

No. 20-2205

**IN THE UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT**

IN RE STEVEN ELSTER,

Appellant.

On Appeal from the United States Patent and Trademark Office,
Trademark Trial and Appeal Board, Appl. Ser. No. 87/749,230

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STATEMENT OF RELATED CASES

No other appeal in or from the present civil action has previously been before this or any other appellate court. The government is not aware of any related cases within the meaning of Federal Circuit Rule 47.5(b).

INTRODUCTION

Appellant sought federal trademark registration for the mark “TRUMP TOO SMALL.” But Congress has precluded registration of any trademark that “[c]onsists of or comprises a name . . . identifying a particular living individual except by his written consent.” 15 U.S.C. § 1052(c). Seeking to build on cases invalidating prohibitions on the registration of disparaging or scandalous marks, appellant argues that this provision violates the First Amendment. *See Iancu v. Brunetti*, 139 S. Ct. 2294 (2019); *Matal v. Tam*, 137 S. Ct. 1744 (2017).

Although the provision at issue here, like those at issue in *Tam* and *Brunetti*, involves a limitation on the marks that are eligible for trademark registration, the similarities end there. *Tam* and *Brunetti* involved efforts to influence the level of discourse in society generally through the imperfect means of limiting the universe of marks that are eligible for federal registration. This case, by contrast, involves a targeted effort to preclude federal registration that facilitates a particular type of commercial behavior that has already been banned by most states: appropriating another person’s name to market a product without consent and thus infringing on the right to publicity and the right to privacy. And unlike the provisions at issue in *Tam* and *Brunetti*, the limitation at issue here is viewpoint neutral.

The First Amendment does not require Congress to assist commercial enterprises that seek to trade on the commercial value of a person’s identity, in violation of state law. Plaintiff’s First Amendment argument should be rejected.

STATEMENT OF JURISDICTION

Appellant Steve Elster filed an application for federal trademark registration, which was rejected by the examining attorney. Appx2.¹ Mr. Elster appealed that denial to the Trademark Trial and Appeal Board and, on July 2, 2020, the Board issued a decision affirming the refusal to register Mr. Elster's mark. Appx1-11. On August 19, 2020, Mr. Elster filed a timely petition for review of the Board's decision. Appx855-856. This Court has jurisdiction under 15 U.S.C. § 1071(a).

STATEMENT OF THE ISSUE

The sole question presented is whether 15 U.S.C. § 1052(c), which prohibits registration of a trademark that “[c]onsists of or comprises a name . . . identifying a particular living individual except by his written consent,” violates the First Amendment.

STATEMENT OF THE CASE

A. Statutory Background

At common law, “[o]ne who first uses a distinct mark in commerce . . . acquires rights to that mark.” *B & B Hardware, Inc. v. Hargis Indus., Inc.*, 575 U.S. 138, 142 (2015); see 1 Anne Gilson LaLonde, *Gilson on Trademarks* § 3.02 (2021) (Gilson). Those rights allow the owner of the mark “to prohibit the use of it so far as to protect the owner's good will against the sale of another's product as his.” *Prestonettes, Inc. v.*

¹ Citations to the Joint Appendix use the form “Appx___”; citations to Appellant's Brief use the form “Br. ___.”

Coty, 264 U.S. 359, 368 (1924). The owner can enforce those rights “under state common law, or if [the mark] has been registered in a State, under that State’s registration system.” *Matal v. Tam*, 137 S. Ct. 1744, 1753 (2017).

“Though federal law does not create trademarks, Congress has long played a role in protecting them.” *B & B Hardware*, 575 U.S. at 142 (citation omitted). In 1946, Congress enacted the Lanham Act, ch. 540, 60 Stat. 427 (15 U.S.C. § 1051 *et seq.*), “the current federal trademark scheme,” *B & B Hardware*, 575 U.S. at 142. Under the Lanham Act, the owner of a mark used in interstate or foreign commerce, whether registered or not, may sue for trademark infringement “in federal court if another is using a mark that too closely resembles the plaintiff’s.” *Id.* at 144; *see* 15 U.S.C. § 1114(1)(a) (federally registered marks); 15 U.S.C. § 1125(a) (federally unregistered marks); *see also Tam*, 137 S. Ct. at 1752 (explaining that, “even if a trademark is not federally registered, it may still be enforceable under [Section 1125(a)]”). Certain federal remedies for dilution and unfair competition are likewise available to owners of marks used in commerce, regardless of whether the mark is registered. *See* 15 U.S.C. §§ 1125(b) (importation ban), 1125(c) (remedy for dilution of famous marks), 1125(d) (remedy for cyber-squatting).

The Lanham Act also creates a system of federal registration of marks and confers additional benefits on owners who federally register their marks. *See Tam*, 137 S. Ct. at 1753; 3 J. Thomas McCarthy, *Trademarks and Unfair Competition* § 19:9 (5th ed. 2021). For example, registration serves as nationwide “constructive notice of the

registrant's claim of ownership" of the mark, 15 U.S.C. § 1072, which forecloses certain defenses in infringement actions, *see* Gilson § 4.02. It also is "prima facie evidence of the validity of the registered mark . . . and of the registrant's exclusive right to use the registered mark in commerce on or in connection with the goods or services specified in the registration." 15 U.S.C. § 1115(a); *see id.* § 1057(b). In addition, after five years of registration, the owner's right to use a trademark can become "incontestable," so that it may be challenged only on limited grounds. *Id.* §§ 1065, 1115(b); *see, e.g., Park 'N Fly, Inc. v. Dollar Park & Fly, Inc.*, 469 U.S. 189, 205 (1985) (holding that, after the owner's right to use the mark becomes incontestable, the mark cannot be challenged on the ground that it is "merely descriptive").

To obtain the benefits of registration, an "owner of a trademark used in commerce" applies to the United States Patent and Trademark Office to record the mark on the agency's "principal register." 15 U.S.C. § 1051(a)(1); *see* 35 U.S.C. § 2(a)(1). The application must include a description of "the goods in connection with which the mark is used." 15 U.S.C. § 1051(a)(2). If the USPTO grants the application, it issues the owner of the trademark a certificate of registration "in the name of the United States of America," *id.* § 1057(a), and the owner "may give notice that his mark is registered by displaying with the mark the words 'Registered in U.S. Patent and Trademark Office' or 'Reg. U.S. Pat. & Tm. Off.' or the letter R enclosed within a circle, thus ®," *id.* § 1111.

Congress has further specified that certain types of trademarks are not eligible for federal registration on “account of [their] nature.” 15 U.S.C. § 1052. Congress has directed the USPTO to refuse registration of, among others, marks that are deceptive, *id.* § 1052(a); marks containing a flag, coat of arms, or insignia of the United States, a State, or a foreign nation, *id.* § 1052(b); marks that so resemble other marks that they are likely to cause confusion, *id.* § 1052(d); marks that are merely descriptive, *id.* § 1052(e)(1); and marks that are functional, *id.* § 1052(e)(5).

This case concerns Section 2(c) of the Lanham Act, which directs the USPTO to refuse registration of any mark that “[c]onsists of or comprises a name, portrait, or signature identifying a particular living individual except by his written consent.” 15 U.S.C. § 1052(c). The USPTO has construed this provision as intended to “protect one who, for valid reasons, could expect to suffer damage from another’s trademark use of his name.” *Martin v. Carter Hawley Hale Stores, Inc.*, 206 U.S.P.Q. 931, 933 (TTAB 1979). Such damage is understood to result when “the particular individual bearing the name in question will be associated with the mark as used on the goods.” *Id.* To determine whether the public will draw such an association between the individual and the mark, the USPTO considers whether the person identified in the mark is either “so well known that the public would reasonably assume the connection” or “the individual is publicly connected with the business in which the mark is used.” *In re Hoefflin*, 97 U.S.P.Q.2d 1174, 1175-76 (TTAB 2010).

B. Facts and Prior Proceedings

Appellant filed a trademark application for the mark “TRUMP TOO SMALL” for use on a line of shirts. Appx1-2 & n.1. The examining attorney refused registration under Section 2(c), finding that the mark “consists of or comprises a name, portrait, or signature identifying a particular living individual,” namely then-President Donald Trump, and that his written consent to register the mark was not of record. Appx40. The examining attorney introduced evidence that “Donald John Trump” is so well known as “an American businessman, television personality, politician, and the 45th President of the United States” that members of the purchasing public would understand the use of the name “Trump” in appellant’s mark to be referencing him. Appx40-41 (citing Appx42-130, Appx204-331, Appx353-423). The examining attorney also refused registration under another provision found in Section 2(a) of the Lanham Act that bars registration of marks that “may . . . falsely suggest a connection with persons, living or dead.” 15 U.S.C. § 1052(a); Appx450-453. Appellant argued that denying his application on these bases infringed his First Amendment rights, but the examining attorney rejected that argument, explaining that the registration bars are not restrictions on speech and that even when evaluated as restrictions on speech, they are permissible, viewpoint neutral regulations. Appx826-829.

Appellant sought review before the Trademark Trial and Appeal Board under 15 U.S.C. § 1070, and the Board affirmed. The Board began by noting that the two

“key purpose[s] of requiring the consent of a living individual” are “to protect rights of privacy and publicity that living persons have in the designations that identify them” and “to protect consumers against source deception.” Appx2-3 (cleaned up) (quoting *In re ADCO Indus. Techs., L.P.*, 2020 U.S.P.Q.2d 53786, at *21, *29 (TTAB 2020)). The Board then recognized that appellant had conceded that his mark explicitly refers to then-President Trump and noted that the application did not include Mr. Trump’s written consent. Appx4-5. Although appellant argued that the relevant public would not presume a connection between then-President Trump and appellant’s shirts, the Board explained that under Section 2(c), any analysis of whether the public will infer a connection is “just part of determining whether the public would perceive the name in the proposed mark as identifying a particular living individual,” which would plainly occur here, as appellant had conceded. Appx5-7. The Board thus affirmed the refusal under Section 2(c) and declined to reach the examining attorney’s refusal under Section 2(a). Appx2.

The Board also rejected appellant’s constitutional challenge to Section 2(c). The Board explained that Section 2(c) does not limit use of a mark, but only sets forth criteria for trademark registration and thus is not a direct restriction on speech. Appx9. The Board also explained that even if the challenged provision were considered a restriction on speech, Section 2(c) applies in an objective way to any proposed mark that consists of or comprises the name of a particular living individual, regardless of the viewpoint that is conveyed by the proposed mark. Appx9-10

(distinguishing *Iancu v. Brunetti*, 139 S. Ct. 2294 (2019) and *Tam*, 137 S. Ct. 1744). The Board added that if further scrutiny were necessary, the restriction is narrowly tailored to the government interests of respecting “the right of privacy and publicity that a living person has in his or her identity and protect[ing] consumers against source deception.” Appx10 (quoting *In re Adco Indus. Techs., L.P.*, 2020 U.S.P.Q.2d 53786, at *29).

SUMMARY OF ARGUMENT

Under the widely recognized rights of publicity and privacy, individuals possess a protectable intellectual property interest in the commercial use of their own identities. In particular, under the laws of most states, it is tortious to appropriate someone’s identity for use in a trademark without that person’s consent. Accordingly, Congress determined in Section 2(c) of the Lanham Act that the supplemental benefits that flow from the voluntary federal trademark registration program should not be available for any mark that “[c]onsists of or comprises a name, portrait, or signature identifying a particular living individual” without that individual’s “written consent.” 15 U.S.C. § 1052(c). This provision is fully consistent with the First Amendment, both facially and as applied here.

Section 2(c) bears no resemblance to other restrictions on registrability that have been found to violate the First Amendment. *See Matal v. Tam*, 137 S. Ct. 1744 (2017) (striking down provision barring registration of disparaging trademarks); *Iancu v. Brunetti*, 139 S. Ct. 2294 (2019) (scandalous and immoral trademarks). The

provisions at issue in *Tam* and *Brunetti* shared a fatal flaw: they targeted the expressive content of speech based on the views expressed. Section 2(c), by contrast, is viewpoint neutral and reflects a permissible balancing between competing intellectual-property interests in the commercial sphere.

Because of the fundamental distinctions between Section 2(c) and the provisions at issue in *Tam* and *Brunetti*, neither the Supreme Court nor this Court has yet decided the proper framework for analyzing appellant’s challenge here. The Supreme Court has refrained from prescribing a framework for First Amendment challenges to eligibility restrictions that are not viewpoint based. And while this Court has analyzed provisions that target expressive speech under heightened scrutiny, it has not yet confronted a First Amendment challenge to a viewpoint-neutral provision that does not target modes of expression. The Court thus can and should recognize—as several Supreme Court justices have—that a provision like Section 2(c) does not directly restrict or burden speech. *See, e.g., Brunetti*, 139 S. Ct. at 2303 (Roberts, C.J., concurring in part and dissenting in part) (“Whether . . . marks can be registered does not affect the extent to which their owners may use them in commerce to identify goods. No speech is being restricted; no one is being punished.”). Accordingly, there is no cause for applying heightened scrutiny here. And without heightened scrutiny, appellant’s challenge plainly lacks merit.

But even if this Court considers Section 2(c) to be a restriction on commercial speech subject to review under the framework from *Central Hudson Gas & Electric*

Corp. v. Public Service Commission of New York, 447 U.S. 557 (1980), appellant’s challenge still fails. The unauthorized use of a source-identifier that identifies a living person will often be misleading, and also is tortious under the laws of many states, even in instances where the public may not be misled into assuming a false connection between the goods at issue and the person whose identity has been misappropriated. Section 2(c) serves a substantial governmental interest in respecting the widely recognized rights of publicity and privacy. And it is well tailored to those governmental interests, tracking the generally recognized scope of the rights of publicity and privacy while imposing no burdens beyond the denial of registration.

ARGUMENT

I. Standard Of Review

“Rulings of PTO tribunals are reviewed by the Federal Circuit in accordance with the standards of the Administrative Procedure Act.” *Bridgestone/Firestone Research, Inc. v. Automobile Club De L’Ouest De La France*, 245 F.3d 1359, 1361 (Fed. Cir. 2001). Under this standard, review of the Board’s legal conclusions is plenary, while its factual findings are upheld “unless they are arbitrary, capricious, or unsupported by substantial evidence.” *Id.* This Court reviews constitutional challenges de novo. *See SKF USA, Inc. v. U.S. Customs & Border Prot.*, 556 F.3d 1337, 1349 (Fed. Cir. 2009).

II. Section 2(c) Is Consistent With The First Amendment

Section 2(c) is consistent with the First Amendment. The provision serves to prevent federal registration of marks whose use in commerce would infringe on

longstanding state-law rights to publicity and privacy. *See, e.g.*, 2 J. Thomas McCarthy, *McCarthy on Trademarks and Unfair Competition* § 13:39 (5th ed. 2021) (describing Section 2(c) as the registration provision that “most closely approximates the policies” embodied in the right to privacy and the right of publicity). It is not unconstitutional for Congress to decline to provide the benefits of federal registration to such marks, and instead to respect individuals’ intellectual-property rights in their own names. And Section 2(c) bears little resemblance to the provisions held to be invalid in *Matal v. Tam*, 137 S. Ct. 1744 (2017), and *Iancu v. Brunetti*, 139 S. Ct. 2294 (2019), which targeted expression and were viewpoint-based rather than viewpoint-neutral. *See Tam*, 137 S. Ct. at 1763 (plurality op.) (holding that a provision barring registration of disparaging trademarks discriminated based on viewpoint and, for that reason, facially violated the First Amendment); *id.* at 1765 (Kennedy, J., concurring in part and concurring in the judgment) (“[T]he viewpoint discrimination rationale renders unnecessary any extended treatment of other questions raised by the parties.”); *Brunetti*, 139 S. Ct. at 2297 (invalidating provision in Section 2 that barred registration of “immoral” and “scandalous” marks on the ground that it “disfavors certain ideas”).

A. Section 2(c) reflects Congress’s respect for the rights to publicity and privacy that are widely recognized under state law

In Section 2(c) of the Lanham Act, Congress determined that the benefits that flow from federal trademark registration should not be extended to any mark that “[c]onsists of or comprises a name, portrait, or signature identifying a particular living

individual” without that individual’s “written consent.” 15 U.S.C. § 1052(c).² As the Board has explained, Section 2(c) respects the widely recognized rights of privacy and publicity that living persons have in the designations that identify them. *See, e.g., In re Nieves & Nieves LLC*, 113 U.S.P.Q.2d 1629, 1638 (TTAB 2015); *see also* USPTO, *Trademark Manual of Examining Procedure* § 1206, <https://go.usa.gov/xH6Yw> (collecting cites); *cf. University of Notre Dame Du Lac v. J.C. Gourmet Food Imports Co.*, 703 F.2d 1372, 1376 n.8 (Fed. Cir. 1983) (recognizing the link between Section 2(c) and the right to privacy). The Board has further recognized that Section 2(c) also operates in tandem with other provisions of the Lanham Act to help “protect[] consumers against source deception.” *In re ADCO Indus. Techs., L.P.*, 2020 U.S.P.Q.2d 53786, at *29 (TTAB 2020); Appx3.

The right to publicity that Section 2(c) honors is widely recognized under state statutes and at common law. While the particulars vary between jurisdictions, the right to publicity is generally understood to bar the appropriation of a person’s identity without her consent for commercial purposes. *See Restatement (Third) of Unfair Competition* § 46 (1995) (“One who appropriates the commercial value of a person’s identity by using without consent the person’s name, likeness, or other indicia of

² Section 2(c) also bars registration of “the name, signature, or portrait of a deceased President of the United States during the life of his widow, if any, except by the written consent of the widow.” 15 U.S.C. § 1052(c). Because former-President Trump is not deceased, that provision is not implicated here.

identity for purposes of trade is subject to liability for the relief.”). The right to publicity thus is “the legal label denominating the law’s recognition of the property right inherent in the commercial value of a person’s identity.” 1 J. Thomas McCarthy, *The Rights of Publicity and Privacy* § 6:2 (2020) (*Rights of Publicity and Privacy*). By the end of the twentieth century the right to control the commercial use of one’s name and likeness “ha[d] been recognized in some form by virtually all states.” *Bi-Rite Enters., Inc. v. Bruce Miner Co.*, 757 F.2d 440, 442 (1st Cir. 1985) (citing Page Keeton & William Lloyd Prosser, *Prosser and Keeton on The Law of Torts* 850-51 (5th ed. 1984)); see *Rights of Publicity and Privacy* § 6:2 (identifying 33 states that have explicitly recognized a “right to publicity” and just one—Louisiana—that has rejected such a right).

The heart of a claim for infringement of the right to publicity is the allegation that the defendant, acting without permission, used some identifiable aspect of the plaintiff’s persona in a manner likely to cause damage to the commercial value of that persona. See *Rights of Publicity and Privacy* § 3:2. For example, as the Seventh Circuit recently observed in a case involving an unauthorized use of Michael Jordan’s identity in an advertisement, Jordan is “highly sought after as a celebrity endorser” and “continues to reap the economic value of his reputation in the history of the game,” and thus “understandably guards the use of his identity very closely” and is legally entitled to do so. *Jordan v. Jewel Food Stores, Inc.*, 743 F.3d 509, 513 (7th Cir. 2014).

Because the right to publicity belongs to the person whose identity is being exploited, it is not limited to circumstances in which the unauthorized use of an

identity would mislead the public. *See Rights of Publicity and Privacy* § 3:2 (explaining that “a right of publicity claim requires no pleading or proof of falsity or resulting confusion or mistake”); *see also Bridgestone/Firestone Research*, 245 F.3d at 1363 (recognizing the right to publicity is “not designed primarily to protect the public, but to protect persons and institutions from exploitation of their persona”). Thus, for example, an unauthorized advertisement saying “Tom Brady has never tried our product but you should!” does not contain any false endorsement, yet it nonetheless would infringe Brady’s right of publicity. *See Rights of Publicity and Privacy* § 5:19.

The right to publicity has been recognized as furthering a number of important objectives. The Supreme Court has described the governmental interest in protecting the right to publicity as being “closely analogous to the goals of patent and copyright law, focusing on the right of the individual to reap the reward of his endeavors.” *Zacchini v. Scripps-Howard Broad. Co.*, 433 U.S. 562, 573 (1977) (rejecting First Amendment challenge to imposition of tort liability). Among the elaborations that have been offered is that the right to publicity prevents unjust enrichment “by the theft of good will,” *id.* at 576; protects the property interest that citizens gain and enjoy through their labor and effort, *Hart v. Electronic Arts, Inc.*, 717 F.3d 141, 151 (3d Cir. 2013); provides an incentive “for creativity and achievement,” *Cardtoons, L.C. v. Major League Baseball Players Ass’n*, 95 F.3d 959, 973 (10th Cir. 1996); and protects the “interest in personal dignity and autonomy,” *Restatement (Third) of Unfair Competition*

§ 46 cmt. c; *see also Rights of Publicity and Privacy* §§ 2:1-2:9 (discussing the various policy rationales supporting the right to publicity).

The right to publicity is closely related to, and originally derived from, a second right that Section 2(c) of the Lanham Act also respects: the right to privacy. *See generally Rights to Publicity and Privacy* §§ 1:23-1:25 (explaining how the right to publicity evolved from the tort of invasion of privacy by appropriation); *Restatement (Third) of Unfair Competition* § 46 cmt. b (“The principal historical antecedent of the right of publicity is the right of privacy.”); *Carson v. Here’s Johnny Portable Toilets, Inc.*, 698 F.2d 831, 834 (6th Cir. 1983) (describing how the right to publicity evolved from the right to privacy). As relevant here, a plaintiff can state a claim for invasion of privacy based on “the appropriation and use of the plaintiff’s name or likeness to advertise the defendant’s business or product, or for some similar commercial purpose.” *Restatement (Second) of Torts* § 652C cmt. b (1977). While this strain of the right to privacy closely resembles the right to publicity, it is distinguished in that it is directed to claims arising from psychic, rather than commercial, injury. *See Rights of Publicity and Privacy* § 5:63; *see also Restatement (Third) of Unfair Competition* § 46 cmt. b (“The distinction between the publicity and privacy actions, however, relates primarily to the nature of the harm suffered by the plaintiff; similar substantive rules govern the determination of liability.”).

Both the right to publicity and the right to privacy may be waived when a person consents to a particular commercial use of her identity. *See Restatement (Third)*

of *Unfair Competition* § 46 cmt. f (“Conduct that would otherwise infringe the personal or commercial interests protected by the rights of privacy and publicity is not actionable if the conduct is within the scope of consent given by the holder of the right.”). Thus, in conditioning registration of a trademark “identifying a particular living individual” on that person’s “written consent,” 15 U.S.C. § 1052(c), Section 2(c) of the Lanham Act ensures that the benefits of federal trademark registration are not extended to marks that infringe the rights to publicity or privacy.

B. Unlike the provisions at issue in *Tam* and *Brunetti*, Section 2(c) is a viewpoint-neutral provision directed at a form of commercial activity that is unlawful in many states

The First Amendment does not prohibit Congress from withholding the benefits of federal trademark registration from marks that infringe on the rights to publicity and privacy. Far from an effort to affect the expressive content of speech based on the views expressed—which was held to be the fatal flaw in the provisions at issue in *Tam* and *Brunetti*—Section 2(c) reflects a permissible balancing between competing intellectual-property interests in the commercial sphere.

1. Because Section 2(c) is focused on respecting the rights of privacy and publicity, it is entwined with the commercial, rather than expressive, function of trademarks. As discussed previously, the right to publicity guards against the appropriation of a “person’s name, likeness, or other indicia of identity *for purposes of trade.*” See *Restatement (Third) of Unfair Competition* § 46 (emphasis added). Likewise, the right to privacy is invaded by “the appropriation and use of the plaintiff’s name or

likeness to advertise the defendant's business or product, or for some similar commercial purpose.” *Restatement (Second) of Torts* § 652C cmt. b (emphasis added). Because the rights to publicity and privacy are triggered only by the unauthorized use of someone's identity in trade, it is highly relevant to Section 2(c)'s purposes that any affected speech appears in the context of a trademark. The government has an interest in refusing to facilitate the use of trademarks that appropriate a person's identity, even if it would have no legitimate interest in keeping a message that references that person off a billboard.

Accordingly, appellant's mark was not rejected because the government wishes to discourage speech that references former-President Trump (or any other person). Rather, the reason for the rejection is that Congress has determined that registration should not be available for marks that appropriate the identities of particular individuals in a manner that could infringe the recognized rights of publicity and privacy. *See generally supra* Part II.A. The touchstone of a denial under Section 2(c) is thus not “the topic discussed or the idea or message expressed.” *In re Brunetti*, 877 F.3d 1330, 1342 (Fed. Cir. 2017) (quoting *Reed v. Town of Gilbert*, 576 U.S. 155, 163 (2015)). Rather, Section 2(c) reflects an accommodation within the federal trademark registration scheme of competing intellectual-property interests. *See Cardtoons*, 95 F.3d at 967 (“Like trademark and copyright, the right of publicity involves a cognizable property interest.”); *Martin v. Carter Hawley Hale Stores, Inc.*, 206 U.S.P.Q. 931, 933

(TTAB 1979) (“[T]he Statute was intended to protect one who, for valid reasons, could expect to suffer damage from another’s trademark use of his name.”).

2. Because of these competing intellectual-property interests, in many states it will be unlawful to use a trademark to which Section 2(c) applies. For example, appellant’s home state of California imposes tort liability on anyone who uses “another’s name . . . signature, photograph, or likeness, in any manner, on or in products, merchandise, or goods, or for purposes of advertising or selling, or soliciting purchases of, products, merchandise, goods or services, without such person’s prior consent.” Cal. Civ. Code § 3344(a) (West); *see also* A33 (showing Mr. Elster’s residence is in California). Likewise, in Donald Trump’s current domicile of Florida, state law forbids the use “for any commercial . . . purpose” of any “name, portrait, photograph, or other likeness of any natural person without . . . express written or oral consent.” Fla. Stat. § 540.08(1). Mr. Trump’s former domicile of New York goes even further, making it a misdemeanor offense to “use[] for advertising purposes, or for the purposes of trade, the name, portrait or picture of any living person without having first obtained the written consent of such person.” N.Y. Civ. Rights Law § 50 (McKinney).

Because the function of trademarks is to identify the source of goods *in commerce*, marks that appropriate someone’s identity without consent will necessarily infringe state laws of this type. Indeed, appropriating someone’s identity within a trademark is a paradigmatic example of the type of conduct that will infringe the right

to publicity. *See Restatement (Third) of Unfair Competition* § 47 (“Appropriation of another’s identity for use as a trademark or trade name is similarly actionable.”).

3. Section 2(c) is also viewpoint neutral. Section 2(c) does not “single[] out a subset of messages for disfavor based on the views expressed.” *Tam*, 137 S. Ct. at 1766 (Kennedy, J., concurring in part and concurring in the judgment) (defining viewpoint discrimination). Rather, the provision bars registration of *all* marks “[c]onsist[ing] of or compris[ing] a name, portrait, or signature identifying a particular living individual except by his written consent.” 15 U.S.C. § 1052(c). The provision applies equally to marks that appropriate the identity of a living individual without her consent, regardless of whether the mark is laudatory or critical.

The record of the Board’s treatment of marks referencing former-President Trump without his authorization confirms that Section 2(c) is viewpoint neutral not only in theory, but also in practice. *Cf. Brunetti*, 139 S. Ct. at 2300 (emphasizing that the scandalous marks provision “result[ed] in viewpoint-discriminatory application”). Just recently, the Board upheld the denial under Section 2(c) of an apparently pro-Trump mark containing the phrase “TRUMP-IT.” *See In re ADCO Indus. Techs., L.P.*, 2020 U.S.P.Q.2d 53786, at *20-24.

In fact, in recent years, many applicants have attempted to register trademarks that reference former-President Trump without his authorization. The USPTO has consistently denied applications of marks containing Mr. Trump’s name or likeness without his consent. Some of these marks (like appellant’s own mark) are openly

critical of Mr. Trump, bearing statements such as 'TRUMP IS ROOTIN' FOR PUTIN (88806771); DRAIN THE TRUMP (88924002); and UN-TRUMP-AMERICA (88782914).³ But other rejected marks express approval of Mr. Trump through messages such as LONG LIVE THE TRUMP (88734429); GOD HAS A PLAN AND TRUMP IS THE MAN (88773486); and MR. TRUMP, YOU'RE HIRED! (88676728). Still other marks rejected under Section 2(c) lack any clear political message and apparently seek only to capitalize on Mr. Trump's fame with marks such as SWIM TRUMPS (88921132); THE TRUMP TOWEL (88581999); and TRUMP FORCE ONES (88788357). Section 2(c) has been applied equally to all of these marks.

Against this backdrop, it cannot seriously be disputed that Section 2(c)—unlike the provisions invalidated in *Tam* and *Brunetti*—is viewpoint neutral. Indeed, appellant never expressly contends otherwise. *See* Br. 18-19 (contending only that Section 2(c) is content- and speaker-based, not viewpoint-based).

4. For all of these reasons, Section 2(c) bears little resemblance to the provisions invalidated in *Tam* and *Brunetti*. The restrictions on disparaging and scandalous marks were squarely directed to the expressive components of the rejected marks. *See In re Tam*, 808 F.3d 1321, 1338, 1355 (Fed. Cir. 2015) (en banc)

³ These marks can be located by searching for the cited serial numbers in the Trademark Status and Document Retrieval (TSDR) system, available at <http://tsdr.uspto.gov/>.

(emphasizing that “it is always a mark’s expressive character . . . that is the basis for the disparagement exclusion from registration” and the “entire interest of the government in § 2(a) depends on disapproval of the message”); *In re Brunetti*, 877 F.3d at 1349 (“There can be no question that the immoral or scandalous prohibition targets the expressive components of the speech.”). And in both cases, the government’s stated interest was in discouraging types of speech. In *Tam*, the Supreme Court rejected the government’s reliance on an asserted interest “in preventing speech expressing ideas that offend.” *Tam*, 137 S. Ct. at 1764. And the government likewise defended the scandalous-marks provision by reference to the “types of marks the government would ‘want to promote’ or ‘has deemed to be most suitable.’” *Brunetti*, 877 F.3d at 1350. In addition, there was no dispute that the use of those trademarks in commerce was lawful.

Section 2(c), by contrast, is not animated by the government’s “disagreement with the message” a particular mark conveys. *Tam*, 137 S. Ct. at 1767 (Kennedy, J., concurring in the judgment) (quotation marks omitted). It is not animated by an interest in speech at all, but merely by a desire to avoid interfering with the rights of individuals to trade on the goodwill associated with their own names, which is often independently protected by state law. And it applies evenhandedly regardless of the viewpoint expressed, both on its face and in its practical application.

Finally, Section 2(c) is unlike the provisions invalidated in *Tam* and *Brunetti* in that it is related to the government’s interest in protecting consumers against source

deception. Appx2. As the Board explained here, certain types of source identifiers are “particularly susceptible to deceptive use.” Appx10 (quotation marks omitted). Specifically, when the name of an identified individual is used without his consent, there is heightened reason for concern that the public will misunderstand the source of goods. Given that appellant appears to recognize avoiding consumer confusion as a legitimate objective of the trademark registration program (Br. 48), it is notable that Section 2(c) is related to that purpose in a way that the disparagement clause and the scandalous marks provision were not.⁴

C. Section 2(c) should not be subject to heightened scrutiny

As a viewpoint-neutral statute that regulates commercial activity to preserve the balance among competing intellectual-property interests, Section 2(c) satisfies any plausibly relevant standard of First Amendment scrutiny. Given the fundamental differences between Section 2(c) and the provisions at issue in *Tam* and *Brunetti*, and given the narrow grounds on which the Supreme Court resolved those cases, those decisions do not require application of heightened scrutiny to Section 2(c), which does

⁴ In addition to the other distinctions discussed in the text, Section 2(c) is not susceptible to the same inconsistent application, and resulting uncertainty, that this Court identified as a defect of both the disparagement and scandalous marks provisions. *See Tam*, 808 F.3d at 1342 n.7 (“The PTO’s record of trademark registrations and denials often appears arbitrary and is rife with inconsistency.”); *Brunetti*, 877 F.3d at 1354 (“[W]e cannot discern any pattern indicating when the incorporation of an offensive term into a mark will serve as a bar to registration and when it will not.”).

not restrict speech but instead declines to provide the benefits of federal trademark registration to a particular type of commercial moniker. But in any event, as discussed below, Section 2(c) would readily satisfy the framework applicable to restrictions on commercial speech. *See infra* Part II.D.

1. The Supreme Court’s decisions do not suggest that heightened scrutiny should apply to Section 2(c)

Because Section 2(c) does not discriminate based on viewpoint, the Supreme Court’s decisions in *Tam* and *Brunetti* do not provide a framework for evaluating appellant’s challenge. *See Brunetti*, 139 S. Ct. at 2302 n.* (“Nor do we say anything about how to evaluate viewpoint-neutral restrictions on trademark registration.”). Appellant acknowledges as much. *See* Br. 20 (“What level of scrutiny applies? The Supreme Court left open this question in *Tam* and *Brunetti*.”). Indeed, the Supreme Court has studiously avoided holding that every limitation on trademark registration must be evaluated under heightened scrutiny.

In *Tam*, which was heard by an eight-member court, four justices expressly left open the possibility that restrictions on federal trademark registration are best conceptualized as limitations on a subsidy program (as the government had urged) rather than as direct restrictions of speech. *See Tam*, 137 S. Ct. at 1767 (Kennedy, J., concurring in the judgment) (joined by Justices Ginsburg, Sotomayor, and Kagan). And while four other justices rejected the subsidy framework, *see id.* at 1760-62 (plurality), those four suggested that limited-public-forum doctrine, under which

“some content- and speaker-based restrictions may be allowed,” provides a “[p]otentially more analogous” framework, *id.* at 1763. After concluding that the disparagement provision could not survive even assuming the applicability of the limited-public-forum framework, *see id.*, the plurality also analyzed the case using the framework for restrictions on commercial speech under *Central Hudson Gas & Electric Corp. v. Public Service Commission of New York*, 447 U.S. 557 (1980), but emphasized that it was “leav[ing] open the question whether *Central Hudson* provides the appropriate test for deciding free speech challenges to provisions of the Lanham Act.” *Tam*, 137 S. Ct. at 1764 n.17. No justice suggested that this Court’s judgment should simply be affirmed on the basis of this Court’s reasoning, which had treated the disparagement provision as a direct restriction of speech subject to strict scrutiny. *See Tam*, 808 F.3d at 1334.⁵

Brunetti is similar. Though five justices authored opinions in that case, not one would have held that every limitation on registration in the Lanham Act is subject to heightened scrutiny. As noted, the majority took pains to limit its reasoning to viewpoint discriminatory provisions of the Lanham Act. *Brunetti*, 139 S. Ct. at 2302 n.*. And four justices authored opinions that are irreconcilable with the view that a denial of trademark registration is no different from a direct restriction on speech.

⁵ Justice Thomas also authored a brief concurrence, but did not suggest that the disparagement provision should be treated as akin to a direct restriction of speech.

Justice Alito—who authored the *Tam* plurality—voted to affirm in *Brunetti*, but expressed the view that Congress could permissibly adopt a restriction on registrability that was better focused on vulgar terms. *Id.* at 2303 (Alito, J., concurring). Chief Justice Roberts—another member of the *Tam* plurality—dissented in part, explaining that under Section 2, “[n]o speech is being restricted” and “no one is being punished.” *Id.* at 2303 (Roberts, C.J., concurring in part and dissenting in part). Justice Sotomayor also authored a partial dissent, joined by Justice Breyer (a third member of the *Tam* plurality), that endorsed application of the government subsidy and limited-public-forum frameworks insofar as they allow for “reasonable, viewpoint-neutral content discrimination” in the trademark registration criteria. *See id.* at 2316-17 (Sotomayor, J., concurring in part and dissenting in part). And Justice Breyer also authored his own partial dissent, which recognized that “the statute does not bar anyone from speaking,” and expressed the view that existing frameworks are inadequate to evaluate restrictions on trademark registrability. *Id.* at 2305 (Breyer, J., concurring in part and dissenting in part).

The combined weight of these decisions, when coupled with the absence of any Supreme Court justice endorsing the view that provisions of Section 2 are akin to direct restrictions of speech, indicate that viewpoint-neutral limitations on federal trademark registrability are not direct restrictions on speech and should not be subjected to heightened scrutiny.

2. This Court’s decisions in *Tam* and *Brunetti* do not require application of heightened scrutiny

Appellant nonetheless argues that Section 2(c) must be analyzed as a direct restriction on speech that is subject to some form of heightened scrutiny, relying on this Court’s decisions in *Tam* and *Brunetti*, which applied heightened scrutiny. Br. 18-24. But this Court’s decisions must be understood in the context of the specific provisions that the Court was confronting in those cases and in light of the Supreme Court’s resolution of those same cases. Especially given the Supreme Court’s treatment of the issues presented—which, as discussed below, in itself justifies a different approach in this case—this Court’s mode of analysis of viewpoint-based restrictions designed to curtail expression should not be extended to impose heightened scrutiny of every viewpoint-neutral limitation on registration, particularly limitations designed to protect intellectual-property rights.

In *Tam* and *Brunetti*, this Court applied heightened scrutiny after determining that the provisions at issue specifically targeted expressive speech. *See Tam*, 808 F.3d at 1338 (“Importantly, *every time* the PTO refuses to register a mark under § 2(a), it does so because it believes the mark conveys an expressive message—a message that is disparaging to certain groups.”); *Brunetti*, 877 F.3d at 1349 (reasoning that a rejection is “necessarily based in the government’s belief that the rejected mark conveys an expressive message—namely, a message that is scandalous or offensive to a substantial composite of the general population.”). As explained previously, *see supra*

pp. 16-18, Section 2(c) does not share the same focus on expressive content.

Accordingly, the framework applied in *Tam* and *Brunetti* is inapposite here.

Appellant asserts that heightened scrutiny must nonetheless be applied because Section 2(c) is content-based and speaker-based. Br. 18-19. But in some contexts, content- and speaker-based restrictions do not necessarily trigger heightened scrutiny. *See Tam*, 137 S. Ct. at 1763 (plurality) (discussing limited public forums). In any case, Section 2(c) is neither content- nor speaker-based in the prototypical sense. The provision is animated not by a desire to control what is said or by whom, but rather to respect a species of intellectual property. *See Rights of Publicity and Privacy* § 10:7 (“Courts view the right of publicity as a form of ‘intellectual property.’”).

Accordingly, the provision looks not to the identity of the speaker, but rather whether the speaker has been licensed to use the intellectual property at issue. Of course, this will have the incidental effect of privileging particular speakers. But it does so only in the same way that copyright law privileges the speech of the author or trademark law privileges the person who first uses a particular mark in commerce. This is fundamentally different from the targeting of expressive speech.

This Court’s prior decisions also should not be read to preclude the application of potential alternatives to heightened scrutiny. Although this Court has rejected the government’s analogy of the trademark-registration program to a federal subsidy, it did so in the context of analyzing a provision that was directly aimed at expression. *Brunetti*, 877 F.3d at 1342-45. In addition, five Supreme Court justices have been

unwilling to dismiss the applicability of that framework. This includes the four justices who joined Justice Kennedy’s opinion in *Tam*, plus Justice Breyer, who joined the *Tam* plurality, but then joined Justice Sotomayor’s opinion in *Brunetti*. *See supra* pp. 23-25; *see also Brunetti*, 139 S. Ct. at 2316 n.10 (Sotomayor, J., concurring in part and dissenting in part) (“Trademark registration differs [from a cash subsidy program], of course, because any ‘subsidy’ comes in the form of a noncash benefit, but that difference does not foreclose understanding the registration system as a beneficial, noncash governmental program.”).

It is questionable whether this Court’s opinions in *Tam* and *Brunetti* retain the force of circuit precedent. *Cf. Troy v. Samson Mfg. Corp.*, 758 F.3d 1322, 1326 (Fed. Cir. 2014) (emphasizing that this Court is bound by the Supreme Court’s mode of analysis, not just its holdings, and that even an affirmance of this Court’s judgment can overturn circuit precedent).⁶ The Supreme Court has now twice reviewed decisions of this Court in cases involving First Amendment challenges to Section 2 and both times has pointedly declined to adopt their analytic framework, holding only that viewpoint-discriminatory restrictions on trademark registrability violate the First Amendment. At a minimum, the Supreme Court’s decisions suggest that this Court’s reasoning

⁶ In *Brunetti*, this Court expressed doubt about the government’s argument that this Court’s *Tam* decision had been displaced by the Supreme Court’s decision in that case, but it did not resolve the issue. *See Brunetti*, 877 F.3d at 1343 n.1.

should be confined to the context in which it arose, rather than expanded to the very different circumstances presented here.

Similarly, although this Court’s decision in *Brunetti* rejected the limited-public-forum analogy, that conclusion should not govern here because of the fundamental difference between the scandalous marks provision, which targeted expression, and Section 2(c), which does not. This Court held in *Brunetti* that forum doctrine is only applicable to circumstances involving access to some form of government property, either real or metaphorical, and “trademarks exist to convey messages throughout commerce.” *Brunetti*, 877 F.3d at 1347. Regardless of the propriety of that analysis in *Brunetti* itself—where, although the government was not directly restricting the use of trademarks in the world at large, it was at least endeavoring to influence expression across the board—here, Section 2(c) has a targeted focus on a particular type of commercial use within the context of a government program that can fairly be analogized to a metaphorical limited public forum. See *Christian Legal Soc’y Chapter of the Univ. of Cal., Hastings Coll. of the Law v. Martinez*, 561 U.S. 661, 682-83 (2010) (applying limited-public-forum precedents when the government “is dangling the carrot of subsidy, not wielding the stick of prohibition” in a manner that exerts only “indirect pressure” on the plaintiff).

3. This Court should not apply heightened scrutiny to Section 2(c)

Because this case presents a new context from the one that was before the Court in *Tam* and *Brunetti*, the Court must choose whether to extend the heightened-scrutiny framework applied in those cases to a challenge to a Lanham Act provision that does not target speech because of the message conveyed. It should decline to do so. Instead, the Court should apply a standard that better reflects the reality of how the federal trademark registration program functions in the context of a provision that does not raise the specter of viewpoint discrimination.

In particular, this Court should recognize that limitations on trademark registration, at least where they are not justified as a mechanism to affect speech but rather serve the commercial purposes of trademark law, do not restrict speech and should not be analyzed in a manner equivalent to direct regulations of speech. Federal law, of course, “does not create trademarks,” which are also creatures of state common and statutory law and whose protection was once entirely the province of those states. *B & B Hardware, Inc. v. Hargis Indus., Inc.*, 575 U.S. 138, 142 (2015) (citing *In re Trade-Mark Cases*, 100 U.S. (10 Otto) 82, 92 (1879)). The Lanham Act does not supplant these state law schemes, but merely advances the federal government’s interest in protecting the intellectual-property rights of its citizens by providing trademark holders with additional tools like a federal cause of action, *see* 15 U.S.C. § 1117; a mechanism to obtain nation-wide constructive notice of a registrant’s claim

of ownership, *id.* § 1072; and enhanced remedies, including the ability to destroy infringing articles, *id.* § 1118, and block their further import, *id.* § 1124. Even without registration, the owners of the marks may continue to use them in commerce to identify goods and services and may even press claims for infringement under most of the Lanham Act's causes of action. *E.g., id.* § 1125(a) (likelihood of confusion); *id.* § 1125(c) (dilution); *id.* § 1125(d) (cybersquatting).

Accordingly, the denial of federal trademark registration does not prohibit any speech nor does it destroy any common law rights that the markholder enjoys under state law. *See, e.g., Brunetti*, 139 S. Ct. at 2303 (Roberts, C.J., concurring in part and dissenting in part) (recognizing that whether a mark “can be registered does not affect the extent to which their owners may use them in commerce to identify goods”). Thus, at least as a matter of federal law, appellant may continue to place any message of his choosing on his T-shirts, may continue to use his mark in commerce, and may continue to enforce any rights he has in that mark under both state law and provisions of the Lanham Act that provide a mechanism for enforcing unregistered marks. *See McCarthy on Trademarks and Unfair Competition* § 13:37 (explaining the Section 2(c) is a “[b]ar to [r]egistration, [n]ot to [u]se”).

The only direct consequence that follows from a denial of federal trademark registration is that a few enhanced remedies for enforcing registered trademark rights under the Lanham Act are unavailable. The unavailability of certain enhanced enforcement remedies bears no resemblance to the direct restrictions on speech at

issue in cases like *Sorrell v. IMS Health Inc.*, 564 U.S. 552 (2011), and *Reed v. Town of Gilbert*, 576 U.S. 155 (2015), on which appellant relies. Nor does it resemble the burdens on speech at issue in *United States v. Playboy Entertainment Group, Inc.*, 529 U.S. 803 (2000). The provision at issue there did not impose a “complete prohibition” on sexually explicit television programming, but its practical effect was to compel a substantial number of cable operators to “silence[]” such programming “for two-thirds of the day in every home in a cable service area.” *Id.* at 812. Section 2(c), by contrast, does not silence appellant or restrict his ability to express himself, through use of his mark or otherwise, at any time or in any place. Rather, it denies him only the benefits associated with federal trademark registration.

We recognize that, as *Tam* and *Brunetti* illustrate, even a mere denial of registration can trigger heightened scrutiny when the denial is viewpoint based or, perhaps, when the government targets the expressive component of a mark for the purpose of influencing the marketplace of ideas. But it does not follow that this Court should treat all of the Lanham Act’s limitations as equivalent to direct prohibitions on speech for First Amendment purposes. Where, as here, a provision is viewpoint neutral and directed to promoting the use of legally appropriate source identifiers in commerce, less demanding scrutiny is warranted. Thus, in this case, the Court should adopt a framework that allows for reasonable, viewpoint neutral regulations on the type of marks eligible for federal registration.

As noted, in *Tam* and *Brunetti*, the government urged the Court to treat the federal trademark program as a form of subsidy. We continue to believe that the subsidy framework best describes how the federal trademark registration system functions. That system provides enhanced benefits to those who take the steps necessary to register their marks, and the only consequence that follows from denial of registration is the withholding of those enhanced benefits. There is a well-developed body of case law that defines the limits on how the government may condition its provision of benefits. *See, e.g., Davenport v. Washington Educ. Ass'n*, 551 U.S. 177, 188-89 (2007); *Rust v. Sullivan*, 500 U.S. 173, 192-94 (1991); *Regan v. Taxation with Representation of Washington*, 461 U.S. 540, 549 (1983). And there is a corresponding body of case law that prevents the government from leveraging its control over a benefit program for improper ends. *See, e.g., Agency for Int'l Dev. v. Alliance for Open Soc'y Int'l, Inc.*, 570 U.S. 205, 214-15 (2013). Particularly now that the Supreme Court has unequivocally held in *Tam* and *Brunetti* that viewpoint discrimination in the trademark program is prohibited, there is no reason to fear that treating the trademark registration system as a subsidy would empower the government to use it, or the copyright system, as a means for penalizing disfavored speech, as appellant suggests. Br. 47-48; *see also, e.g., Tam*, 137 S. Ct. at 1768 (Kennedy, J., concurring in part and concurring in the judgment) (emphasizing that viewpoint-based regulations are invalid in all except a single narrow context that does not apply to trademark registration or copyright).

Alternatively, the Court could view the trademark program through the framework traditionally applied to a limited public forum.⁷ As Justice Sotomayor has pointed out, “[n]o Justice . . . [has] rejected the limited-public-forum analogy . . . and scholars have noted arguments for adopting it.” *Brunetti*, 139 S. Ct. at 2316 n.10 (Sotomayor, J., concurring in part and dissenting in part) (collecting cites). This should be unsurprising because Section 2(c)’s effects are cabined in a similar manner to other limitations that have been addressed under that doctrine. The provision merely limits the types of commercial source identifiers eligible for inclusion in the government’s voluntary trademark registry and it applies only to that limited domain. And even if limited-public-forum doctrine does not apply on its own terms, it is instructive here. *See Legal Servs. Corp. v. Velazquez*, 531 U.S. 533, 544 (2001) (“As this suit involves a subsidy, limited forum cases . . . may not be controlling in a strict sense, yet they do provide some instruction.”).

⁷ Appellant describes the government as having conceded before the Supreme Court in *Brunetti* that the trademark registration system is not a limited public forum. Br. 47 (citing Oral Arg. Tr. 27, *Iancu v. Brunetti*, No 18-302 (S. Ct.), https://www.supremecourt.gov/oral_arguments/argument_transcripts/2018/18-302_7k47.pdf (*Brunetti* Tr.)). In fact, government counsel merely was explaining why the subsidy analogy is stronger, but then elaborated that “we think essentially the same legal standard should apply to the restrictions at issue here as would apply to a limited public forum.” *Brunetti* Tr. 28. And in any event, the Supreme Court subsequently issued its decision in *Brunetti*, which the government and this Court are entitled to consider especially now that the government’s primary submission in that case was not adopted by the Court under the circumstances presented there.

Even if the government-subsidy or limited-public-forum frameworks have not previously been applied in circumstances quite like those presented here, it would be more faithful to the case law to extend those precedents rather than to accept appellant's efforts to equate Section 2(c) with a direct restriction on speech, which fundamentally misdescribes the federal trademark registration program. Appellant identifies no Supreme Court case applying heightened scrutiny under circumstances like those presented here. And if, as Justice Breyer has suggested, the "trademark statute does not clearly fit within any of the existing outcome-determinative categories" for First Amendment analysis, *Brunetti*, 139 S. Ct. at 2306, the Court should not default to a framework that would treat all limitations on the government's voluntary trademark registration program as presumptively suspect. Heightened scrutiny is unwarranted for viewpoint-neutral provisions of the Lanham Act. A contrary conclusion could imperil any number of other Lanham Act provisions that are, at least in some sense, content based.

4. In the absence of heightened scrutiny, Section 2(c) should readily be upheld as a reasonable restriction that has no direct effect on speech

Section 2(c) readily passes muster under any framework that does not impose heightened scrutiny. As explained above, Section 2(c) reflects a reasonable policy choice by Congress to respect the widely recognized rights of privacy and publicity. Indeed, in many ways the federal government's interest in protecting its citizens' rights to publicity through Section 2(c)—*i.e.*, facilitating the protection of intellectual

property rights—closely mirrors its interest in providing additional protections for trademark rights through the Lanham Act itself. Without Section 2(c), one individual could, for example, obtain “a right of priority, nationwide in effect” on the use of a mark which misappropriates the name or likeness of another, undercutting the value of that vested property right. 15 U.S.C. § 1057(c). By barring the registration of such marks, Section 2(c) serves Congress’s goal of “preclud[ing] registration of a mark which conflicted with another’s rights.” *University of Notre Dame Du Lac*, 703 F.2d at 1376.

Appellant briefly argues that even without heightened scrutiny, Section 2(c) would be unconstitutional, at least as applied to appellant’s own mark, which criticizes former-President Trump. Br. 48. But while there is unquestionably a First Amendment right to express a political opinion about a public figure, it does not follow that there is a right to express that opinion by using the public figure’s name in the brand for a commercial product. Speech may be limited within a particular forum, and Congress may limit the degree to which it subsidizes particular categories of speech in particular contexts. *See, e.g., Minnesota Voters All. v. Mansky*, 138 S. Ct. 1876, 1885-86 (2018) (“[O]ur decisions have long recognized that the government may impose some content-based restrictions on speech in nonpublic forums, including restrictions that exclude political advocates and forms of political advocacy.”); *Archdiocese of Washington v. Washington Metro. Area Transit Auth.*, 897 F.3d 314, 324 (D.C. Cir. 2018) (recognizing the “government has wide latitude to restrict subject

matters—including those of great First Amendment salience” such as political speech and religious speech “in a nonpublic forum as long as it maintains viewpoint neutrality and acts reasonably”); *Regan*, 461 U.S. at 550 (recognizing that there is no First Amendment right to governmental support in engaging even in constitutionally protected speech).

Appellant argues that Section 2(c) is unreasonable because it is not sufficiently related to what appellant portrays as the Lanham Act’s sole purpose of avoiding consumer confusion. As an initial matter, appellant is wrong to argue that Section 2(c) has no connection to avoiding consumer confusion or deception. While that is not the primary purpose of the provision, the Board has recognized that Section 2(c) operates in tandem with other provisions, such as Section 2(a), in order to ensure that consumers will not be misled into believing that there is a connection between an identified individual and a product where no connection exists. *See In re ADCO Indus. Techs., L.P.*, 2020 U.S.P.Q.2d 53786, at *29 (recognizing that Section 2(c) operates in tandem with other provisions of the Lanham Act to help “protect[] consumers against source deception”).

But in any case, appellant’s argument proceeds from a flawed premise. While avoiding confusion about the source of goods is certainly a primary purpose of the trademark statute, it hardly means that Congress did not wish to promote other values as well. For example, the Lanham Act provides a remedy for dilution of famous marks “regardless of the presence or absence of actual or likely confusion.” 15 U.S.C.

§ 1125(c). The Supreme Court has also noted that the Lanham Act’s goal of avoiding consumer confusion is tempered by other considerations, such as preventing commercial monopolization of language. *See KP Permanent Make-Up, Inc. v. Lasting Impression I, Inc.*, 543 U.S. 111, 122 (2004). Congress could likewise reasonably take account of other intellectual-property interests in crafting the scope of the supplemental trademark protections that would be available under the Lanham Act. It should hardly be surprising that Congress chose to limit the scope of the program so as to respect competing rights widely recognized under state laws.

D. Even if the Court applies the *Central Hudson* test applicable to direct restrictions on commercial speech, appellant’s challenge still lacks merit

Even if the Court concludes that Section 2(c) should be analyzed under the standards applicable to a direct restriction on speech, it should nonetheless reject appellant’s claim. If Section 2(c) is to be treated as a restriction on speech at all, it can only fairly be viewed as a restriction on commercial speech. As we have explained, Section 2(c) does not target expression, but rather is focused on preventing the unauthorized (and potentially deceptive) commercial use of someone’s identity in violation of the recognized rights of privacy and publicity. *See supra* pp. 16-18. Accordingly, even appellant largely confines his argument to the commercial speech framework. *See* Br. 23-24 (suggesting in passing that strict scrutiny might apply, but concluding “the Court need not go so far here” and can apply the intermediate scrutiny applicable to restrictions on commercial speech).

In analyzing restrictions on commercial speech, the Court first considers whether the speech being regulated concerns lawful activity and is not misleading. If it answers that question in the affirmative, it then considers whether (1) the asserted government interest is substantial; (2) the regulation directly advances that government interest; and (3) the regulation is more extensive than is necessary to serve that interest. *See Central Hudson Gas & Elec. Corp.*, 447 U.S. at 566. Under that test, Section 2(c) should be upheld.

1. Section 2(c) targets speech that is unlawful and misleading

Appellant proceeds from the premise that marks using an identifiable individual's name without his consent will be lawful and not misleading so long as (1) the underlying product or service associated with the trademark is lawful, and (2) the mark does not falsely suggest a connection between the product and the referenced individual. As an initial matter, marks that reference an individual without that person's consent will often confuse consumers as to whether the referenced individual is associated with the goods in question. Appx10 (recognizing certain types of source-identifiers as being particularly susceptible to deceptive use); *cf. Friedman v. Rogers*, 440 U.S. 1, 13 (1979) (discussing how commercial use of names can be used to mislead the public). But even setting to the side that Section 2(c) captures a significant quantity of material that could be misleading, appellant's argument overlooks that, as discussed above, marks that misappropriate the commercial identity

of identified individuals will not be lawful in the many states that recognize the rights of publicity and privacy. *See supra* p. 18. Thus, notwithstanding appellant's assertion to the contrary, Section 2(c) is directed to "illegal advertising." Br. 26.

Appellant emphasizes that Section 2(c) is often applied to marks that reference celebrities and argues that the material affected by Section 2(c) must be lawful because the First Amendment is particularly protective of discussion of public figures. Br. 26. But appellant is wrong to conflate the discussion of public figures, which receives heightened First Amendment protection, *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964), with the commercial exploitation and misappropriation of the identity of public figures, which does not. Section 2(c) focuses narrowly on the latter, leaving appellant free to criticize any public figure he wishes. While appellant has an unquestionable right to criticize former-President Trump, he fails to identify any authority that suggests that there is any constitutional entitlement to include Mr. Trump's name in a trademark. Accordingly, appellant fails to show that Section 2(c) is directed to speech that is lawful and not misleading.

Appellant is likewise wrong to suggest that Section 2(c) is somehow suspect because it is often applied in cases involving celebrities. The statute sensibly applies only when the use of a name in a mark would be understood to actually "identify[]" a "particular" individual, 15 U.S.C. § 1052(c), which will only be true when a person is so generally well known that the public would reasonably assume the connection or when the individual is publicly connected with the field in which the mark is used. *See*

Krause v. Krause Publ'ns, Inc., 76 U.S.P.Q.2d 1904, 1909-11 (TTAB 2005). Under a contrary rule, the happenstance that a tax attorney has the last name “Fanta” could enable him to bar the registration of a trademark for a well-known soft drink (or to extort a licensing fee from the company). See *Martin*, 206 U.S.P.Q. at 933 (discussing this and other real-world examples).

2. Section 2(c) furthers substantial governmental interests

Section 2(c) furthers the substantial governmental interest in ensuring that the federal government does not facilitate the infringement of the rights of publicity and privacy recognized under state law, while also buttressing provisions designed to prevent consumers from mistakenly believing an identified individual is associated with a product.

Appellant does not and cannot deny that there is a widely recognized “right to control the use of one’s identity” for purposes of commerce. *University of Notre Dame Du Lac*, 703 F.2d at 1376; see also *supra* Part II.A. Appellant apparently disagrees with the right to publicity and believes that it does not rest on an adequate theoretical foundation. Br. 36-37. But the overwhelming majority of states disagree, and the federal government surely has a legitimate interest in respecting that choice.

Appellant also notes that the right to publicity has occasionally been asserted under circumstances that pose difficult First Amendment questions. Br. 37-38. But whatever hard questions of First Amendment law may be posed when the right of

publicity is used to try to control novel creative works such as parody baseball cards, *see Cardtoons*, 95 F.3d at 968, no such edge cases are presented under Section 2(c), which applies only to the misappropriation of someone's identity in the limited context of commercial source identifiers. Appellant's own authorities recognize this distinction. *See, e.g.*, Eugene Volokh, *Freedom of Speech and the Right of Publicity*, 40 *Hous. L. Rev.* 903, 905, 930 (2003) (recognizing that First Amendment critiques of the right to publicity have less force in the "core commercial advertising zone," which is analytically distinct from attempts to apply the right to publicity to "biography, news reporting, fiction, and the like").

Appellant also argues (Br. 33-35) that there can be no substantial governmental interest in shielding an identifiable public figure, like the President, from criticism. But, again, the question is not whether the President (or anyone) is entitled to be shielded from criticism, but rather, whether all people have a right not to have their personas misappropriated for commercial uses without their consent. And notwithstanding appellant's suggestion to the contrary, "[i]n most jurisdictions both 'celebrities' and 'noncelebrities' may allege dignity-injuring claims from such an invasion of appropriation privacy." *Rights of Publicity and Privacy* § 5:62. Indeed, the *Restatement of Torts* uses the misappropriation of the President's name as a paradigmatic illustration of a prohibited invasion of privacy. *See Restatement (Second) of Torts* § 652C cmt. b ("A is the President of the United States. B forms and operates a corporation,

engaged in the business of insurance, under the name of A Insurance Company. This is an invasion of A's privacy.”).

Appellant cites two cases in support of the proposition that celebrities do not enjoy a right to privacy (Br. 40), but both undercut appellant's position. While *Haelan Laboratories, Inc. v. Topps Chewing Gum, Inc.*, 202 F.2d 866 (2d Cir. 1953), recognized that the interest celebrities have in their personas is often not best described as a right of “privacy,” it was for that very reason that *Haelan* was the first decision to coin the term “right of publicity” and to recognize the validity of that right. See *Rights of Publicity and Privacy* § 1:26 (describing this history). Likewise, though *O'Brien v. Pabst Sales Co.*, 124 F.2d 167 (5th Cir. 1941), concluded that under Texas law, the right to “privacy” did not protect a college athlete from having his image used in an advertisement without his consent, Texas courts later recognized a separate “cause of action for the unauthorized appropriation or exploitation of [a college football player's] name and likeness.” *Kimbrough v. Coca-Cola/USA*, 521 S.W.2d 719, 722 (Tex. Civ. App. 1975).

Thus, appellant fails to show that Section 2(c) is not supported by a substantial government interest.

3. Section 2(c) is adequately tailored

Section 2(c) is also sufficiently tailored to the governmental interests at stake. By conditioning registration of marks containing an identified individual's name or persona on the written consent of the person identified, the provision materially

advances the government's interest in respecting the rights to privacy and publicity. Likewise, because the provision only denies the benefits of registration to marks that are reasonably likely to infringe those rights and carries no other collateral consequences, the provision is not broader than necessary to achieve the government's interest. *See United States v. Edge Broad. Co.*, 509 U.S. 418, 429 (1993) (recognizing "commercial speech cases require a fit between the restriction and the government interest that is not necessarily perfect, but reasonable").

Appellant's contrary argument (Br. 41) is not so much an attack on the tailoring of Section 2(c), but rather, a call on the Court to reject the legitimacy of the right to publicity itself, which appellant claims is merely a tool to suppress criticism. The Court should reject the proposition that the government has no legitimate interest in respecting a widely recognized form of intellectual-property right. And appellant's criticisms of the right to publicity are particularly ill-founded in a context where the right to publicity is not being used as a basis for imposing tort liability, but only to limit the universe of marks eligible for the benefits of federal registration.

Nor does appellant show that Section 2(c) is broader than necessary to achieve its purposes. Appellant does not argue that Section 2(c) sweeps beyond the scope of the right to publicity as it has been widely recognized in the states. To the contrary, Section 2(c) tracks the contours of the right to publicity as it has been generally recognized.

Appellant baldly asserts that public officials lack “any legitimate economic interest” in their personas. Br. 43. But this assertion misstates the law. *See Restatement (Second) of Torts* § 652C (recognizing the President can state a claim). The only support appellant offers for his position is a citation to an observation in the plurality opinion in *Tam* that a restriction on the hypothetical mark “Buchanan was a disastrous president” would not further a governmental interest in avoiding the disruption of commerce (which was one of the interests asserted by the government in defense of the disparagement provision at issue there). 137 S. Ct. at 1765. But *Tam* says nothing at all about the right to publicity and in no way suggests that Section 2(c) is inadequately tailored to the governmental interest at issue *here*. Accordingly, Section 2(c)—unlike the disparagement provision—satisfies the *Central Hudson* criteria.

CONCLUSION

The judgment of the Trademark Trial and Appeal Board should be affirmed.

Respectfully submitted,

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May 2021

CERTIFICATE OF SERVICE

I hereby certify that on May 14, 2021, I electronically filed the foregoing brief with the Clerk of the Court for the United States Court of Appeals for the Federal Circuit by using the appellate CM/ECF system. Service will be accomplished by the appellate CM/ECF system.

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limit of Federal Rule of Appellate Procedure 32(a)(7)(B) because it contains 11,447 words. This brief also complies with the typeface and type-style requirements of Federal Rule of Appellate Procedure 32(a)(5)-(6) because it was prepared using Microsoft Word 2016 in Garamond 14-point font, a proportionally spaced typeface.

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