2020-2205

UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

In re: STEVE ELSTER,

Appellant

APPEAL FROM THE TRADEMARK TRIAL AND APPEAL BOARD

Serial Number 87749230

Rogers, Chief Administrative Trademark Judge,
and Zervas and Lynch, Administrative Trademark Judges.

AMICUS BRIEF OF MATTHEW A. HANDAL IN SUPPORT OF NEITHER PARTY (CORRECTED)

(Urging Affirmance on Section 2(a)
and Reversal on Section 2(c))

MATTHEW A. HANDAL

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CERTIFICATE OF INTEREST

Amicus MATTHEW A. HANDAL certifies the following:

1. The full name of every party represented by me is: **MATTHEW A. HANDAL** (self-represented).
2. The name of the real party in interest represented by me is: **same**.
3. All parent corporations and any publicly held companies that own 10 percent or more of the stock of the party represented by me are: **none**.
4. The names of all law firms and the partners or associates that appeared for the party now represented by me in the trial court or agency or are expected to appear in this court are: **none**.
5. Related Cases. Provide the case titles and numbers of any case known to be pending in this court or any other court or agency that will directly affect or be directly affected by this court's decision in the pending appeal:

   Amicus' pending trademark applications for MAKE AMERICA GREAT AGAIN DUMP TRUMP! 2020, S/N 88/931066; MAKE AMERICA GREAT AGAIN DUMP TRUMP! 2020, S/N 88/936129; DUMP TRUMP AND LOCK HIM UP, S/N 90/340590; INDICT THE TRUMP ORGANIZATION, S/N 90/340613; INDICT 45, S/N 90/434555.
6. Organizational Victims and Bankruptcy Cases. Provide any information required under Fed. R. App. P. 26.1(b) (organizational victims in criminal

cases) and 26.1(c) (bankruptcy case debtors and trustees). Fed. Cir. R. 47.4(a)(6). **Not applicable.**

February 26, 2021 /s/ Matthew A. Handal

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

OTHER AUTHORITIES

INTEREST OF AMICUS[1]

Amicus Matthew Handal has trademark applications that include the word "Trump." Two of his applications have been refused under Section 2(c). The others certainly will be refused in due course on the same grounds. Those applications are:

MAKE AMERICA GREAT AGAIN DUMP TRUMP! 2020, S/N 88/931066

MAKE AMERICA GREAT AGAIN DUMP TRUMP! 2020, S/N 88/936129

DUMP TRUMP AND LOCK HIM UP, S/N 90/340590

INDICT THE TRUMP ORGANIZATION, S/N 90/340613

INDICT 45, S/N 90/434555

In his responses to the office actions, dated February 4, 2021, to 88/931066 and 88/936129, Amicus argued that Section 2(a)'s Deceptive and False Association Clauses are constitutional if correctly applied. He contends that Section 2(c) is

[1] The parties in this case have consented to the filing of this brief. Jonathan Taylor, counsel for Appellant consented in an email dated January 24, 2021. Christina J. Hieber, counsel for Respondent, consented in an email dated January 28, 2021. This brief was not authored in whole or in part by counsel for any party. No one other than amicus or his counsel made a monetary contribution to preparing or submitting this brief.

unconstitutional. The outcome of this case is likely to affect the outcome of Amicus' applications.

Accordingly, Amicus files this brief to bring some matters to the Court's attention to make sure that they are adequately briefed.

SUMMARY OF ARGUMENT

The refusal of TRUMP TOO SMALL should be affirmed pursuant to the False Association Clause of Section 2(a). Appellant did not dispute the false association finding. Amicus argues that Section 2(a) is clearly constitutional since it relates to a core purpose of the Lanham Act: prevention of confusion (or deception or false association)

Amicus argues that Section 2(c) is unconstitutional under *Sullivan v. New York Times*. It is also unconstitutional as viewpoint regulation. The Patent & Trademark Office allows all manner of trademarks that express political viewpoints. The only type it does not allow **is** those that discuss specific named candidates. That is viewpoint regulation.[2]

ARGUMENT

I. THE UNDISPUTED FALSE ASSOCIATION GROUND IS A MORE LIMITED BASIS FOR AFFIRMING REFUSAL

Amicus contends that the TTAB should have affirmed the refusal on the false association ground.

A. Section 2(a) Refusal Was Not Disputed by the Appellant.

[2] This filing of this brief would have been filed timely but it was delayed because the Court had to approve Amicus' ECF log-on. In any event, the brief is timely because it urges affirmance.

The first two rounds of office actions raised only Section 2(c). However, the TTAB remanded to the examining attorney and she raised a new ground: Section 2(a), false association. *See* Office Action dated June 24, 2019. In response, the Appellant offered no evidence or argument in response to the Section 2(a) refusal. Instead, the Appellant contended that False Association Clause is unconstitutional. Thus, the Examining Attorney's evidence that there is a false association is undisputed, as is her conclusion that Appellant' mark creates a false association. Accordingly, Section 2(a) should have been the basis for affirming the refusal.

B. The Section 2(a) Refusal Was Proper on This Record.

The Examining Attorney's conclusion that TRUMP TOO SMALL could create a false association is entirely plausible. Traditionally the Republican Party has stood for small government. Presumably, Trump and some of his supporters think Trump's views are exactly the right size (i.e., small) about the environment, health care, immigration and other issues. For those persons, the mark could create a false association. The TRUMP TOO SMALL mark is not so clearly critical of Trump that it negates false association.

The Appellant's t-shirt does not change the conclusion. If a registration were granted, it would only be for TRUMP TOO SMALL, without any requirement that other words (such as those on the backside of Appellant's t-shirt) be used. Nor is there any showing that most consumers even heard of the

exchange of insults in the debate, or they will remember it in many years that the registration, if granted, would be valid. Accordingly, the record supports the Section 2(a) refusal.

C. Section 2(a) Is Constitutional as to Marks that Cause False Association.

Most trademark attorneys, even those who believe in expansive Free Speech right, would not want to have the traditional rules relating to confusion (likelihood of confusion, deception, false association) invalidated. There clearly is a substantial governmental interest in preventing confusion.

Amicus requests that the Court should use careful language in its decision. When there is no possibility of confusion (such as Amicus' marks, e.g., DUMP TRUMP AND LOCK HIM UP or INDICT 45, then Section 2(a) should not apply. No reasonable person would think such goods or a blog under that service mark, was endorsed by Trump.

D. It Matters Upon What Ground This Case is Decided.

It is puzzling that the TTAB did not affirm the refusal based upon Section 2(a) when the record **is** undisputed on that issue. The issue that the TTAB should have decided is whether a mark that creates a false association must still be allowed when it criticizes a government official. Since the First Amendment does

not protect deceptive speech, that seems to be an easy question to resolve. Under the doctrine of constitutional avoidance, it would seem that deciding the easier issue only, especially one based upon an undisputed factual finding (false association), would be preferable.

If this Court decides the constitutionality of Section 2(c), it will be a major precedent. It has the potential for going up to the Supreme Court. It is best that such issue be decided on the proper and narrow grounds.

The Court need not worry that the issue will go undecided. The Appellant might file another application that more clearly presents the issue. Or other applications will raise the issue. The Court may want to consider the more extensive record and discussion of TRUMP trademarks in Amicus' response to office actions in MAKE AMERICAN GREAT AGAIN DUMP TRUMP! 2020, S/N 88931066 and 88936129. Although that is not part of the record in this case, arguments (whether in a law review article or otherwise) may always be considered for whatever they are worth. The evidence in such response can all be judicially noticed.

II. SECTION 2(c) IS INCONSISTENT WITH THE PURPOSE OF THE LANHAM ACT.

A. The Purpose of the Lanham Act

The purpose of the Lanham Act is to prevent consumer confusion and to

foster the free flow of commerce by granting rights to trademark owners. *Matal v. Tam*, 582 U.S. ___, 137 S. Ct. 1744, 1751, 198 L. Ed. 2d 366 (2017).

There are other provisions that are not related to the core purpose of the Lanham Act. Such provisions included what are referred to as the Disparagement Clause and the Scandalous and Immoral Clauses. The former was held unconstitutional in *Tam*, while the latter two were held unconstitutional in *Brunetti*.

B. Section 2(c) Is Inconsistent with the Purpose of the Lanham Act

Section 2(c) has no function relating to the purpose of the Lanham Act that is not already adequately covered by the Deception and False Association Clauses of Section 2(a).[3] This can be seen by looking at what trademarks are covered by the two provisions.

Within marks with TRUMP are:

> Marks with TRUMP that do not refer to Mr. Trump. Neither Section 2(a) nor Section 2(c) apply.

[3] The Four Factor test for false association is set forth in TMEP 1203.03(c)(i). Trademarks critical of someone, such as Trump, cannot create a false association. No reasonable person would think Trump endorses DUMP TRUMP. If the Four Factor test says otherwise, then it is contrary to the plan language of Section 2(a). The Supreme Court has repeatedly held that the interpretation of a statute commences with the plain language of the statute. Alternatively, a *Sullivan* exception for public figures needs to be read into the test.

Marks that are positive or ambiguous. Section 2(a) applies.

Marks that are clearly negative. Section 2(a) should not apply because there is no possibility of deception or false association. Section 2(c) only serves to prevent negative comment about the living individual.

In summary, Section 2(c) serves no purpose beyond what is covered by Section 2(a). Section 2(a) is sufficient to prevent any deception or false association. So what purpose does Section 2(c) serve? Only to allow a public figure to suppress negative speech. There is no governmental interest in Section 2(c).

III. SUBSTANTIVE LAWS MUST GIVE WAY TO FREE SPEECH

A. *Sullivan* Prohibits Government Officials from Using Civil Law to Restrict Criticism of Official Conduct

The Supreme Court has repeatedly held that Free Speech requires limitations on substantive civil law as to public figures. *New York Times Co. v. Sullivan*, 376 U.S. 254, 84 S. Ct. 710, 11 L. Ed. 2d 686 (1964). The Court in *Sullivan* referred to the "obsolete doctrine that the governed must not criticize their governors." The reasoning of *Sullivan* is set forth in its lengthy quote from *Coleman v. MacLennan,* 78 Kan. 711, 98 P. 281 (1908).

> It is of the utmost consequence that the people should discuss the character and qualifications of candidates for their suffrages. The importance to the state and to society of such discussions is so vast, and the advantages derived are so great, that they more than counterbalance the inconvenience of private persons whose conduct may be involved, and occasional injury to the reputations of individuals must yield to the public welfare, although at times such injury may be great. The public benefit from publicity is so great, and the chance of injury to private character so small, that such discussion must be privileged.

Especially pertinent to Section 2(c), the Court said that:

> "[P]ublic men are, as it were, public property," and "discussion cannot be denied, and the "right, as well as the duty, of criticism must not be stifled."

The Court in *Sullivan* held that public officials **cannot** use civil law to suppress speech about themselves. The fundamental principle reaffirmed by *Sullivan* is that:

Action brought by a public official against critics of his official conduct, abridges the freedom of speech and of the press that is guaranteed by the First and Fourteenth Amendments.

The difference between *Sullivan* and this case, is in *Sullivan* the public official had to take an action by filing a lawsuit. In Section 2(c), the public official can merely refuse to take an action. This is a distinction without a difference.

If Section 2(c) serves to prohibit criticism of Trump in connection with his official conduct then, just as in *Sullivan*, it abridges the Freedom of Speech.

B. *Sullivan* Established a Broad Rule that No Civil Statute or Tort May Be Used to Suppress Criticism of Government Officials

The Supreme Court, rather than leaving *Sullivan* as an outlier, has instead applied it in every situation in which public figures have attempted to suppress criticism. *Time, Inc. v. Hill*, 385 U.S. 374, 87 S. Ct. 534, 17 L. Ed. 2d 456 (1967), extended *Sullivan* to false light invasion of privacy, requiring the public figure to prove actual malice. In *Hustler Magazine v. Falwell*, 485 U.S. 46, 108 S. Ct. 876, 99 L. Ed. 2d 41 (1988), actual malice was required for intentional infliction of emotional distress claims asserted by a public figure.

The closest analogy to Section 2(c) is the right of publicity. The interaction between Free Speech and right of publicity was the issue in *Cardtoons, L.C., v. Major League Baseball Players Association*, 95 F.3d 959 (10th Cir. 1996). It held that right of publicity must give way to Free Speech:

> Since celebrities will seldom give permission for their identities to be parodied, granting them control over the parodic use of their identities would

not directly provide them with any additional income. It would, instead, only allow them to shield themselves from ridicule and criticism. 95 F.3d at 974.

There is simply no constitutionally sound basis to allow public figures to suppress trademarks about them when there is no false association. The principle in *Sullivan* applies to Section 2(c) and that Section is invalid as to public figures.

C. Section 2(c) Substantially Burdens Discussion About Public Officials

Trademarks clearly are a form of public discussion. The government has previously argued that refusal of registration does not prohibit use and therefore, it does not matter if the Lanham Act's provisions are otherwise unconstitutional. The Supreme Court has twice rejected that argument, in *Tam* and in *Brunetti*.

An applicant cannot obtain the priority of an intent-to-use application or nationwide constructive first use. Without the benefits of federal registration, starting a brand or using a trademark is substantially more difficult and riskier.[4]

That is a constitutionally significant undue burden on speech.

[4] It is obvious that the unconstitutional conditions doctrine applies because the value of federal registration is so important that denial of registration is constitutionally significant. The best analogy is that a federal registration is like Speakers' Corner in Hyde Park. A common law registration is more like being allowed to speak only in a far corner of the Park, behind the restrooms and garbage containers.

D. The Prohibition of Use of the Public Official's Name in a Trademark is Tantamount to Prohibition of Use

In order to engage in a discussion about a public official one has to refer to her. But under Section 2(c) all trademarks referring to any candidate for office are prohibited. How do you critique a candidate for office or a government official as part of your expressive trademark if the listener does not know to whom you are referring to? It is necessary to mention the subject of the discussion. That is why Amicus' mark mentions Trump. It is functionally impossible to discuss Trump without making it clear that he is being referred to.

There is no alternative to using the public official's name. The PTO has interpreted Section 2(c) to prohibit not only Trump's name, but also anything that refers to him. For example, applications referring to "45" (since Trump was the 45th president) are refused. All reference, direct or indirect, to the public official is prohibited.[5]

Section 2(c) prohibits not only critical discussion of Trump **but** any discussion of him at all in expressive trademarks. All discussion, whether positive,

[5] Trademarks including "45" do not "[c]onsist[] of or comprises a name, portrait, or signature." The PTO's rule is contrary to the plain language of the statute but it is not necessary to argue here the validity of the PTO's interpretation. It is sufficient to note that the PTO will not allow any trademark that refers, even indirectly, to Trump.

negative or neutral is prohibited. In plain language, Section 2(c) gives Trump absolute control over the use of his name and discussion of his performance as a public official in any registered trademark. We would expect that in Russia and China. But this is not consistent with the American form of democracy.

E. The PTO's Deference to an Individual is Still Government Action

The fact that an individual, namely Trump, has a veto does not save Section 2(c). The government is making the decision to refuse the registration. As in *Sullivan*, the actor may be private, but when the government assists the private person to suppress speech, then it is a governmental action and Free Speech is invoked.

Since this is a facial challenge, it is not necessary to show that Trump has actually refused to consent to any trademarks. However, to Applicant's knowledge, never has Trump consented to any trademark. Rather, Trump has stated that he thinks freedom of the press is "disgusting." *See, Washington Post*, "Trump's 'frankly disgusting' comments about the media and the First Amendment annotated" October 11, 2017. So, he is happy that the PTO is giving him absolute control over registered trademarks, which in turn gives him functional control over trademarks given the significant disadvantages entailed by a lack of federal registration.

That some trademarks prohibited by Section 2(c) are not constitutionally protected (for example, trademarks not involving public figures), does not save the statute from overbreadth. A substantial amount of clearly protected high-value speech is restricted.

If one cannot criticize the president, then there really is no Freedom of Speech. Freedom of Speech in which some channels of speech are prohibited is not Free. Applicants must be allowed to use trademarks to criticize the President.

IV. SECTION 2(c) IS UNCONSTITUTIONAL VIEWPOINT REGULATION.

A. Many Trademarks Are Expressive of Viewpoint

A century ago, trademarks were used mostly to identify the source of industrial and consumer goods. However, that is no longer the case. Trademarks are used to identify churches, political campaigns and non-profits. Marks are used for high-value speech, such as blogs, websites newsletters, and magazines. Viewpoint is inextricably incorporated into the trademarks.

Although the *Tam* Court claimed it was not deciding whether trademarks are expressive, it noted that:

> [M]any, if not all, trademarks have an expressive component. In other words, these trademarks do not simply identify the source of a product or

> service but go on to say something more, either about the product or service or some broader issue. The trademark in this case illustrates this point. The name "The Slants" not only identifies the band but expresses a view about social issues. 137 S. Ct. at 1764.

It is indisputable that many registered marks express a viewpoint. Specifically, many applications for marks using TRUMP clearly are expressing viewpoint.

> ANTITRUMPTOWER.COM, 87392636
>
> DUMP TRUMP NOW, 90065897
>
> I AM THE ANTITRUMP, 87238314
>
> SAVE AMERICA! COMRADE TRUMP YOU'RE FIRED!, 88905452
>
> THE BIG DUMP TRUMP, 90057561
>
> THE GREAT WALL OF TRUMP, 87331904
>
> THIS NATION IS IN THE DUMP BECAUSE OF TRUMP, 88719120
>
> TRUMP DON'T TRUMP GOD. GOD'S GOT THE TRUMP CARD, 80237501
>
> TRUMP IS ROOTIN' FOR PUTIN, 88806771
>
> TRUMP YOU'RE FIRED!!!, 88956390
>
> WHEN TRUMP HITS THE FAN, 87261658

It is worth noting that Trump himself is happy to have registrations for viewpoint marks. That is, as long as he controls the speech, as shown by his published application and registrations for KEEP AMERICA GREAT, 87305551 (NOA). and MAKE AMERICA GREAT AGAIN, Reg. 5020556. In short, Trump is glad to take advantage of the rights and benefits of federal registration to express his viewpoints. And he is happy with the absolute control that the Section 2(c) provides him over registered trademarks. But his right to exclude other voices is not constitutional.[6] Nor is it sound policy in the type of democracy that our Founding Fathers envisioned.

B. Section 2(c) Is Viewpoint Regulation Because It Allows Some Trademarks Referring to Politics but Refuses Trademarks About Individual Government Officials and Candidates

Section 2(c) is viewpoint regulation because it does not apply evenly to all marks about politics. The subject matter is politics and Section 2(c) prohibits only

[6] It is obvious that the unconstitutional conditions doctrine applies because the value of federal registration is so important that denial of registration is constitutionally significant. The best analogy is that a federal registration is like Speakers' Corner in Hyde Park. A common law registration is more like being allowed to speak only in a far corner of the Park, behind the restrooms and garbage containers.

some viewpoints. It is perfectly acceptable to have trademarks about political parties and political issues. They are frequently registered.

AMERICANS AGAINST ABORTIONS, Reg. 1466687

GUN CONTROL HOLD IT AIM IT FIRE IT, Reg. 4539125

KEEP AMERICA GREAT, 87305551 (NOA)

MAKE AMERICA GREAT AGAIN, Reg. 5020556

REPUBLICANS HAVE ACCIDENTS TOO!, Reg. 4892315

ROBIN HOOD REPUBLICAN, 2867375

UNTERRIFIED DEMOCRAT, Reg. 0725652

VOTE FOR DEMOCRATS BECOME TAXED, Reg. 3261550

What is not allowed by Section 2(c) is any discussion of specific government officials or candidates. The government official or candidate is allowed absolute control over any discussion of his fitness for office or his official acts. Not only is he allowed to prohibit any negative trademarks but he can also effectively prohibit any discussion at all using trademarks. Trump has a veto over all speech about him in the trademark context. It is absolute as to registered trademarks. That gives him, as a practical matter, a strong hand to prevent use of common law trademarks.

Would it be constitutional to mandate that television stations may discuss politics, but they must avoid mentioning individual candidates by name? Section 2(c) clearly is viewpoint regulation.

C. The PTO Decides the Meaning of TRUMP

The PTO is applying its own viewpoint by selecting among the various meanings for "Trump." "Trump" has multiple meanings, including a trump card, overrule, outrank or defeat. The PTO has to decide which "Trump" meaning to apply. It imposes its own viewpoint even if contrary to the Applicant's viewpoint.

The PTO has granted many TRUMP trademarks (registered, allowed, or refused on other grounds). Live marks include:

AMERICAN TRUMPS SOCIALISM, 88630894 (NOA)

AQUATRUMP, Reg. 4602582

BLESSINGS TRUMP CURSES, 88120106 (NOA)

CAPITALISM TRUMPS SOCIALISM, 88507542 (refused on other grounds)

CONSCIOUSNESS TRUMPS ALL, Reg. 4254442

CULTURE TRUMPS EVERYTHING, Reg. 4881671

iTRUMP, Reg. 4607873

DUTY TRUPS DOUBT, 87262234 (NOA)

EDUCATION TRUMPS HATE PASS IT ON, 88343293 (published, but successfully opposed)

POSTIVITY TRUMPS NEGATIVITY, 88820764 (NOA)

RESILIENCE TRUMPS ACES, Reg. 6062046

TALENT TRUMPS!, Reg. 4472373

TOP TRUMPS, 5440628

TORAH TRUMPS HATE, Reg. 562335

TRUMP, Reg. 0536692

TRUMP CARD, Reg. 3823129

TRUMPJET, Reg. 3414733

TRUMP MEDIAEVAL, Reg. 3111758

TRUMP NEW WORLD RESERVE, Reg. 4950588

TRUMP THIS WORD, Reg. 5915292

VEGGIE TRUMPS, Reg. 4681225

VIRTUE TRUMPS EVIL, 88647563 (NOA)

YOU CAN'T TRUMP GOD, Reg. 5898250

Other marks that were registered, allowed or not refused on such grounds, but now dead include:

ACTION TRUMPS EVERYTHING, Reg. 4041608

BEER TRUMPS, 85002985 (NOA)

GABI TRUMP CARDS, Reg. 4378711

NO TRUMP, 7861257 (refused on other grounds)

PLAY TRUMP, 78026377 (NOA)

POKERTRUMPS.COM, Reg. 4326719

SALES TRUMP, Reg. 2587680

TESTAMENT TRUMPS, Reg. 3771835

THE TRUMP CARD, Reg. 1161291

TRUMP and Spade, Reg. 1668637

TRUMP, Reg. 1694575

TRUMP, Reg. 2240180

TRUMP, Reg. 2010785

TRUMP-IT, Reg. 2270315

TRUMPTINI, Reg. 3363449

TRUMP TOP, Reg. 3011884

YOUR FEAR DOESN'T TRUMP MY FREEDOM, 85923501 (refused on other grounds)

WHAT'S TRUMP, Reg. 2915078

WINE TRUMPS, 7809292 (refused on other grounds)

The PTO has to decide if a mark refers to a trump card, overcome, defeat, or to Mr. Trump, or some other meaning. That can only be done by deciding what

viewpoint is expressed by the mark. The decision to raise a Section 2(c) refusal depends on what the PTO believes to be the meaning of the word. It cannot be viewpoint neutral is viewpoint is necessary to decide whether to allow registration.

D. Section 2(c) is Viewpoint Regulation Because the PTO Looks at the Applicant's Viewpoint.

Section 2(c) is viewpoint regulation because the decision to raise a Section 2(c) refusal depends on the Applicant's viewpoint. The PTO even asks the applicant's viewpoint. For example, in WE R TRUMP CARDS, 88357555, in an office action dated June 10, 2019 the PTO asked, "Is the term TRUMPCARDS in applicant's mark a reference to Donald Trump?" Presumably the application is refused or granted depending on the viewpoint intended by the Applicant.

There are a number of applications that include the word TRUMP that on their face do not refer to Mr. Trump. Section 2(c) was raised in an office action dated November 10, 2020 for TRUMP THE VIRUS, 9068713. The plain meaning of TRUMP in that context is "defeat." Yet, the PTO issued a Section 2(c) refusal because, apparently, it "knows" which meaning.

Another example is example is TRUMP FENCE COMPANY, 86944214, owned by Trump Fence Company LLC, for among other goods, "installing

fencing" in Class 37. How does the PTO "know" that this refers to Trump? Only by examining the applicant's viewpoint.

There are further examples of marks that do not refer to Mr. Trump or are ambiguous whether they refer to Trump but nevertheless were refused under Section 2(c). The reason for refusal under Section 2(c) must be that the PTO determined the meaning from the applicant's viewpoint:

DON'T TRUMP ON ME!, 87186513 (the mark includes five playing cards)

I BID NO TRUMP, 86794750

IF YOU DON'T LIKE IT TRUMP IT!, 86973550

LOVE TRUMPS HATE, 87307247

LOVE TRUMPS HATE, 8711765

THE TRUMP FACTOR, 86841588

TRUMP DECK, 88049639

TRUMP THAT DEMOCRAT!, 88398167

TRUMP THE VIRUS, 90087130

TRUMP THIS, 88698047

TRUMPDRIVE ENERGY, 88657831 (applicant makes a convincing argument he is not referring to Mr. Trump)

TRUMP YOU, 87146438

TRUMP YOU!, 87239571

TRUMPLESS, 87840125

YOUR FEAR DOESN'T TRUMP MY FREEDOM, 85923501

In short, the PTO endeavors to determine the applicant's viewpoint and to act upon such a viewpoint. Clearly, viewpoint discrimination and unconstitutional.

Note that the goods and services are not listed above. The reason for the omissions is that, in the refusals, the PTO almost never makes the refusal dependent on the applicant's goods and services. Rather the PTO takes the position that, because Mr. Trump is famous, the applicant must be referring to him regardless of the goods and services. That is a logical fallacy. Context works only against the applicant. Almost never is the PTO convinced by the applicant's context. In other words, "heads I win, tails you lose." It was the same way with respect to scandalous marks as shown by actual data. M. Carpenter and M. Gardner, "NSFW: An Empirical Study of Scandalous Trademarks, *Cardozo Arts and Entertainment Law Journal*, 33:321-365. (2015). When "high value" or "core" speech is involved, there is far too great of risk that speech is chilled or suppressed.

V. SECTION 2(c) DOES NOT SURVIVE EITHER STRICT OR INTERMEDIATE SCRUTINY

Applicant believes that *Sullivan* is determinative. The fact that Section 2(c) discriminates upon viewpoint is also dispositive. In the event that it is necessary to go further, then the question is the correct level of scrutiny to apply and whether Section 2(c) survives such scrutiny.

The Supreme Court in *Tam* could not agree on the level of scrutiny. In *Brunetti*, the Court did not even use the word scrutiny. However, Section 2(c) is invalid under either possibly applicable level of scrutiny. Accordingly, it may not matter whether the level is strict or intermediate because the outcome is the same either way.[7]

A. Section 2(c) Fails Strict Scrutiny

Section 2(c) is restricting speech based on content. The Government restricts speech based on content when "a law applies to particular speech because of the topic discussed or the idea or message expressed." *Reed v. Town of Gilbert*, 576 U.S. 155, 135 S. Ct. 2218, 2227, 192 L. Ed. 2d 236 (2015). To be content neutral the regulation must be "applicable to all speech irrespective of content." *Consolidated Edison Co. v. Public Svc. Comm'n*, 447 U.S. 530, 536 (1980).

[7] In previous cases the government has argued that denial of federal registration does not require constitutional analysis. That argument has always been rejected by the Supreme Court. The Court often has not felt it necessary to explain in detail its reasons for rejecting such contentions because it concluded other clauses were viewpoint regulation.

There is no neutrality of content. As to marks involving individual politicians, the only marks granted are the ones that the named politician choses to approve. Trump has an effective veto over any speech he does not control under Section 2(c). This is viewpoint discrimination between marks relating to politics, and specifically, relating to politicians: marks approved by the named politician are allowed, all others are refused. Actually, it goes even further, the discrimination among marks about politics is to reject marks that Trump does not approve of.

Marks including TRUMP are handled differently based upon the perceived viewpoint or meaning of the applicant, or the perceived meaning. If it were content-neutral, all marks with TRUMP would be treated the same.

Viewed another way, Section 2(c) it is not a "time, place, manner" regulation. Thus, it is not content-neutral.

It follows that, even in the event Section 2(c) is not considered viewpoint regulation, then it certainly is content regulation.

If it is content regulation, then strict scrutiny applies. There is no compelling government interest that would justify Section 2(c). As mentioned above, there is no reason for Section 2(c) at all that is not already covered by the content-neutral Deception and False Association Clauses of Section 2(a).

Nor is Section 2(c) narrowly drawn. It covers a broad swath of "high-value" or "core" speech. To be narrowly drawn, Section 2(c) would have to be limited only to trademarks that are deceptive or clearly create a false association.

B. Section 2(c) Does Not Survive Intermediate Scrutiny

Amicus contends that *Reed* implicitly overruled *Central Hudson Gas & Electric Corp. v Public Service Commission*, 447 U.S. 557, 100 S. Ct. 2343, 65 L. Ed. 23 341 (1980), as to "content-based regulations of speech" because *Reed* applied strict scrutiny to such regulations. At a minimum, *Reed* implicitly limited *Central Hudson* to purely commercial transactions, such as offers to sell. However, if it were to be determined that intermediate scrutiny is the appropriate level, Section 2(c) is still unconstitutional. Under *Central Hudson*, a restriction of speech must serve "a substantial interest," and it must be "narrowly drawn." This means, among other things, that "[t]he regulatory technique may extend only as far as the interest it serves." *Tam*, 137 S. Ct. at 1764 (Alito, J.) (plurality) (citations omitted, quoting *Central Hudson* at 564-65).

Here, there is neither empirical support nor sound reasoning for Section 2(c)'s requirement for written consent beyond the prevention of deception in Section 2(a). Prevention of deception or false association is a valid interest, when such actually exists. But Section 2(c) goes far beyond that and rejects applications

when no deception or false association is possible. No reasonable person could believe that Trump approves of DUMP TRUMP. Deception and false association with Trump are impossible with Amicus' mark.

The government has no legitimate interest in protecting the sensibilities of Trump since he is a public figure. There can be no legitimate interest in preventing registration because Trump's right of publicity does not allow him to prevent use of non-confusing marks that addresses his public actions. In other words, if use is allowed, then there is no governmental interest in prohibiting registration.

The statute, in order to be narrowly drawn, would have to exclude public figures. Accordingly, Section 2(c) does not survive intermediate scrutiny.[8]

VI. SECTION 2(c) IS UNCONSTITUTIONAL AS APPLIED

Amicus contends that the "consent of living individual" requirement is overbroad and therefore unconstitutional on its face. Even if Section 2(c) is not struck down in its entirety, it unconstitutionally limits the ability to express

[8] It is not necessary to address here potential government reasons for rational basis scrutiny because the Supreme Court has always rejected all such arguments as to the Lanham Act.

political viewpoints. If the PTO had not found TRUMP TOO SMALL to be deceptive, then the statute is unconstitutional as applied to his mark.

VII. CONCLUSION

The refusal under the False Association Clause should be affirmed. If the Court reaches Section 2(c), then it is facially unconstitutional because the government is discriminating based on viewpoint. Section 2(c) fails to pass either strict or intermediate scrutiny.

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CERTIFICATE OF SERVICE

I hereby certify that I served a copy of this brief on counsel of record on February 26, 2021, by CM/ECF, with courtesy copies by email.

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of FRAP 32(a) (7)(B) because it contains 5,140 words, excluding the parts of the brief exempt by FRAP 32(a)(7)(B)(iii).

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