

Case No. 15-1007

In the Supreme Court of the United States

The 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

QUESTIONS PRESENTED

1. Did the Patent and Trademark Office err in refusing to register Respondent’s mark DUMB BLONDE on the ground that the mark may be disparaging to women within the meaning of Section 2(a) of the Lanham Act?
2. Does Section 2(a)’s prohibition on registering marks that may be disparaging violate the United States Constitution?

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The opinion of the Trademark Trial and Appeal Board (“TTAB”) is unreported. The opinion of the United States Court of Appeals for the Federal Circuit is reported as *In re Luvv*, 1337 F.3d 455 (Fed. Cir. 2015).

STATEMENT OF JURISDICTION

Pursuant to 15 U.S.C. § 1051, Respondent, Kourtney Luvv, filed for registration of the mark DUMB BLONDE, Application No. 99/989,052, with the Patent and Trademark Office (“PTO”). Upon finding that the mark may be

disparaging to women in violation of 15 U.S.C. § 1052(a), the PTO refused registration of the mark.

Respondent timely filed a Notice of Appeal in the United States Court of Appeals for the Federal Circuit pursuant to 15 U.S.C. § 1071. As 28 U.S.C. § 1295 gives the United States Court of Appeals for the Federal Circuit exclusive jurisdiction over an appeal from a decision of the TTAB, appellate jurisdiction was proper. The Court of Appeals reversed the judgment of the TTAB on June 6, 2015, and the United States filed a petition for writ of certiorari. According to 28 U.S.C. § 1254, “[c]ases in the courts of appeals may be reviewed by the Supreme Court by . . . writ of certiorari granted upon the petition of any party” Therefore, the Supreme Court of the United States has proper jurisdiction.

STATEMENT OF THE CASE

I. Statement of the Facts

Kourtney Luhv (“Respondent”) is a solo recording artist and vocalist whose music lyrics focus on current women’s issues. *Luhv*, 1337 F.3d at 455. Respondent is also known by her stage name, Dumb Blonde, under which she has been performing since 2012. *Id.* During this time, Respondent has performed at various venues across the United States. *Id.* She has collected a sizeable fan base, with fans frequently attending her concerts and a large number of users following her music online through www.soundpuff.com (“Soundpuff”), an online streaming service, and www.uTube.com (“uTube”), a video hosting website. *Id.* at 455-56. At the time Respondent filed for trademark registration, her Soundpuff account had over 40,000 “followers,” while her uTube account had over 100,000 subscribers. *Id.* at 456. Respondent’s uTube account is registered under the name DumbBlondeMusic, and she uses the account to post videos communicating with her fans and sharing music production tips with other uTube users. *Id.* Respondent also manages a website, which includes images “depicting a blonde woman eating plastic fruit and applying Wite-Out® to text displayed on her computer monitor.” *Id.* at 456-57.

In June 2014, Respondent negotiated with a record label to produce a record in an extended play format. *Id.* at 456. This deal would include a \$2 million advance upon its execution, and potentially much more profits in record sales. *Id.* However, the agreement required Respondent to register a trademark for her stage name. *Id.*

She filed for registration of the trademark DUMB BLONDE with the PTO on July 9, 2014. *Id.*

II. Procedural History

This appeal before the United States Supreme Court by Petitioner, the United States, arises from the PTO's refusal to register Respondent's mark. Respondent filed with the PTO on July 9, 2014, seeking to register the mark DUMB BLONDE for "[e]ntertainment, namely live performances by a musical band" and "clothing, namely, sweatshirts, t-shirts, tank tops, and headwear." *Id.* (internal quotations omitted). Because the examining attorney found that the mark may be disparaging to women within the meaning of 15 U.S.C. § 1052(a) ("the Lanham Act"), the PTO refused registration of the mark. *Id.* Respondent subsequently brought an appeal to the TTAB, which affirmed the PTO's refusal of registration. *Id.* The TTAB cited "dictionary definitions, numerous articles, and user comments on [Respondent]'s uTube videos," along with the photograph images on Respondent's website depicting an unintelligent blonde woman, and determined that the mark DUMB BLONDE "may be disparaging to a substantial composite of the referenced group, namely women who have a blonde hair color." *Id.* at 456-57.

Respondent timely filed a Notice of Appeal in the United States Court of Appeals for the Federal Circuit, challenging the TTAB's analysis of the disparaging nature of her mark. Respondent contended that the opinions of the women cited by the examining attorney do not represent the views held by Respondent's fans or by a substantial composite of women. *Id.* at 457. Respondent also argued that the

prohibition on disparaging marks under Section 2(a) of the Lanham Act is unconstitutional. *Id.*

The Court of Appeals found that the mark DUMB BLONDE may be disparaging to a substantial composite of women, which warranted the PTO's Section 2(a) refusal to register the mark. *Id.* at 460. However, the court also found that the statute's prohibition of disparaging marks is unconstitutional. *Id.* Therefore, the Court of Appeals reversed the judgment of the TTAB, finding that neither the PTO nor the TTAB may rely on Section 2(a) as a basis for rejecting Respondent's trademark application. *Id.*

The United States filed a petition for writ of certiorari to determine whether the Court of Appeals correctly found that the mark may disparage women and whether the prohibition of disparaging marks under Section 2(a) of the Lanham Act is constitutional.

STANDARD OF REVIEW

In reviewing factual findings of the TTAB, this Court uses a substantial evidence standard of review. *Dickenson v. Zurko*, 527 U.S. 150, 161-62 (1999); *In re Hyatt*, 211 F.3d 1367, 1372 (Fed. Cir. 2000). If the TTAB's factual findings are supported by substantial evidence, they must be upheld. *See Recot, Inc. v. Becton*, 214 F.3d 1322, 1327 (Fed. Cir. 2000). This Court reviews the TTAB's legal conclusions *de novo*. *See id.*; *In re Save Venice New York Inc.*, 259 F.3d 1346, 1351-52 (Fed. Cir. 2001). Legal conclusions of the TTAB include interpretations of the

Lanham Act and the legal tests the TTAB applies in determining registrability. *Save Venice*, 259 F.3d at 1351-52.

SUMMARY OF THE ARGUMENT

This Court should affirm the finding of the Federal Circuit Court of Appeals that the mark DUMB BLONDE is disparaging within the meaning of Section 2(a) of the Lanham Act. However, this Court should reverse the court's holding that Section 2(a)'s prohibition against registering disparaging marks violates the United States Constitution.

When determining whether a mark may be disparaging within the meaning of Section 2(a) of the Lanham Act, a court must consider (1) the likely meaning of the mark, and (2) whether that meaning may be disparaging to a substantial composite of the referenced group. *In re Geller*, 751 F.3d 1355, 1358 (Fed. Cir. 2014) (citing *In re Lebanese Arak Corp.*, 94 U.S.P.Q.2d 1215, 1217 (T.T.A.B. 2010)).

The likely meaning of the mark DUMB BLONDE is an unintelligent woman with a blonde hair color, which references women in a derogatory manner. The Court of Appeals reviewed numerous dictionary definitions, recent literature and articles, and user comments on Respondent's uTube videos reacting negatively to the mark. Substantial evidence therefore supports the court's finding that the likely meaning of the mark is disparaging. *See Luhn*, 1337 F.3d at 457. This evidence is heightened by the manner in which Respondent uses the mark in the marketplace. Respondent's website features photos of "a blonde woman eating plastic fruit and

applying Wite-Out® to text displayed on her computer monitor.” *Id.* These photos perpetuate the stereotype that blonde women are, in fact, “dumb.” In displaying the mark DUMB BLONDE next to these photos, Respondent reinforces the mark’s connection with this negative stereotype. Moreover, Respondent failed to present any evidence of a secondary meaning of the mark other than her intent to create a new meaning in the future. Therefore, only one likely meaning of the mark DUMB BLONDE exists, and that meaning is a derogatory reference to women.

Further, a substantial composite of women may find the mark DUMB BLONDE to be disparaging. Because the mark “has only one pertinent meaning, dictionary evidence alone can be sufficient” to satisfy this requirement. *In re Boulevard Entm’t*, 334 F.3d 1336, 1340-41 (Fed. Cir. 2003). The record includes evidence of several dictionary definitions that support the disparaging nature of the mark. *Luhv*, 1337 F.3d at 457. Moreover, recent literature, “numerous articles, and user comments on Respondent’s uTube videos” further prove that women find the phrase “dumb blonde” to be disparaging. *Id.* at 457. Therefore, the evidence of record exceeds that which is necessary to prove that the mark DUMB BLONDE may disparage a substantial composite of women.

The Federal Circuit has also determined that a substantial composite need not be all, or even a majority, of the referenced group. *See In re Mavety Media Grp. Ltd.*, 33 F.3d 1367, 1371 (Fed. Cir. 1994). The TTAB has similarly found that thirty percent is “more than substantial.” *Blackhorse v. Pro-Football, Inc.*, 111 U.S.P.Q.2d 1080, at *29 (T.T.A.B. 2014). Further, once a court finds a substantial composite,

“the mere existence of differing opinions cannot change the conclusion.” *Id.* The overwhelming evidence of record therefore proves that a substantial composite of women, likely much more than thirty percent, may be disparaged by the mark. Accordingly, this Court should affirm the finding of the Court of Appeals that the mark DUMB BLONDE is disparaging within the meaning of Section 2(a) of the Lanham Act.

However, this Court should reverse the holding of the Court of Appeals that Section 2(a)’s prohibition on registering disparaging marks is unconstitutional. In determining whether one’s First Amendment rights have been violated, courts follow a three-part test to consider the validity of such a claim. The three requirements for finding a First Amendment violation are: (1) the speech in question must be protected speech; (2) the government must take some action which abridges the speech in a manner implicating the First Amendment; and (3) the abridgment must be construed as unconstitutional. *See Luvv*, 1337 F.3d at 459; *see also Texas v. Johnson*, 491 U.S. 397, 408 (1989); *Cent. Hudson Fas & Elec. Corp. v. Pub Serv. Comm’n*, 447 U.S. 557, 566 (1980); *Roth v. United States*, 354 U.S. 476, 481 (1957).

There is little debate regarding whether commercial speech is protected; however, this Court has held that some forms of commercial speech regulation are permissible. *Virginia State Bd. of Pharm. v. Virginia Citizens Consumer Council*, 425 U.S. 748, 770 (1976). For example, restriction on the manner of expression is permissible provided that it is justified without reference to the content of the

regulated speech, it serves a significant governmental interest, and that in doing so it leaves open ample alternative channels for communication of information. *Id.*

Section 2(a)'s prohibition on registration of disparaging marks does not prevent an applicant from using her mark in any way. The statute "does not prohibit or limit the type of informational advertising held to be protected." *Friedman v. Rogers*, 440 U.S. 1, 2 (1978). Conversely, the statute allows factual information associated with trademarks to be communicated freely and explicitly with the public, whether or not the trademarks are approved for registration. *Id.* In the present case, the PTO's refusal of registration for the mark DUMB BLONDE does not prevent Respondent from continuing to use the mark in any manner. Respondent may still display the mark on her website, merchandise, or advertisements. She may still perform under her chosen stage name, post videos using her account entitled DumbBlondeMusic, and continue to fight gender barriers by attempting to reclaim the negative stereotype. Respondent's sole purpose of filing for registration of her mark DUMB BLONDE was to *receive federal protection* for the mark, not to actually *obtain use* of the mark. In fact, Respondent has used the mark DUMB BLONDE since 2012. *Luhv*, 1337 F.3d at 455. Absent any federal protection, Respondent successfully amassed thousands of fans, registered a uTube account under the name DumbBlondeMusic, and performed using the mark at various venues across the United States. *Id.* at 456. Respondent has also sold merchandise featuring the mark and created a website which advertises the mark in connection with Respondent's services. *Id.* At no time during the years of

Respondent's use of the mark DUMB BLONDE did Respondent ever seek federal registration, because she was able to use her mark freely without registering it. When Respondent ultimately sought registration, she was entirely motivated by financial gain through a record deal that required registration.

Section 2(a)'s prohibition against registering disparaging marks therefore does not deny Respondent her right to freedom of speech in any way. All Respondent lost from the PTO's Section 2(a) refusal was the added benefit of federal protection for her use of the mark DUMB BLONDE. Thus, Section 2(a)'s prohibition on registering disparaging marks, which justified the PTO's refusal to register Respondent's mark DUMB BLONDE, does not abridge her right to freedom of speech guaranteed by the First Amendment.

Additionally, Section 2(a) of the Lanham Act serves a significant governmental interest in protecting the rights of those potentially disparaged by certain marks. The statute seeks to encourage the morality of marks by denying benefits of federal registration to those marks which disparage or offend a specific group of individuals. Therefore, the public policy behind Section 2(a) is to protect individuals who may take offense to disparaging marks. The public may easily interpret federal protection of a disparaging mark as the federal government's endorsement of its subject matter; accordingly, the government has a substantial interest in refusing to endorse matter which may disparage members of the public. Section 2(a)'s prohibition on registering disparaging marks is not more extensive than necessary to serve this governmental interest. The statute does not prevent

the registration of *all* marks, only those which the PTO determines to be disparaging. Additionally, Section 2(a) does not deny an applicant's right to use her chosen mark in any way. The statute simply denies disparaging marks the additional benefit of federal protection, which ensures that the government does not appear to endorse those marks which are potentially disparaging to certain individuals. For this reason, the limited regulation imposed by Section 2(a) of the Lanham Act is constitutional.

Further, Section 2(a) is specific and particular in its prohibition against certain types of marks. The language of the statute sufficiently conveys a definite warning to applicants that potentially disparaging marks may not be approved for federal registration. In addition, the TTAB and the Federal Circuit have adopted a two-part test to determine with specificity whether a mark is disparaging in order to ensure that only those marks that are actually disparaging are refused registration. Accordingly, this Court should conclude that the term "disparaging" is sufficiently precise to satisfy due process requirements. Therefore, this Court should reverse the holding of the Court of Appeals and find that Section 2(a) of the Lanham Act's prohibition against registering disparaging marks does not violate the United States Constitution.

ARGUMENT

I. THE MARK DUMB BLONDE IS DISPARAGING TO WOMEN WITHIN THE MEANING OF SECTION 2(A) OF THE LANHAM ACT.

A mark is refused registration under Section 2(a) of the Lanham Act if the mark includes “matter which may disparage . . . persons, living or dead,” or “bring them into contempt, or disrepute” 15 U.S.C. § 1052(a). When determining whether a mark may be disparaging under Section 2(a), a court must consider the following two factors:

- (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 and/or services, and the manner in which the mark is used in the marketplace in connection with the goods and/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.

Geller, 751 F.3d at 1358 (citing *Lebanese Arak Corp.*, 94 U.S.P.Q.2d at 1217).

A. THE LIKELY MEANING OF THE MARK IS A DEROGATORY REFERENCE TO WOMEN.

Dictionary definitions are important to this Court’s inquiry into the disparaging nature of the mark, as such definitions “represent an effort to distill the collective understanding of the community with respect to language and thus clearly constitute more than a reflection of . . . individual views.” *Boulevard*, 334 F.3d at 1340. Although the record fails to include specific wording of dictionary

definitions for the phrase “dumb blonde,” it does specify that various definitions reviewed by the court indicate the disparaging nature of the phrase. *See Luhv*, 1337 F.3d at 457. In finding that the mark may be disparaging to a substantial composite of women, the Court of Appeals reasoned that the evidence of record, including these dictionary definitions, “demonstrate[d] that the phrase ‘dumb blonde’ implies a negative, stereotypical view of women . . . [that is] offensive or insulting” to such women. *Id.*

Consideration of the writings and actions of third parties is also important to this Court’s inquiry because such evidence “indicate[s] the public’s perceptions of the meanings attributable to, and associations made in connection with,” the mark. *Harjo v. Pro-Football Inc.*, 50 U.S.P.Q.2d 1705, 1742 n.111 (T.T.A.B. 1999), *rev’d*, 284 F. Supp. 2d 96 (D.D.C. 2003), *remanded*, 415 F.3d 44 (D.C. Cir. 2005), *on remand*, 567 F. Supp. 2d 46 (D.D.C. 2008), *aff’d*, 565 F.3d 880 (D.C. Cir. 2009). In determining that “[s]ignificant evidence suggests that women view ‘dumb blonde’ jokes negatively,” the Court of Appeals looked to recent literature addressing the derogatory nature of the phrase. *Luhv*, 1337 F.3d at 457 (citing KAREN ROSS, THE HANDBOOK OF GENDER, SEX, AND MEDIA 88 (2011)). Moreover, “numerous articles[] and user comments on [Respondent]’s uTube videos support the fact that women find the phrase ‘dumb blonde’ to be offensive.” *Id.* Therefore, the evidence of record makes clear that the public perception of the phrase is negative, as it strongly associates the phrase with the derogatory stereotype.

Respondent's use of the mark DUMB BLONDE in the marketplace further perpetuates the stereotype that connects blonde women with stupidity. For example, Respondent's website features pictures of "a blonde woman eating plastic fruit and applying Wite-Out® to text displayed on her computer monitor." *Id.* at 457. Portraying a blonde woman in such a manner suggests that Respondent has adopted the idea that blonde women are, in fact, "dumb." Moreover, when featured next to the mark DUMB BLONDE, these photos serve to further define the mark as a derogatory reference to women. Similarly, in *In re Tam*, a band attempted to register a disparaging mark, THE SLANTS, as a band name. 108 U.S.P.Q.2d 1305, 2013 WL 5698164, at *1 (T.T.A.B. 2013), *aff'd*, 785 F.3d 567 (Fed. Cir. 2015), *reh'g granted, opinion vacated*, 600 Fed. Appx. 775 (Fed. Cir. 2015). One definition of the term "slants" pejoratively referred to people of Asian descent, and the band reinforced this definition by displaying the term on posters with art featuring an Asian woman, a rising sun, and a dragon image. *Id.* at *11. The TTAB found that although the term "slants" had multiple meanings, the band's use of the mark in connection to Asian culture and heritage defined the mark as a derogatory reference. *Id.* at *7.

Further, Respondent has failed to present any substantial evidence proving that the mark DUMB BLONDE has any secondary meaning other than that which derogatively references women. Respondent simply contends that "she aims to recast the phrase in a positive light by displaying it prominently alongside a woman with a successful career, and through musical lyrics that shed light on critical

issues faced by women.” *Luhv*, 1337 F.3d at 458. However, one cannot “claim ownership and redefine the term without a use that acknowledges the meaning that must be overcome.” *Tam*, 108 U.S.P.Q.2d at *13. Therefore, in attempting to recast the phrase “dumb blonde” positively, Respondent is admitting to the negative meaning of the phrase. Moreover, Respondent’s intentions to redefine “dumb blonde” do not equate an actual secondary meaning of the phrase. Respondent does not contend that the phrase has garnered a secondary, positive meaning; instead, she merely “*aims to recast the phrase in a positive light*” through her career. *Luhv*, 1337 F.3d at 458 (emphasis added). Therefore, by stating her intent to create a secondary meaning for the phrase “dumb blonde,” Respondent is essentially admitting that the phrase currently has but one meaning, which is a disparaging reference to women.

Moreover, although Respondent allegedly has good intentions in using the derogatory phrase, her website suggests otherwise. The photos of the “blonde woman eating plastic fruit and applying Wite-Out® to text displayed on her computer monitor” do little to redefine the stereotype of a “dumb blonde.” *Id.* at 457. In fact, such photos indicate that Respondent is reinforcing the stereotype by associating a blonde woman with stupidity. Therefore, even if this Court were to find that Respondent’s intended redefinition qualifies as a secondary meaning for the mark DUMB BLONDE, this meaning also seems to amount to a disparaging reference to women.

Therefore, substantial evidence demonstrates that Respondent is projecting a single meaning of the mark DUMB BLONDE in the marketplace—an unintelligent woman with a blonde hair color. The use of the phrase “dumb blonde” in any way, other than Respondent’s proffered intention to redefine the stereotype, is as a disparaging reference to women.

B. THE MEANING OF THE MARK MAY BE DISPARAGING TO A SUBSTANTIAL COMPOSITE OF WOMEN.

Trademarks may disparage if they “dishonor by comparison with what is inferior, slight, deprecate, degrade, or affect or injure by unjust comparison.” *Harjo*, 50 U.S.P.Q.2d at 1738. The perceptions of the general public are irrelevant to this determination; instead, only the persons to whom the mark refers, identifies, or implicates in some recognizable manner are relevant. *Id.* at *1739.

This Court must therefore primarily determine the referenced group at issue. Although the mark DUMB BLONDE references a “blonde,” or an individual with blonde hair, the Court of Appeals found that significant evidence suggests that *all women*, not just those with a blonde hair color, view “dumb blonde” jokes negatively. *See Luvv*, 1337 F.3d at 457 (citing *ROSS*, *supra*, at 88). Moreover, an association with stupidity is generally disparaging; undoubtedly, the majority of women, especially those who are unaware of Respondent’s intent to redefine the stereotype, would take offense to being described as “dumb.” Accordingly, the relevant group in this Court’s determination is all women, regardless of hair color.

Where a mark “has only one pertinent meaning, dictionary evidence alone can be sufficient” to show that a substantial composite of the referenced group may find the mark disparaging. *Boulevard*, 334 F.3d at 1340-41. While Respondent intends to create a secondary meaning for the phrase “dumb blonde” in the future, the phrase currently has only one pertinent meaning—an unintelligent woman with a blonde hair color—which is a derogatory reference to women. The dictionary definitions of record, which “support the fact that women find the phrase ‘dumb blonde’ to be offensive,” are thus sufficient to satisfy this requirement. *Luhv*, 1337 F.3d at 457.

Although these definitions alone are sufficient, additional evidence further proves that a substantial composite of women may view the mark DUMB BLONDE to be disparaging. Recent literature and numerous articles highlight the disparaging nature of the phrase. *Id.*; see also ROSS, *supra*, at 88. This evidence, coupled with “user comments on Respondent’s uTube videos” responding negatively to the mark, clearly proves that the mark is disparaging to women. *Id.* Therefore, the substantial evidence of record exceeds that which is necessary to satisfy this requirement.

The Federal Circuit Court of Appeals has also determined that a substantial composite need not be all, or even a majority, of the referenced group. See *Mavety*, 33 F.3d at 1371. While there is no statutory quantification addressing this issue, the TTAB has found that thirty percent of the referenced group is “more than substantial.” *Blackhorse*, 111 U.S.P.Q.2d at *29. Moreover, once a court finds a

substantial composite, “the mere existence of differing opinions cannot change the conclusion.” *Id.* Extensive evidence, including numerous articles, dictionary definitions, recent literature, and negative comments regarding the mark, clearly shows that the mark DUMB BLONDE is disparaging to a significant portion of women. This evidence, despite Respondent’s alleged intentions to redefine the stereotype, is dispositive in this Court’s inquiry.

Although Respondent has a considerable fan base, the referenced group to be considered in this Court’s analysis “is not restricted to the perception of [Respondent]’s fans who have no objection to” Respondent’s mark. *Tam*, 108 U.S.P.Q.2d at *15-16 (citing *In re Heeb Media, LLC*, 89 U.S.P.Q.2d 1071, 2008 WL 5065114 (T.T.A.B. Nov. 26, 2008)). Instead, this Court must “take into account the views of the *entire referenced group*” who may encounter any of Respondent’s goods or services in any ordinary course of trade; this group includes any women who may encounter Respondent’s music, websites, clothing, or promotional materials, regardless of whether those women support or appreciate Respondent’s endeavors. *Id.* at *16; *see also Geller*, 751 F.3d at 1360. Therefore, a majority of the referenced group may encounter the mark DUMB BLONDE without even knowing about Respondent’s goods or services, much less about her intended redefinition of the stereotype. Moreover, the first word in the mark, “dumb,” sets a negative tone for the mark as a whole. Undoubtedly, a majority of women, especially those without knowledge of Respondent’s intended redefinition of the stereotype, would take offense to a description of a woman as “dumb.”

Further, while Respondent's fan base represents a portion of the referenced group, it is in no way determinative to this Court's analysis. Respondent's fan base is mostly comprised of "women in their twenties and thirties." *Id.* at 457. Therefore, even assuming that every single one of Respondent's fans supports her use of the mark DUMB BLONDE, this leaves a significant number of women that may oppose Respondent's use of the mark, or that may not know of Respondent or her endeavors. Further, much of the evidence cited by Respondent refers to Respondent's particular use of the phrase "dumb blonde" only in relation to her goods and services. Thus, even if Respondent's fans may support her particular use of the mark DUMB BLONDE, they likely find the phrase to be disparaging in any other context. These fans therefore increase substantial composite of women who may find the meaning of the mark DUMB BLONDE to be disparaging. It is also irrelevant that some members of the public may support Respondent's use of the mark DUMB BLONDE, as "mixed opinion among members of the referenced group does not erase the perception of a substantial composite who find it disparaging[]." *In re Beck*, 114 U.S.P.Q.2d 1048, at *8 (T.T.A.B. 2015); *Heeb*, 89 U.S.P.Q.2d, at *18.

Some of Respondent's own evidence also reinforces the fact that the mark DUMB BLONDE may be disparaging to women. For example, Respondent presented evidence of positive user comments on social media websites, such as: "[A]s a blonde woman I totally support you even if the haters gon' hate." *Luhv*, 1337 F.3d at 458. Although this comment shows support for Respondent, its reference to "haters" implies that there are indeed individuals who oppose Respondent's use of

the mark, likely because of the mark's disparaging nature. While these "haters," most likely women, may not be particular targets of Respondent's music, they represent a significant portion of the female community. Such women further increase the composite of women that may find the mark to be disparaging. Therefore, a substantial composite of women, likely much more than thirty percent, may be disparaged by the mark DUMB BLONDE.

Respondent's primary argument against the Section 2(a) refusal of registration is that she intends to redefine the stereotype "dumb blonde" in a positive light by "displaying it prominently alongside a woman with a successful career, and through musical lyrics that shed light on critical issues faced by women." *Id.* at 458. However, an applicant's good intentions cannot discount evidence that some people find the meaning of the mark disparaging. *Heeb*, 89 U.S.P.Q.2d at *22-23. Respondent's statement thus fails to rebut the considerable evidence showing that a substantial composite of women may find the mark to be disparaging. Moreover, in contending that she intends to "recast the phrase in a positive light," Respondent is admitting to the negative connotations associated with the phrase. *Luhv*, 1337 F.3d at 458. Therefore, even Respondent herself finds the phrase "dumb blonde" to be disparaging, where the phrase is not used in connection with Respondent's own goods and services.

Respondent also presented evidence of a mark, "DYKES ON BIKES," which was previously approved for registration. *See id.* However, the fact that similar potentially disparaging marks have been registered "cannot assist [an applicant] in

traversing a refusal to register a disparaging term [E]ven if marks in prior registrations have some characteristics similar to [the] Applicant’s mark, the PTO’s allowance of such prior registrations does not bind the Board.” *Beck*, 114 U.S.P.Q.2d at *7 (citing *In re Nett Designs Inc.*, 236 F.3d 1339 (Fed. Cir. 2001)). The reasoning behind this rule is that some marks may be registered “because of administrative error or otherwise,” even if the marks violate the Lanham Act, and such oversight should not force a court to apply the same standard in all other cases. *Id.* (quoting *Boulevard*, 334. F.3d at 1343). Therefore, although the term “dykes” is also potentially disparaging to women and yet “DYKES ON BIKES” was previously approved for registration, that approval is irrelevant to this Court’s determination and should not be considered.

Therefore, overwhelming evidence fully supports the finding of the Court of Appeals that the mark DUMB BLONDE is a derogatory phrase used to describe women and that a substantial composite of women may find the meaning of the mark to be disparaging. Accordingly, this Court should affirm the finding of the Court of Appeals that Respondent’s mark DUMB BLONDE is disparaging within the meaning of Section 2(a) of the Lanham Act.

II. SECTION 2(A)’S PROHIBITION ON REGISTERING DISPARAGING MARKS DOES NOT VIOLATE THE UNITED STATES CONSTITUTION.

The First Amendment provides that “Congress shall make no law . . . abridging the freedom of speech, or of the press” U.S. CONST. AMEND. I. Beginning with *Bigelow v. Virginia*, the Supreme Court extended First Amendment

protection to commercial speech. 421 U.S. 809 (1974). It is now well settled that the First Amendment protects commercial speech from *unwarranted* governmental regulation. Ann K. Wooster, *Protection of Commercial Speech Under First Amendment: Supreme Court Cases*, 164 A.L.R. Fed. 1 (2000). However, the First Amendment does not prohibit the government from ensuring that the stream of commercial information flows *cleanly* as well as freely. *Virginia State Bd. of Pharm.*, 425 U.S. at 772. Thus, in certain cases, a trademark is commercial speech that can be regulated without violating the First Amendment.

The Lanham Act is a federal statute, with the dual objectives of protecting the consuming public from deception and protecting the mark holder from misappropriation. Theodore H. Davis, *Registration of Scandalous, Immoral, and Disparaging Matter Under Section 2(A) of the Lanham Act: Can One Man's Vulgarity Be Another's Registered Trademark?*, 54 OHIO ST. L.J. 331, 357 (1993). Consistent with its underlying purpose of consumer protection, the Lanham Act contains broad prohibitions against the registration of marks that are likely to create confusion between their owner's goods and services and those of prior registrants. *Id.* at 332. The Act also seeks to protect the integrity of marks by prohibiting the registration of those marks which are disparaging to certain individuals. Section 2(a) states that the PTO may refuse to register a mark that "consists of or comprises immoral, deceptive, or scandalous matter; or matter which may disparage or falsely suggest a connection with persons . . . or bring them into contempt, or disrepute." 15 U.S.C. § 1052(a).

In considering similar matters, this Court has relied on a four-part analysis to determine whether a government regulation violates the Constitution. First, the communication must be neither misleading nor related to unlawful activity. *Cent. Hudson*, 447 U.S. at 564. The speech is thereafter subject to an intermediate level of scrutiny so that suppression is permitted only when there is a substantial governmental interest. *Id.* at 566. If both inquiries yield positive answers, it must be determined whether the regulation advances the governmental interest asserted, and whether the regulation is not more extensive than necessary to serve that interest. *Id.* Upon applying this four-part analysis to the present case, it is evident that Section 2(a)'s prohibition on registering disparaging marks serves a substantial governmental interest in limiting marks to which the government affords federal protection, and such prohibition is specifically tailored to serve that interest. Therefore, this Court should reverse the holding of the Court of Appeals and find that Section 2(a) of the Lanham Act is constitutional.

A. SECTION 2(A) DOES NOT ABRIDGE THE FIRST AMENDMENT RIGHT TO FREEDOM OF SPEECH.

Section 2(a) of the Lanham Act does not affect an applicant's right to use the mark in any manner. *See In re McGinley*, 660 F.2d. 481, 484 (C.C.P.A. 1981). Further, the statute proscribes no conduct, nor does it suppress any tangible form of expression. *Id.* These facts are crucial to this Court's consideration of the constitutionality of Section 2(a) of the Lanham Act.

The First Amendment serves as a means for ensuring the “free flow of commercial information.” *Friedman*, 440 U.S. at 2. Nevertheless, this Court has remained diligent in emphasizing that “some forms of commercial speech regulation are surely permissible.” *Id.* at 9. For example, restriction on the manner of expression is permissible provided that it is justified without reference to the content of the regulated speech, it serves a significant governmental interest, and that in doing so it leaves open ample alternative channels for communication of information. *Id.*

Section 2(a)’s prohibition on registration of disparaging marks serves a significant governmental interest in protecting the rights of those potentially disparaged by the marks. Additionally, such refusal does not prevent an applicant from using her mark in any way. In the present case, the PTO specifically considered whether the mark DUMB BLONDE is disparaging to women within the meaning of Section 2(a) of the Lanham Act. The PTO was careful to limit its decision to the character of the mark itself, and did not make any evaluation of the message expressed through the Respondent’s lyrics, videos, websites, advertisements, or merchandise. This refusal of registration does not prevent Respondent from continuing to use the mark DUMB BLONDE in any manner. It does not deny Respondent the right to display the mark on her website, merchandise, or advertisements. It does not strip Respondent of the ability to perform under her chosen stage name, or to post videos using her account entitled DumbBlondeMusic. It does not prevent her from continuing to fight gender barriers

by attempting to reclaim the negative phrase. To the contrary, the refusal of registration merely prevents Respondent from receiving an added benefit of federal protection for her use of the mark.

This distinction is ultimately what the Court in *Friedman* acknowledged. The Court explained that Section 2(a) “does not prohibit or limit the type of informational advertising held to be protected.” *Id.* Conversely, the statute allows factual information associated with trademarks to be communicated freely and explicitly to the public, whether or not the trademarks are approved for registration. *Id.* Therefore, irrespective of the prohibition on disparaging marks imposed by Section 2(a) of the Lanham Act, an applicant may continue to use her unregistered mark in any manner in which she so chooses.

Further, an applicant’s sole purpose of filing for registration of a mark is to *receive federal protection* for the mark, not to actually *obtain use* of the mark. Respondent, in this case, is no exception. The most blatant evidence that supports the argument that Section 2(a) has not abridged Respondent’s right to free speech is that Respondent has used the mark DUMB BLONDE since 2012. *Luhv*, 1337 F.3d at 455. Absent any federal protection, Respondent successfully amassed over 40,000 “followers” on her Soundpuff account and over 100,000 active subscribers to her uTube Channel, which Respondent also registered under the name DumbBlondeMusic. *Id.* at 456. Additionally, Respondent has performed using the mark at various venues across the United States, sold merchandise featuring the mark, and created a website which advertises the mark in connection with

Respondent's services. *Id.* Prior to 2012, Respondent had no inclination to seek registration with the PTO. It was not until 2014 that Respondent sought registration, when a record deal required her to register a trademark for the mark DUMB BLONDE. *Id.* This deal, which included a \$2 million advance upon its execution and potentially much more profits in record sales, was the sole driving force behind the Respondent's desire to file an application with the PTO. *Id.* At no time during the years of Respondent's use of the mark DUMB BLONDE did Respondent ever seek federal registration, because she was able to use her mark freely without registering it. When Respondent ultimately sought registration, she was entirely motivated by financial gain.

Section 2(a)'s prohibition against registering disparaging marks therefore does not preclude Respondent from using her mark in any way. The PTO's refusal of registration under Section 2(a) denied Respondent only the added benefit of federal protection for her mark, and Respondent seemingly failed to care about such protection during her years of using the mark. Respondent was motivated to seek registration solely because of the potential financial gain from her pending record deal, which required registration. Thus, Section 2(a)'s prohibition on registering disparaging marks, which justified the PTO's refusal to register Respondent's mark DUMB BLONDE, does not abridge her right to freedom of speech guaranteed by the First Amendment.

B. THE GOVERNMENT HAS A SUBSTANTIAL INTEREST IN ENSURING THAT THE MARKS TO WHICH IT CONFERS FEDERAL PROTECTION ARE NOT DISPARAGING.

If the speech at issue is neither misleading nor related to unlawful activity, the government must assert a substantial interest to be achieved by restricting the speech. *Cent. Hudson*, 447 U.S. at 564. A restriction complies with this requirement if it directly advances the governmental interest involved. *See id.* at 566. In the present case, the governmental interest is to protect the rights and interests of women by prohibiting the registration of marks that may be disparaging to a substantial composite of women.

The United States has regulated the morality of marks for over a century. Christine H. Farley, *Stabilizing Morality in Trademark Law*, 63 AM. U. L. REV. 1019, 1024 (2014). Section 2(a) has limited legislative history; however, “the language of the provision reveals its purpose: it seeks to encourage civility by denying the benefits of federal registration to marks that cause deep offense to a significant portion of the public.” *Id.* at 1025. Therefore, the public policy behind Section 2(a) is to protect individuals who may take offense to disparaging marks. The public may easily interpret federal protection of a disparaging mark as the federal government’s endorsement of its subject matter; accordingly, the government has a substantial interest in refusing to endorse matter which may disparage members of the public. Moreover, the fact that Congress has continued for over a hundred years to maintain the prohibition against registration of disparaging marks indicates its satisfaction with the PTO’s administration of the law. *See McGinley*, 660 F.2d at 486 n.10. The unwavering firmness shown by

Congress's inaction reflects the substantial governmental interest in excluding disparaging marks from receiving the benefit of federal protection.

The statutory benefits of registration also invoke a strong government interest in limiting the registration of certain marks. Registration on the Principal Register provides a trademark with several advantages not otherwise available under state common law. Justin G. Blankenship, *The Cancellation of Redskins As A Disparaging Trademark: Is Federal Trademark Law An Appropriate Solution for Words That Offend*, 72 U. Colo. L. Rev. 415, 419 (2001). Such benefits include

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, access to federal courts where there is a presumption of validity of the registration (e.g., that the mark is not immoral or [disparaging]), 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.

McGinley, 660 F.2d at 484.

This list emphasizes the fact that once registration is approved, the responsibilities of the government with respect to a mark do not end. *Id.* The government plays an integral role in the maintenance and protection of trademarks,

which is indicative of the government's interest in only registering certain marks. Therefore, the statutory benefits of registration, coupled with the public policy underlying Section 2(a), satisfy the second prong of the *Central Hudson* test. The chosen language of the statute asserts a strong interest in protecting the integrity of trademarks. To this point, Section 2(a)'s prohibition against registering disparaging marks directly achieves the government's established goal of regulating the morality of registered trademarks.

C. SECTION 2(A) IS NOT MORE EXTENSIVE THAN NECESSARY TO SERVE THE GOVERNMENT'S INTEREST.

This Court has established that *some* regulation of commercial speech is permitted. However, the regulation must be narrowly tailored; accordingly, it may extend only as far as the interest it serves. *Cent. Hudson*, 447 U.S. at 564.

The language included in Section 2(a) highlights Congress's concern with the danger of allowing disparaging marks federal protection. Essentially, this language acknowledges that regulation of commercial speech is necessary to reserve registration for only those marks that "pose no danger to the asserted state interest." *Id.* at 565.

In previous cases, this Court has expressed a preference for narrowly-tailored regulations. For example, after establishing that the Commission in *Central Hudson* asserted a substantial interest, this Court considered whether a more limited regulation could adequately achieve that interest. *Id.* at 570-71. The State in *Central Hudson* had imposed a ban on promotional advertising on the basis of the

State's interest in conserving energy and ensuring fair and effective rates for electricity. *Id.* at 557. Although the Court acknowledged that energy conservation is an important state interest, it ultimately held that "it cannot justify suppressing information about electric devices or services that would cause no net increase in total energy use." *Id.* at 570.

This Court employed the same reasoning in *Bolger v. Youngs Drug Products Corporation*, in which the Court examined whether a sweeping prohibition on the mailing of unsolicited contraceptive advertisements was more extensive than necessary to serve the governmental interest. 463 U.S. 60, 75. The interest asserted in *Bolger* was to "control the manner in which children become informed about sensitive and important subjects such as birth control." *Id.* at 71. The Court held that the statute provided only the most limited incremental support for the interest asserted. *Id.* at 73. The Court reasoned that the language of the statute asserted minimal interest in protecting children from learning about contraceptives. *See Id.* Additionally, it could be reasonably assumed that "parents already exercise substantial control over the disposition of mail once it enters their mailboxes." *Id.* Therefore, the Court found that the restriction was more extensive than what the Constitution permits, because "the government may not 'reduce the adult population . . . to reading only what is fit for children.'" *Id.* (citing *Butler v. Michigan*, 352 U.S. 380, 383 (1957)).

Applying the same reasoning to the present case, this Court should find that Section 2(a)'s prohibition on registering disparaging marks is not more extensive

than necessary to serve the governmental interest in protecting potentially disparaged individuals. Unlike the total bans imposed in *Central Hudson* and *Bolger*, Section 2(a) of the Lanham Act does not prevent the registration of *all* marks. Rather, the statute clearly prohibits only certain marks, such as those which the PTO determines to be disparaging. Additionally, Section 2(a) does not deny an applicant's right to use her chosen mark in any way. The statute simply denies disparaging marks the additional benefit of federal protection, which ensures that the government does not appear to endorse those marks which are potentially disparaging to certain individuals. For this reason, the limited regulation imposed by Section 2(a) of the Lanham Act should be upheld as constitutional.

D. SECTION 2(A)'S USE OF THE TERM "DISPARAGING" IS PRECISE AND DOES NOT ARBITRARILY VIOLATE DUE PROCESS.

The Lanham Act often faces opposition regarding the "vagueness" of the language used. In similar cases, parties have asserted claims that the statute does not provide reasonably ascertainable standards of guilt and therefore violates the constitutional requirements of due process. *See Roth*, 354 U.S. at 491.

In *McGinley*, this Court acknowledged that the Lanham Act affords "a limited statutory right to registration, which carries certain benefits." 660 F.2d at 484. That right cannot be denied without compliance with the Fifth Amendment right to due process. The Constitution does not require "impossible standards;" rather, all that is required is that the language "conveys sufficiently definite warning as to the proscribed conduct when measured by common understanding

and practices.” *Id.* (citing *Roth*, 354 U.S. at 491). Section 2(a) is specific and particular in its prohibition against certain types of marks. The statute clearly states that “[n]o trademark . . . shall be refused registration on the principal register on account of its nature unless it . . . may disparage . . . persons, living or dead, . . . or bring them into contempt, or disrepute” 15 U.S.C. 1052(a). Therefore, this language sufficiently conveys a definite warning to applicants that potentially disparaging marks may not be approved for federal registration. In addition, the TTAB and the Federal Circuit have adopted a two-part test to determine with specificity whether a mark is disparaging in order to ensure that only those marks that are actually disparaging to certain individuals are refused registration. *See Geller*, 751 F.3d at 1358; *Lebanese Arak Corp.*, 94 U.S.P.Q.2d at 1217.

Congress has determined that some sort of restriction upon the federal registration of marks is necessary, and it has settled upon the Lanham Act’s prohibition of certain marks as the mechanism by which to achieve exclusivity of federal protection. Moreover, Section 2(a) is sufficiently precise to warn an applicant that marks deemed disparaging will not be granted federal registration. Accordingly, this Court should conclude that the term “disparaging” is sufficiently precise to satisfy due process requirements.

CONCLUSION

This Court should affirm the finding of the Federal Circuit Court of Appeals that the mark DUMB BLONDE violates Section 2(a) of the Lanham Act, and therefore should not be registered. Substantial evidence shows that the likely meaning of the mark DUMB BLONDE, as used by Respondent on her goods and services, is an unintelligent woman with a blonde hair color. Respondent fails to provide any evidence of a secondary meaning of the mark, and her alleged intent to redefine the stereotype is insufficient to create such secondary meaning. Accordingly, the likely meaning of the mark is a disparaging reference to women.

Further, significant evidence in addition to dictionary definitions proves that the meaning of the mark DUMB BLONDE may be disparaging to a substantial composite of women. A substantial composite requires only a small percentage of women. Numerous uTube users reacted negatively to Respondent's mark, and recent literature and articles have commented that women generally view the phrase "dumb blonde" as disparaging. Therefore, it is evident that a small percentage of women, at the very least, finds the meaning of DUMB BLONDE to be disparaging. If Respondent continues to grow her fan base and popularity while simultaneously attempting to reclaim the stereotype, perhaps in future years the meaning of the mark DUMB BLONDE will cease to be disparaging to women. However, the current evidence of record makes clear that that day has not yet arrived. Accordingly, Respondent's mark DUMB BLONDE is disparaging to women

within the meaning of Section 2(a) of the Lanham Act, and the PTO's refusal of the mark was proper.

Notwithstanding a determination by this Court that the mark DUMB BLONDE is disparaging, this Court should reverse the holding of the Court of Appeals and hold that Section 2(a)'s prohibition on registering disparaging marks is constitutional. Although registration of Respondent's mark DUMB BLONDE would afford her the benefit of federal protection, the PTO's Section 2(a) refusal to register the mark does not preclude any common law rights to which Respondent is entitled. Therefore, the PTO's refusal to register Respondent's disparaging mark does not affect her right to use it. This is evident based on the fact that Respondent has been using the mark extensively since 2012, with no desire to seek registration until Respondent was motivated by financial gain from a record deal.

In addition, Section 2(a)'s prohibition on registering disparaging marks is limited and is not more excessive than necessary to serve the government's interest in protecting potentially disparaged individuals. Section 2(a) clearly prohibits only certain marks, including those that are disparaging. Further, Section 2(a) does not impose a total ban on the registration of all marks, nor does it prevent any party from using an unregistered mark in any way. Moreover, because the statute's precise wording is clear in its intent to maintain the morality of trademarks, it does not arbitrarily violate due process law. Section 2(a) therefore does not abridge the First Amendment rights of any individual; accordingly, this Court should find that the statute does not violate the United States Constitution.

Therefore, this Court should affirm the finding of the United States Court of Appeals for the Federal Circuit that the mark DUMB BLONDE is disparaging within the meaning of Section 2(a) of the Lanham Act. However, this Court should reverse the judgment of the Court of Appeals and find that Section 2(a)'s prohibition on registration of disparaging marks is constitutional.

Respectfully submitted,

/S/ Team # 123

Attorneys for Petitioner

October 20, 2015

