be different through issue preclusion. Issue preclusion only applies when the identical issue has already been fully litigated and the decision on said issue was integral to the outcome of the case. *B & B Hardware, Inc. v. Hargis Indus., Inc.*, 135 S. Ct. 1293, 1302-10, 191 L.

Ed. 2d 222 (2015). The elements of issue preclusion are addressed and are met to preclude the disparagement issue.

i. The Meaning Within Section 2 Of The Lanham Act's Disparagement Provision Has Been Vigorously Litigated And Decided.

Once a court has decided an issue, it is “forever settled as between the parties. *Id.* at 1302 (quoting *Baldwin v. Iowa State Traveling Men's Assn.*, 283 U.S. 522, 525, 51 S.Ct. 517, 75 L.Ed. 1244 (1931)). There is nothing in the Lanham Act barring application of issue preclusion for TTAB rejections. *See id.* at 1304. The applicant in *B & B Hardware* appealed and the TTAB affirmed the examining attorney's rejection. *Id.* at 1302. The issue before the TTAB in *B & B Hardware* was whether a trademark was registerable on the principal register within the meaning of section 2 of the Lanham Act. *Id.*; *See also* 15 U.S.C § 1052 (2006). In a later action, the Supreme Court found issue preclusion, because the TTAB had fully litigated the meaning of the section 2 provision and the decision was integral to the trademark being denied federal registration. *Id.*

Luhv appealed and the TTAB affirmed the rejection of the '052 application based on the TTAB providing substantial evidence. *In re Kourtney Luhv*, 1337 F.3d 455, 455 (Fed. Cir. 2015). The Court of Appeals for the Federal Circuit affirmed the denial of Luhv's trademark on the principal register within the meaning of section 2 of the Lanham Act, which demonstrates the meaning of section 2 of the Lanham Act's 'may disparage' issue has been vigorously litigated and decided.

ii. There Is Little Likelihood DUMB BLONDE Will Be Registered With The PTO Because An Opposition Proceeding Is Decided By The TTAB That Previously Denied Registering DUMB BLONDE.

The concurrent authority of Congress and state legislatures regulating trademarks is because the PTO does not have the power to grant trademark rights. Kimberly A. Pace, *The Washington Redskins Case and the Doctrine of Disparagement: How Politically Correct Must A Trademark Be?*, 22 Pepp. L. Rev. 7, 18-19 (1994). As state common law grants trademark rights, a balance had to be made with federal law to further service trademark owners while deterring them from forum shopping. This balance established an effective and fair system, which creates a more efficient way of processing trademark applications. If this Court agreed with the dissent and found Luv's DUMB BLONDE should at least have the opportunity to be disputed in an opposition proceeding, there is little likelihood Luv's DUMB BLONDE would be registered.

Opposition proceedings are before the TTAB, where Luv was first denied trademark registration for DUMB BLONDE. The dissent also neglects Luv chose to appeal before the United States Court of Appeals for the Federal Circuit thereby waiving her right to resolve the issue before a district court. See 15 U.S.C. § 1071 (2011). Opposition proceedings are governed by rules of procedure and rules regarding evidence that are similar to those used in civil actions in a federal district court. *B & B Hardware, Inc. v. Hargis Indus., Inc.*, 135 S. Ct. at 1300; *see also In re McGinley*, 660 F2d. 481, 486 (1981), 211 U.S.P.Q. 668. Because the main concern of the PTO is whether a trademark meets the provisions for federal

registration, its examining attorneys and the TTAB consist of highly trained individuals in the area of trademarks. Given this level of this expertise, there has been a trend in giving the PTO decisions more deference. See Melissa F. Wasserman, *The Changing Guard of Patent Law: Chevron Deference for the PTO*, 56 William & Mary L. Rev. 6, 2004 (2013).

The dissent concluded the TTAB correctly affirmed the examining attorney's rejection of DUMB BLONDE on the ground of disparagement. *In re Kourtney Luhv*, 1337 F. 3d 455, 460 (Fed. Cir. 2015). A trademark, however, is only published for opposition when an examining attorney deems that registration is warranted, which is not the case here as the examining attorney rejected Luhv's application. See *B & B Hardware, Inc. v. Hargis Indus., Inc.*, 135 S. Ct. at 1300; see also 15 U.S.C. § 1062 (1999). As the TTAB affirmed the examining attorney's denial of DUMB BLONDE, there is little likelihood the result will be different in an opposition proceeding. This Court finding issue preclusion, as in *B & B Hardware*, upholds judicial economies of scale by furthering a more efficient justice system to sustain the economic growth of the United States.

B. The TTAB Properly Rejected Luhv's Standard Character Trademark DUMB BLONDE Regardless Of Issue Preclusion Because As A Brand Owner She Has A Right To Control How Her Mark Is Discerned

The current federal registration system for protecting trademarks used in commerce was born when Congress passed the Lanham Act of 1946. Kimberly A. Pace, *The Washington Redskins Case and the Doctrine of Disparagement: How Politically Correct Must A Trademark Be?*, 22 Pepp. L. Rev. 7, 18-19 (1994). Since

the Lanham Act's inception, it has been the well-established rule of law used to balance the protection of both the public and the trademark owner. *Id.* In an effort to clarify the complex process and provisions of registering trademarks, the PTO publishes the Trademark Manual of Examining Procedure ("TMEP") and the Trademark Trial and Appeal Board Manual of Procedure ("TBMP") on its website. These provided materials inform applicants of the current practices and procedures of the PTO under the applicable authority, which includes the Lanham Act.

Under section 2(a) of the Lanham Act, the PTO protects the public by denying registration to any mark that "[c]onsists of or comprises immoral, deceptive, or scandalous matter; or matter which may disparage or falsely suggest a connection with persons, living or dead, institutions, beliefs, or national symbols, or bring them into contempt or disrepute." 15 U.S.C. § 1052(a) (2006). The TMEP § 1203.03(b)(i) indicates the TTAB has established the following two-part test to determine whether a mark "may disparage":

(1) What is the meaning of the matter in question, as it appears in the marks and as those marks are used in connection with the goods and services identified in the registrations?

(2) Is the mark's meaning one that may disparage mainly blonde women?

See In Re Heeb Media, LLC, 89 U.S.P.Q.2d 1071, *4 (P.T.O. Nov. 26, 2008); *See also Pro-Football, Inc. v. Blackhorse*, 115 USPQ2d 1524, 21 (TTAB 2015); *In re Geller*, 751 F.3d 1355, 1358 (Fed.Cir.2014); *In re Tam*, 108 USPQ2d 1305 (TTAB 2013); *In re Lebanese Arak Corp.*, 94 USPQ2d 1215 (TTAB 2010).

In analyzing this disparagement test, the TTAB correctly found substantial evidence supporting the denial of Luhv's application.

i. There Are No Other Elements In DUMB BLONDE Itself To Indicate Any Other Meaning Than The Negative And Stereotypical View Of Blonde Women.

Luhv's trademark can only mean "dumb blonde" when the mark has no other meaning pertinent to the context of the goods or services as identified in the application. *See In Re Heeb Media, LLC*, 89 U.S.P.Q.2d 1071, 5 (P.T.O. Nov. 26, 2008). The applicant in *In re Heeb* filed an application to register the mark HEEB (in standard character form) for "clothing, namely, jackets, jerseys, sweat pants, sweat shirts, track suits, t-shirts, tank tops and pants; headwear" and "entertainment, namely, conducting parties." *Id.* at *1. The examining attorney in *In re Heeb* submitted excerpts of Jewish groups and Jewish individuals who considered the term HEEB to be disparaging. *Id.* at *3-*6. Because there were no "other elements" in the mark to affect HEEB's negative dictionary definition meaning, the term HEEB was found to be disparaging to the Jewish population. *Id.* at *6.

Luhv's Application No. 99/989,052 ('052 application) seeks to register the mark DUMB BLONDE (in standard character form) for "Entertainment, namely live performances by a musical band" and "clothing, namely, sweatshirts, t-shirts, tank tops, and headwear." *In re Kourtney Luhv*, 1337 F.3d at 456. Luhv's '052 application does not include her lyrics or website. *Id.* Because there are no other elements in DUMB BLONDE itself, as in *In re Heeb*, to affect the phrase "dumb blonde," Luhv's mark in her '052 application can only mean the negative and a stereotypical view of blonde women.

ii. Substantial Evidence Proves The Manner In Which DUMB BLONDE Is Displayed May Disparage Blonde Women Because It Perpetuates The Era Of Dumb Blonde Jokes.

Section 2(a) does not require *every* woman think the phrase dumb blonde is matter that “may disparage,” nor does it mandate *a majority* of women consider the mark one that consists of matter that “may disparage.” *Pro-Football, Inc. v. Blackhorse*, No. 1-14-CV-01043-GBL, 2015 WL 4096277, 36 (E.D. Va. July 8, 2015). Section 2(a), rather, denies registration of any mark that consists of or comprises matter that “*may* disparage” the referenced group. *Id.* Because the PTO essentially does not have the means to conduct a poll to determine whether dumb blonde may disparage women, the TTAB takes a more permissive stance in regards to the admissibility and probative value of evidence. *In re Tam*, 785 F.3d 567, 571 (Fed. Cir.) *reh'g en banc granted, opinion vacated*, 600 F. App'x 775 (Fed. Cir. 2015); see also Trademark Trial and Appeal Board Manual of Examining Procedure § 1208 (2015). The TTAB, moreover, permits consideration of Internet materials. *See e.g., Id.*

The court in *In re Tam* found there was substantial evidence to reject registration of applicant’s mark THE SLANTS for “Entertainment, namely, live performances by a musical band.” *Id.* at 568. The Examining Attorney provided dictionary definitions, articles, and comments from Asian individuals that supported the fact that “the slants” was disparaging. *Id.* at 570. Because the applicant showed “slants” had disparate meanings, however, the court found it necessary to examine how the applicant actually used THE SLANTS in relation to

the services claimed in the application. *Id.*

The Court in *In re Tam* affirmed the TTAB's rejection because of the way the mark THE SLANTS was used for entertainment services, which the band's website had the mark THE SLANTS set against "a depiction of an Asian woman, utilizing rising sun imagery and using a stylized dragon image." *Id.* at 570-71. The court found the way the applicant displayed its mark THE SLANTS to the public was in a manner that still retained the negative meaning that may disparage people of Asian descent. *See id.* at 570.

Because the lower court found Luhv presented support for her position that there were disparate meanings to the phrase dumb blonde, the way she uses the mark DUMB BLONDE in relation to the services and goods claimed in her '052 application is required. *See In re Kourtney Luhv*, 1337 F.3d at 458. The TTAB properly cited to materials to show how Luhv uses her mark in public. Luhv uses the stage name DUMB BLONDE, where her website has a blonde woman eating plastic fruit and applying Wite-Out® to text displayed on her computer monitor and a blonde woman depicted as the president of the United States. *Id.* at 457-58.

The examining attorney also cites to an article that the lower court found had significant evidence suggesting women view "dumb blonde" jokes negatively. *Id.* at 457. As the phrase "dumb blonde" implies a negative, stereotypical view of blonde women, when juxtaposition with the pictures on Luhv's website, displays the mark in a manner that seems to be making a joke of blonde women. Because the manner in which Luhv displays DUMB BLONDE to the public still retains its

negative meaning, as in *In re Tam*, this Court should find Luhv's DUMB BLONDE may disparage mainly blonde women.

As the PTO determines if a mark will be a reliable notice of the owner's goods or services, federal registration must have a provisions like section 2(a) of the Lanham Act. The TTAB numerously has pointed out that it is only empowered to deny the statutory registration of the marks under Section 2(a); it cannot cancel the trademarks themselves. *Pro-Football, Inc. v. Blackhorse*, No. 1-14-CV-01043-GBL, 2015 WL at 6. Federal law **does not** create trademarks. *B & B Hardware, Inc. v. Hargis Indus., Inc.*, 135 S. Ct. at 1300 (citing *Trade-Mark Cases*, 100 U. S. 82, 92 (1879) ("This exclusive right was not created by the act of Congress, and does not now depend upon it for its enforcement. The system of trademark rights and the civil remedies for its protection existed long before the Lanham Act, and have remained in full force since its enactment.")). Brand owners create trademarks, and said owners can control how the public discerns the source and origin of their goods and services. *Pro-Football, Inc. v. Blackhorse*, No. 1-14-CV-01043-GBL, 2015 WL at 39. How Luhv chooses to use DUMB BLONDE is not within the scope of what the PTO reviews. Because common law gives Luhv the ability to still use DUMB BLONDE as a brand to the public, this Court should find substantial evidence supported the TTAB properly denying Luhv's application.

C. The Referenced Group Is Blonde Women As Luhv's Good Intentions Are Irrelevant.

Section 2(a) of the Lanham Act does not preclude registration of matter that **is** disparaging; said section precludes registration of matter that **may** be disparaging. *E.g.*, *Harjo*, 50 U.S.P.Q.2d 1705, *35 (P.T.O. Apr. 2, 1999). The purpose of the term “may” before “disparage” is to avoid interpreting section 2(a) requires a showing of Luv’s intent to disparage in order to reject an application. *See e.g.*, *Harjo*, 50 U.S.P.Q.2d at *35. Disparagement within the meaning of section 2(a) of the Lanham Act does not require intent, but federal registration does take intent into account. Luv’s good intentions are discussed, and are irrelevant based on her ‘052 application.

i. Blonde Women Find DUMB BLONDE Disparaging Despite Luv’s Efforts.

The fact Luv has good intentions underlying her use of the phrase “dumb blonde” does not obviate the fact that a substantial composite of women would find the term objectionable. *See In re Tam*, 785 F.3d. 567, 571, 108 USPQ2d 1305 (TTAB 2013). The applicant in *In re Tam*, was an Asian musician who stated the following: “We want to take on these stereotypes that people have about us, like the slanted eyes, and own them. We’re very proud of being Asian—we’re not going to hide that fact.” *Id.* Because there posts discussing the negative nature of THE SLANTS, the court reasoned the applicant’s intent did not preclude the mark from still portraying the stereotype to people of Asian descent. *Id.*

Luv chose the mark DUMB BLONDE as a way to reclaim the stereotype associated with blonde women and raise awareness of negative stereotypes faced by all women. *See In re Kourtney Luv*, 1337 F.3d at 457. Luv’s intent does not

obviate the fact that posts on her uTube videos show blonde women find the phrase “dumb blonde” to be disparaging. *Id.* While Luhv can control how her fans perceive DUMB BLONDE, blonde women in the public find her mark disparaging.

ii. Intent Would Be Relevant Had Luhv Asserted Intent In Her Goods And Services.

Even when a third-party federal registration has been properly made of record, its probative value is limited. Trademark Trial and Appeal Board Manual of Examining Procedure § 704.03(b)(1)(B) (2015). Luhv contends the views of the substantial composite should be her fan base or women, in general. *In re Kourtney Luhv*, 1337 F.3d at 458. The third-party registration may be used to show the meaning of a mark in the same manner as a dictionary definition, but not to determine the substantial composite of a referenced group. *See id.* Luhv submitted the registration of DYKES ON BIKES, but Luhv wrongly relies on this trademark.

Luhv chose DUMB BLONDE as a way to reclaim the stereotype associated with blonde women, but applied to register DUMB BLONDE for “Entertainment, namely live performances by a musical band” and “clothing, namely sweatshirts, t-shirts, tank tops, and headwear.” *Id.* at 456-57. The applicants for DYKES ON BIKES was San Francisco Women's Motorcycle Contingent, whom applied to register DYKES ON BIKES for “education and entertainment services in the nature of organizing, conducting, and promoting parade contingents, community festivals, events, street fairs, forums, seminars, parties and rallies to support, organize and motivate women motorcyclists everywhere to do the same, thereby fostering pride in a wide variety of sexual orientations and identities, namely

lesbian, bisexual and transgender.” See *Michael J. Mcdermott*, 81 U.S.P.Q.2d 1212 (P.T.O. Sept. 13, 2006) (quoting Application Serial No. 78281746). The applicants for DYKES ON BIKES clearly asserted their intent in their application, where the examining attorney considered said intent because it was in the claims for goods and services. Luhv does not assert her intent in the goods and services in the ‘052 application; therefore, the examining attorney properly denied DUMB BLONDE for live performances and clothing.

D. The *Greyhound* Test For Disparagement Is Inappropriate In This Matter Because The Nature Of The Interest Is Federal Registration

Luhv contends DUMB BLONDE is commercial speech and thus the rarely used *Greyhound* test for disparagement is applicable. The court in *Greyhound*, however, had concepts of the right to privacy and the right of publicity in mind, as they held section 2(a) protection is intended to prevent the unauthorized use of the persona of a person and not to protect the public. See *Greyhound Corp.*, 6 U.S.P.Q.2d 1635 (P.T.O. Mar. 30, 1988); see also Trademark Manual of Examining Procedure § 1203.03 (2015). As Luhv’s DUMB BLONDE is distinguishable, the *Greyhound* test is improper here.

The nature of the interest (i.e. commercial or non-commercial) disparaged by the mark requires an evaluation of the nature of the party alleging the claim. *Bd. Of Trs. of Univ. of Ala. Pitts*, 107 USPQ2d 2001, 2028 (TTAB 2013)). The alleging parties in *Board of Trustees* was a university and the estate of the famous football coach, whom filed an opposition to the applicant’s mark on the ground it was disparaging their mark. *Id.* Because these existing brand owners filed the

opposition claiming the applicant's mark would negatively affect their potential income, the *Greyhound* test was applied. *See id.*

As Luhv is the claimant here, an inquiry into the nature of her claim is required. She contends the nature of her claim is commercial as she uses DUMB BLONDE to promote commercial sales of her music. *See In re Kourtney Luhv*, 1337 F.3d at 459. Luhv further contends her potential income will be negatively affected as she negotiated a deal with a record label for a recording contract that would include a \$2,000,000 advance upon execution of the agreement. *Id.* at 456. She neglects her claim is about federal trademark registration and not asserting a trademark right, as in *Board of Trustees*. As Luhv's interest is distinguishable from that in *Board of Trustees*, this Court should find applying the *Greyhound* test for disparagement is not appropriate here.

II. Federal Trademark Registration May Be Denied If the Mark Is Disparaging Without Violating The United States Constitution.

There are three requirements for finding a First Amendment violation in connection with a restriction placed on speech. First, the speech in question must be protected speech. *See, e.g., Roth v. United States*, 354 U.S. 476, 481 (1957). Second, the government must take some action which abridges the speech in a manner that implicates the First Amendment. *Texas v. Johnson*, 491 U.S. 397, 405 (1989). Third, the abridgment must be construed as unconstitutional when analyzed under the appropriate framework. *Cent. Hudson Gas & Electric Corp. v. Pub. Serv. Comm'n*, 447 U.S. 557, 566 (1980).

Here, federal trademark registration is government speech that is exempt from First Amendment scrutiny. Second, denying federal trademark registration is not the equivalent to

abridging speech in a manner that implicates the First Amendment. Third, under the *Central Hudson* framework, the act of denying federal trademark registration is not unconstitutional.

Therefore, section 2(a)'s prohibition on registering marks that may be disparaging does not violate the United States Constitution.

A. Federal Trademark Registration is Government Speech That Is Exempt From First Amendment Scrutiny.

The first issue is whether Luv's federal trademark registration can be construed as protected commercial speech. Commercial speech is the "dissemination of information as to who is producing and selling what product, for what reason, and at what price." *Va. State Bd. Of Pharmacy v. Va. Citizens Consumer Council*, 425 U.S. 748, 765 (1976). Luv's federal trademark registration cannot be construed as protected commercial speech.

TTAB denied the registration of Luv's mark, DUMB BLONDE, because it was disparaging to women who have blonde hair. TTAB cited to a photographic image from Luv's website that depicted a blonde woman eating plastic fruit and applying Wite-Out® to text displayed on her computer.

Luv contends that she chose the mark DUMB BLONDE as a way of reclaiming the stereotype associated with blonde women; for the purpose of raising awareness of the challenges stemming from gender discrimination and negative stereotypes faced by all women.

However, TTAB found the mark disparaging on the grounds that a substantial composite of women, because of dictionary definitions, numerous articles, and user comments on Luv's uTube videos found the phrase "dumb blonde" to be offensive.

Similarly, in *Pro Football Inc., v. Blackhorse*, Pro Football Inc., (PFI) filed a cross-motion for summary judgment contesting TTAB's order cancelling the registrations of their six trademarks on the grounds that the trademarks "may disparage" Native Americans by bringing them into contempt or disrepute. The six trademarks consisted of the "Redskins" mark, a mark used by the "Washington Redskins," a National Football League.

In *Pro Football Inc.*, the Court reasoned that "courts consider dictionary evidence when determining whether a term 'may disparage' a substantial composite of the referenced group." *See Pro Football Inc., v. Blackhorse* 115 U.S.P.Q 2D 1524. Based on the substantial composite of Native Americans and dictionary definitions, the United States District Court for the Eastern District of Virginia found that the "Redskins" mark was disparaging and that such speech did not fall into a protect class of speech but rather into the class of government speech. The Court held that the federal trademark registration program is government speech that is exempt from First Amendment scrutiny. *Id.*

The analysis for the holding was due to the reasoning that Federal law does not create trademarks. The Court explained that regardless of whether a mark is registered, the "right to a particular mark grows out of its use, not its mere adoption." *See United Drug Co., v. Theodore Rectanus Co.*, 248 U.S. 90.

"Just as Allen Iverson once reminded the media that they were wasting time at the end of the Philadelphia 76ers' season "talking about practice" and not an actual professional basketball game, the Court is similarly compelled to highlight what is at issue in this case-trademark registration, not the trademarks themselves." *See Pro*

Football Inc., v. Blackhorse 115 U.S.P.Q 2D 1524. It is the registration of the Redskins mark that was scheduled for cancellation by TTAB's decision, not the actual mark.

TTAB explained that "it is only empowered to cancel the statutory registration of the marks under Section 2(a) of the Lanham act; it cannot cancel the trademarks themselves." *Id.* Therefore, the federal trademark registration program cannot be identified as a protected commercial speech but is rather identified as government speech exempt from First Amendment scrutiny.

Similarly here, Luhv is welcome to use her mark. However, because of the evidence provided in the federal trademark registration application, dictionary definitions, numerous articles, and user comments prove that, just like the "Redskins" mark, the DUMB BLONDE mark is also disparaging to blonde women in that it too brings a substantial composite of women into contempt and disrepute.

Furthermore, just as the Redskin's mark was scheduled for cancellation by TTAB; here, Luhv's mark DUMB BLONDE is denied registration conceding that TTAB's decision only cancels the statutory registration of the mark and does not cancel the mark itself.

For these reasons, just as the Court found that the federal trademark registration is not protected commercial speech in *Pro Football Inc.*, the denial of Luhv's mark is also not protected commercial speech.

B. Denying Federal Trademark Registration Is Not The Equivalent To Abridging Speech In A Manner That Implicates The First Amendment.

The second issue is whether the denial of Luhv's federal trademark registration constitutes a manner of abridgment that implicates the First Amendment. The unconstitutional conditions doctrine does not give rise to a constitutional claim in it's own right; the condition must actually cause a violation of a substantive First Amendment right. *See FAIR*, 547 U.S. at

59-60, 126 S. Ct 1297. Federal trademark registration is government speech and not afforded First Amendment protection. Therefore, registration of a trademark is not a substantive and procedural right conferred upon trademark applicants under the Lanham Act in that federal trademark registration does not amount to a constitutional claim implicating the First Amendment.

In Alliance for Open Society International Inc., v. Agency for International Development, Congress had enacted the United States Leadership Against HIV/AIDS, Tuberculosis, and Malaria Act (“the Act”). Through the Act, Congress apportioned billions of dollars towards the funding of non-governmental organizations (NGO’s) that satisfied certain conditions. One of these conditions was that all federally funded NGO’s implement a policy explicitly opposing prostitution. The NGO’s argued that the funding provisions violated the First Amendment by restricting the organization’s speech.

The United States Court of Appeals, Second Circuit, held that the purpose of the unconstitutional conditions doctrine in the government subsidy context was to provide guidance on when a subsidy condition actually infringed upon a person’s constitutionally protected speech and that such a condition was not an infringement on the NGO’s substantive First Amendment right.

Similarly here, TTAB’s denial of Luvh’s federal trademark registration does not abridge Luvh’s speech because her speech, as explained previously, is not categorically recognized as protected speech. Rather, Luvh’s trademark amounts to government speech and is not afforded First Amendment protection. Therefore, since federal trademark registration is not a protected speech, TTAB’s denial of Luvh’s federal trademark registration cannot amount to a manner of abridgment that implicates the first amendment.

Here, a federal trademark that is disparaging may not be registered. Denial of the registration is just that, mere denial. It does not prevent the Respondent from using in the stream of commerce. Rather, because the mark is disparaging to mainly women who are blonde, TTAB cannot grant acceptance of the registration of the mark.

If denial of a federal trademark registration is found to be a constitutionally protected right, then there would be no need for TTAB in that any mark that was denied registration would amount to a constitutional violation. Therefore, as a matter of policy, allowing Respondent to register her mark would open the floodgates in that TTAB would have to permit the registration of every mark.

On appeal, Respondent argued that the Lanham Act affords trademark owners who register their marks, certain substantive and procedural rights and benefits. *B&B Hardware, Inc. v. Hargis Ind., Inc.*, 135 S. Ct. 1293, 1300 (2015). Therefore, Respondent will argue that under the unconstitutional conditions doctrine the government cannot deny her the benefit of trademark registration on the basis that such denial would infringe on her constitutionally protected-freedom of speech.

However, this is a feeble argument to make because the unconstitutional conditions doctrine does not give rise to constitutional claims; the condition has to actually cause a violation of a substantive First Amendment right and here it does not.

Therefore, denying Respondent's federal trademark registration is not the equivalent to abridging speech in a manner that implicates the First Amendment.

C. Denial Of A Federal Trademark Registration Is Not A Form Of Abridgment That Is Construed As Unconstitutional When Analyzed Under The *Central Hudson* Analysis.

The third requirement for finding a First Amendment violation requires the application of the appropriate framework from *Central Hudson*. The *Central Hudson* test asks the following four questions: (1) Does the speech concern illegal activity or is it misleading?; if not (2) Is the asserted governmental interest substantial; 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? Here, section 2(a) of the Lanham Act does satisfy the *Central Hudson* test therefore making the denial of Respondent’s federal trademark registration constitutional. *Cent. Hudson Gas & Electric. Corp. v. Pub. Serv. Comm’n*, 447 U.S. 557, 566 (1980).

i. Respondent’s Mark Is Misleading But Not Concerned With Illegal Activity.

The first issue analyzed under the *Central Hudson* test is whether the speech in question proposes a commercial transaction, if so then it receives constitutional protection if the speech in question is not false or misleading; or related to the sale of illegal things. *Id.* Here, Respondent’s federal trademark registration is for the mark DUMB BLONDE. Respondent’s mark is used for “entertainment, namely live performances by a musical band” and “clothing, namely, sweatshirts, t-shirts, tank tops, and headwear.” As a result, Respondent’s mark is not concerned with illegal activity.

However, it may be argued that Respondent’s mark is misleading. Respondent’s mark, DUMB BLONDE, is misleading in that the mark is self-explanatory in that it is referencing to a “dumb blonde.” Additionally, a substantial composite of women, because of dictionary definitions, numerous articles, and user comments on Respondent’s uTube videos support that

the fact that women find the phrase to be offensive. Meanwhile, Respondent argues that she chose the mark DUMB BLONDE as a way of reclaiming a stereotype. These two inconsistencies provide that Respondent's intent for the mark and the greater masses conflict as to the interpretation of the mark. Therefore, DUMB BLONDE is likely to be misleading to the general public.

Thus, Respondent's mark is misleading but not concerned with illegal activity and is therefore not afforded constitutional protection.

CONCLUSION

For the aforementioned reasons, Petitioner respectfully requests that this Court affirm the Court of Appeals for the Federal Circuit and hold the TTAB properly denied the application for disparagement.

Dated: October 20, 2015

Respectfully Submitted.

Team 119
Brief for Petitioner

CERTIFICATION PAGE

Submission of the brief certifies that the brief has been prepared in accordance with the Rules of the Competition and that it represents the work product solely of the competing team's members.

Dated: October 20, 2015

Respectfully Submitted.

_____/s/
Team 119
Brief for Petitioner