

No. 15-1874

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

PRO-FOOTBALL, INC.,

Appellant

v.

AMANDA BLACKHORSE, MARCUS BRIGGS-CLOUD, PHILLIP GOVER,
JILLIAN PAPPAN, AND COURTNEY TSOTIGH,

Appellees,

and

UNITED STATES OF AMERICA,

Intervenor-Appellee.

**On Appeal From the United States District Court
for the Eastern District of Virginia, Alexandria Division.
No. 1:14-cv-01043 (Hon. Gerald Bruce Lee)**

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STATEMENT OF ISSUES

1. Whether the term “Redskins,” an ethnic slur to Native Americans, is matter that “may disparage” under Section 2(a) of the Lanham Act, 15 U.S.C. §1052(a).
2. Whether the First Amendment requires the government to register racist and ethnic slurs as part of its trademark registration program.
3. Whether Section 2(a)’s prohibition against registering marks with matter that “may disparage” is unconstitutionally vague.
4. Whether the cancellation of registrations for trademarks owned by Pro-Football, Inc. (“PFI”), following a litigated proceeding before the Trademark Trial and Appeal Board (“TTAB”) and a District Court, violates due process.
5. Whether Appellees’ petition with the TTAB was barred by laches.

INTRODUCTION

Since 1946, the Lanham Act has provided that trademarks containing matter that “may disparage” persons are not eligible for federal registration. Accordingly, the U.S. Patent and Trademark Office (“PTO”) has refused registration for trademarks that may disparage, for example, Muslims, Jews, and Native Americans. *See, e.g., In re Geller*, 751 F.3d 1355, 1360-61 (Fed. Cir. 2014), *cert. denied*, 135 S. Ct. 944 (2015); *In re Lebanese Arak Corp.*, No. 77072261, 2010 WL 766488, at *4 (T.T.A.B. 2010); *In re Heeb Media, LLC*, No.

78558043, 2008 WL 5065114, at *1 (T.T.A.B. 2008); *In re Squaw Valley Dev. Corp.*, Nos. 76511144, 76511145, 2006 WL 1546500, at *10 (T.T.A.B. 2006).

In the past – before the 1946 legislation that excluded trademarks that may disparage from the registration program – the PTO had registered disparaging marks such as the following:



JA ___ [D.E.118-2Ex.5; A1609-1632]. This Court should not lightly overturn a statute that has served its purpose well, and should not require the PTO to include racist trademarks in the federal registration program.

Between 1967 and 1990, PTO examining attorneys erroneously registered six of PFI's trademarks that contain the term "redskins," despite the Section 2(a) provision that marks containing "matter" that may disparage are not eligible for the federal registration program. The registrations were issued in 1967, 1974, 1978 and 1990.

In 2014, the TTAB corrected these errors of the PTO. It granted a petition filed by Appellees, five Native Americans, to cancel the registrations for PFI's trademarks because "redskin" is a term that may disparage Native Americans. Subsequently, the District Court, reviewing a detailed supplemented record, agreed that the term "redskins" may disparage and that the federal registrations should be canceled. This Court should affirm.

STATEMENT OF THE CASE

I. FACTUAL BACKGROUND

A. THE HISTORICAL AND PERVASIVE USE OF "REDSKINS" AS AN ETHNIC SLUR.

"Redskin" has been recognized as a disparaging term for Native Americans for more than a century. The 1898 *Webster's Collegiate Dictionary* defined "redskin" as a term for a "North American Indian" that was "often contemptuous."

JA__ [D.E.72-6]. Likewise, the 1911 *Encyclopedia Britannica* noted that, as a reference to Native Americans, the term “redskin” was “not in such good repute.”

JA__ [D.E.72-20].

When George Preston Marshall acquired a professional football franchise in 1932, it was initially known as the Boston Braves, named after the baseball team with which the team shared a stadium. JA__ [D.E.1¶34;D.E.72-3Nos.1,2] The team moved the next year to Fenway Park and Marshall changed the name to the “Boston Redskins” to “keep the Indian motif” while sharing space with the Boston Red Sox baseball club. JA__ [D.E.1¶34;D.E.72-5]. The team moved to Washington and became the “Washington Redskins” in 1937. JA__ [D.E.72-5].

While the team played in Washington, the term “redskins” remained a derogatory slur used to refer to Native Americans, continuing up through the period, starting in 1967, when PFI first registered a mark containing “redskins.” A 1962 article in *The American Journal of Sociology* identified “redskin” as an example of a “racial or ethnic group derogatory nickname for another,” noting that “whites call Negroes ‘niggers,’” “the Spanish-speaking are called ‘spics,’” “Gentiles call Jews ‘Yids,’” and “[w]hites call Indians ‘redskins.’” JA__ [D.E.72-18]. That same year, Alan Dundes and C. Fayne Porter studied the use of slang by students at Haskell Institute, a post-secondary coeducational vocational training school for Native Americans with a student body representing at least 80 tribes

from around the country. JA__ [D.E.73-19at7:10-8:9;D.E.73-20at3-5]. When Dundes and Porter published their findings in *American Speech: A Quarterly in Linguistic Usage*, they noted that “[a]lmost all the students [at Haskell] resent being called redskins.” JA ___ [D.E.73-21at270].

The Random House Dictionary of the English Language recognized the continued disparaging nature of the term in its 1966 edition, noting that it was “Often Offensive.” JA __ [Dkt. 72-2 ¶¶ 2, 14-15]. Throughout the period when PFI sought to register its marks, many dictionaries identified “redskins” as belittling:

- Thorndike-Barnhart Intermediate Dictionary (1974): “a term often considered offensive.”
- Oxford American Dictionary (1980): “contemptuous.”
- The American Heritage Dictionary of the English Language (1982): “Offensive Slang.”
- Webster’s Ninth New Collegiate Dictionary (1983): “usu[ally] taken to be offensive.”
- Merriam-Webster Collegiate Dictionary (1983): “usu[ally] taken to be offensive.”
- Collier’s Dictionary (1986): “considered offensive.”

JA __ [D.E.72-8—72-11;D.E.72-12at23:18-26:11;D.E.72-13at11]. Other dictionaries followed with similarly negative usage labels.¹

Many scholarly works recognize the use of “redskins” as a slur. One such work, *Unkind Words: Ethnic Labeling From Redskin to WASP* (1990), which PFI’s expert recognized as “a respected source” in the field of ethnic labeling, calls “redskin” a “slur-name” and a “racial epithet.” JA __ [D.E.72-17at141:7-143:21;72-19at3,18]. *See also* JA __ [D.E.72-20—72-26] (scholarly works reaching same conclusions).

Indeed, PFI’s own dictionary expert, when asked for his opinion as a lexicographer regarding the “word redskin in 1967 as applied to American Indian persons,” agreed the term “certainly might be offensive.” JA __ [D.E.72-14at180:20-181:12]. He offered the same opinion for 1975 and 1985. JA __ [D.E.72-14at182:4-12].

B. THE TEAM’S ASSOCIATION OF “REDSKINS” WITH NATIVE AMERICANS

PFI has continually associated the name of the Washington Redskins with Native Americans. The team admitted that in its marks the word “redskin,” the spear, and the image of a man’s head in profile (as seen on the team helmet) all allude to Native Americans. JA__ [D.E.72-3at6-7].

¹ Linguistic experts for both parties agreed that dictionaries tend to lag in updating usage labels for ethnic slurs. JA __ [D.E.72-15at216:24-218:1;D.E.72-16at56-57; D.E.72-17at146:13-147:4].

The team has built on this association. The team's band has worn "Indian headdresses," the cheerleaders historically wore Indian-themed outfits including stereotyped braided wigs, and team publications use Native American imagery. JA __ [D.E.73-82—73-100;D.E.74-1—74-3]. The original lyrics of the team fight song likewise stereotyped and mocked Native American speech patterns:

Hail to the Redskins,
Hail Vic-to-ry!
Braves on the warpath,
Fight for old Dixie.
Scalp 'em swamp 'em,
We will take 'em big score.
Read 'em, Weep 'em,
Touch-down we want heap more.

JA __ [D.E.72-3Nos.75,76;D.E.73-80] (emphasis added).

C. NATIVE AMERICAN OPPOSITION TO THE TEAM NAME

Because "redskins" is a slur, Native Americans have opposed the team's name for decades. In 1972, a delegation of American Indian leaders representing major national Native American organizations, including the National Congress of American Indians ("NCAI"), the American Indian Movement ("AIM"), and the National Indian Youth Counsel ("NIYC") met with then-President of PFI, Edward Bennett Williams, to demand that PFI eliminate the "redskins" name.

NCAI was founded in 1944 to represent the interests and needs of Indian governments and communities. JA __ [D.E.73-20at6;D.E.71-3¶5;D.E.71-2¶¶7,12;D.E.71-5¶11]. From the 1960s to the present, NCAI has been the largest

and most prominent national American Indian organization. JA ___ [D.E.73-20at5-6;71-2¶7;71-3¶5;71-5¶11]. In the late 1960s and thereafter, NCAI had approximately 150 tribes as members; these tribes comprised approximately 50% of all American Indians. JA ___ [D.E.73-22at79:16-80:20,93:14-22;D.E.71-3¶6]. In 1972, NCAI's member tribes comprised between 300,000 and 350,000 Native Americans. JA ___ [D.E.73-12,73-13]. Between 1984 and 1989, NCAI had over 300 member tribes. JA ___ [D.E.71-5¶13]

Leon Cook was elected President of NCAI in 1971 on a platform of increased cooperation between NCAI and other Native American groups like AIM and NIYC. JA ___ [D.E.71-3¶¶6-10]. At a January 1972 meeting, these three groups and several other Native American groups agreed "wholeheartedly" to work together to eliminate the Washington NFL team name which, among the disparaging names and images used for Native Americans, they considered "the worst of the worst." JA ___ [D.E.71-3¶¶9-10].

On January 8, 1972, Harold Gross, Director of the Indian Legal Information Development Service and former attorney for NCAI wrote to Williams to object to the team's name:

... I ask you to imagine a hypothetical National Football League, in which the other teams are known as the New York Kikes, the Chicago Polocks, the San Francisco Dagoes, the Detroit Niggers, the Los Angeles Spics, etc....

Yet, the term ‘Redskin’ is no less stereo-type provoking and no less insulting to American Indians than the others which I have used solely to make my point....

JA __ [D.E.73-24at7:5-10:7;D.E.73-25;D.E.71-3¶11].

This letter led to a May 1972 meeting between Williams and prominent Native American leaders, led by Cook. These leaders argued that the team name needed to change. JA __ [D.E.73-24at19:19-22:24;D.E.71-3¶¶12-13].

Williams informed NFL Commissioner Pete Rozelle that he met a “delegation of American Indian leaders who are vigorously objecting to the continued use of the name Redskins” and admitted that the Native American leaders “set[] out their position quite cogently.” JA __ [D.E.72-3Nos. 73,74;D.E.73-24;Ex. 64 at 23:12-24;D.E.73-27]. PFI did not change the team name, but Williams decided to change the team’s cheerleaders’ stereotypical Indian-style wigs and to revise the fight song’s mocking lyrics. JA __ [D.E.73-14,72-3No.82;73-6;71-3¶13]. Six months later, a November 1972 game program contained a lengthy article discussing Native American opposition to Indian team names generally and the “Redskins” team name in particular. JA __ [D.E.72-Ex. 5].

At the same time, the local and national press, publications including *The Washington Post*, *Washington Daily News*, *Washington Evening Star*, *Baltimore Sun*, and the *Wall Street Journal* also took note of Native American opposition to

the team name. JA __ [D.E.73-12,73-15;73-29—73-35]. One Washington columnist observed that “[P]articularly annoying to the 750,000 American Indians is the word ‘redskin.’ To them, the word is a racist slur, no more acceptable than the word ‘nigger’ is to a black man and no more acceptable than the term ‘white trash’ is among the poor in the south.” JA __ [D.E.72-30].

The name remained, however, and NCAI’s opposition to the team name continued. At the 1973 NCAI annual convention, Reuben Snake, the Winnebago Tribal Chairman, won unanimous support for a resolution calling for an end to the Washington team’s name. JA __ [D.E.71-3¶14;D.E.71-5¶15]. Suzan Harjo, Executive Director of NCAI from 1984 through 1989, “reflected and carried out the position of NCAI to oppose the name of the Washington NFL team and to call for its elimination.” JA __ [D.E.71-5¶13]. NCAI voiced its opposition to the team name as disparaging “in statements, speeches, telephone calls, interviews, educational outreach, and coalition-building meetings,” as well as attempts to get additional meetings with team owners. JA __ [D.E.71-5¶16].

NCAI supported protest efforts, including a “Change The Name” banner flown above the NFC Conference Championship game in January 1988 and protests at the Super Bowl a few weeks later as well as outside the 1992 Super Bowl. JA __ [D.E.72-24;D.E.73-2,73-3,73-42,73-44,73-58—73-59].

In January 1993, NCAI, through its Executive Council, adopted a resolution declaring the organization's position that "redskins" has always been and continues to be a slur:

[T]he term REDSKINS is not and has never been one of honor or respect, but instead *it has always been and continues to be* a pejorative, derogatory, denigrating, offensive, scandalous, contemptuous, disreputable, disparaging and racist designation for Native American[s].

JA __ [D.E.73-43at50:18-51:20;D.E.73-68] (emphasis added). Later that year the NCAI General Assembly passed a second resolution supporting Congressional efforts to prevent PFI from building a new stadium on federal land unless the team changed its name. JA ___ [D.E.73-43at39:7-40:3,46:21-48:7;D.E.73-69].

Contrary to PFI's assertions that only "activists" opposed the name, the record showed widespread opposition to the slur. In addition to the opposition of the NCAI — the largest and most prominent national Native American organization — editorials, columns and articles identifying "redskin" as an ethnic slur were published between 1967 and 1990 in *The Washington Post*, *The Baltimore Evening Sun*, *The Chicago Tribune*, *The Wall Street Journal*, and *Sports Illustrated*. See, e.g., JA __ [D.E.72-29—72-40;D.E.73-1—73-15]. These authors observed that the team name should shock the conscience no less than disparaging

terms given other ethnic groups, and that “Redskins” was the most offensive team name still in use. *See* JA ___ [D.E.72-33;D.E.73-3,73-8].

D. PREVIOUS CANCELLATION ACTION

In 1992, Suzan Harjo and five other Native Americans petitioned under Section 2(a) of the Lanham Act to cancel registrations for PFI’s trademarks that contain “redskins.” JA ___ [Op.6]. In 1999, the TTAB found that the marks may disparage Native Americans, and ordered that the registrations be cancelled. *Harjo v. Pro-Football, Inc.*, 1999 WL 375907 (TTAB 1999). The District Court for the District of Columbia held that the TTAB’s decision in *Harjo* was not supported by substantial evidence and that the TTAB erred in not dismissing the *Harjo* petition due to laches. JA ___ [D.E.1¶18]. After two trips to the D.C. Circuit, in 2009 the decision was affirmed, but only as to laches. JA ___ [Op.6-7]; *Pro Football, Inc. v. Harjo*, 565 F.3d 880, 881 (D.C. Cir. 2009).

II. PROCEDURAL HISTORY

A. BLACKHORSE PETITION AND DISTRICT COURT DECISION

On August 11, 2006, Appellees Amanda Blackhorse, Marcus Briggs- Cloud, Phillip Gover, Jillian Pappan, and Courtney Tsotigh petitioned the TTAB to cancel the registrations of the same six marks at issue in *Harjo*. *Blackhorse v. Pro-Football, Inc.*, 2014 WL 2757516 (TTAB 2014) at *3. Since *Harjo* was on appeal, the TTAB suspended action in *Blackhorse* until 2010. *Id.* When the TTAB

reviewed Appellees' petition and supporting evidence, it found by a preponderance of the evidence that "a substantial composite of Native Americans found the term REDSKINS to be disparaging in connection with respondent's services during the relevant time frame of 1967-1990," that the six registrations at issue must be cancelled, and that cancellation was not barred by laches. *Id.* at *29, *34.

PFI filed suit in the Eastern District of Virginia pursuant to 15 U.S.C. § 1071(b), seeking review of the TTAB decision. JA ___ [D.E.1]. PFI sought declarations that the registered marks do not disparage Native Americans or bring Native Americans into contempt or disrepute; that Section 2(a) violates the First Amendment; that Section 2(a) is void for vagueness; that Section 2(a) violates the Due Process and Takings Clauses; and that Appellees' petition in the TTAB was barred by laches. *Id.* The United States intervened to defend the statute's constitutionality. JA ___ [D.E.46].

In a § 1071(b) proceeding, the parties may submit additional evidence to supplement the TTAB record. Additional evidence submitted by Appellees included:

- Dictionary evidence. JA ___ [D.E.72-6—72-11].
- Scholarly articles. JA ___ [D.E.72-18,72-19,73-21]
- News reports. JA ___ [D.E.73-32,73-33,73-38].

- Expert reports of a linguist, Dr. Geoffrey Nunberg, showing the use of “redskin” as a disparaging term throughout history and in multiple mediums, and of a historian, Dr. James Riding In, showing opposition of Native Americans to the term “redskin.” JA ___ [D.E.72-16,73-20].
- Documents regarding the University of Utah’s decision in 1972 to drop “Redskins” as the name of its teams. JA ___ [D.E.73-36,73-37].
- Sworn affidavits from prominent Native Americans, Raymond Apodaca, Leon Cook, Kevin Gover, and Suzan Harjo, regarding their experience with the term “redskin.” JA ___ [D.E.71-2—71-5].

On cross-motions for summary judgment, the District Court denied PFI’s motions and granted summary judgment to Appellees on all counts. JA ___ [D.E.54,69,79,105,108;Op.68-69].

B. EVIDENTIARY STIPULATIONS

During the TTAB proceedings in *Blackhorse*, the parties stipulated that the *Harjo* TTAB record would serve as the *Blackhorse* TTAB record and waived all non-relevance evidentiary objections as to evidence in the *Harjo* record. JA ___ [D.E.1¶28;D.E.72-2at2]. Thus, the stipulation encompassed a waiver of objections to hearsay, as well as hearsay within hearsay. *See Blackhorse*, 2014 WL 2757516, at *6 n.21.

PFI moved to admit the entire record from the *Blackhorse* TTAB proceeding before the District Court. JA ___ [D.E.32]. The District Court confirmed that the parties waived all non-relevancy evidentiary objections to evidence incorporated from the *Harjo* record. JA ___ [Op.7]. While the evidentiary stipulation did not cover evidence admitted before the District Court to supplement the TTAB record, the parties agreed to waive any authenticity objections to documents presented by either side to supplement the record. JA ___ [D.E.68].

SUMMARY OF ARGUMENT

1. The District Court properly ruled that PFI's trademark registrations containing the term "redskins," an ethnic slur, should be cancelled. *See* 15 U.S.C. § 1052(a) (trademarks containing matter that "may disparage" persons are not eligible for registration). In a thorough and well-reasoned 70-page decision, the District Court found that the trademarks contain matter that "may disparage" Native Americans or bring them into contempt or disrepute, and that the registrations were therefore issued contrary to 15 U.S.C. § 1052(a). *See* JA ___ [Op.]. In addition, the Court rejected PFI's Constitutional arguments and a claim that the cancellation was barred by laches. *Id.*

In finding that the trademarks "may disparage," the Court relied upon a detailed record that included dictionaries and other reference sources identifying "redskin" as a slur term, *id.* at 42-46; dozens of scholarly, literary and media

references to “redskins”, *id.* at 46-50; statements of Native American individuals and group leaders, including continuous opposition to the team’s name by NCAI and other leading Native American organizations, *id.* at 52-58; and a data compilation by linguist Dr. Geoffrey Nunberg demonstrating the negative connotations of the term “redskin”, *id.* at 65. The District Court reviewed overwhelming evidence that the term “redskins” disparages Native Americans and that opposition to the team name became a unifying cause for the NCAI, AIM, and other Indian organizations. JA ___ [OP.52-53,55,61].

2. The District Court also correctly rejected PFI’s constitutional arguments. Section 2(a) does not run afoul of the First Amendment for at least three reasons. First, cancelling PFI’s registrations does not restrict PFI’s speech rights; at most, it will restrict PFI’s ability to restrict the ability of others to speak. Second, the bar against registering trademarks that “may disparage” is exempt from First Amendment review under the government speech doctrine, and it represents a legitimate restriction in participation in a government program. Third, the statutory bar is a permissible regulation of commercial speech that advances the substantial interest of disassociating the Government from trademark content that may disparage fellow Americans. This Court need not and should not follow the Federal Circuit’s flawed decision in *In Re Simon Shiao Tam*, 808 F.3d 1321, (Fed. Cir. 2015).

3. PFI's void-for-vagueness argument fails because "may disparage" is not impermissibly vague. "Disparage" is defined consistently by dictionaries, and the Supreme Court even utilized the word "disparage" to establish a legal standard for Establishment Clause purposes. *Marsh v. Chambers*, 463 U.S. 783 (1983). In addition, courts have affirmed statutory language far more vague than "may disparage."

4. PFI's Due Process argument was properly rejected because PFI has not demonstrated prejudice due to any delay by Appellees and because PFI deliberately waived for tactical purposes the argument that trademark registrations are "property" for Due Process Clause purposes. Furthermore, the Lanham Act put PFI on clear notice that a petition to cancel its registration could be filed "at any time," 15 U.S.C. § 1064, and PFI knew or should have known that trademarks that contain "redskin" could be vulnerable to a challenge under Section 2(a).

5. PFI's laches claim is meritless because the petition raised issues of broad public interest, Appellees did not unreasonably delay in bringing their petition, and PFI cannot demonstrate reliance on any unreasonable delay.

STANDARD OF REVIEW

On appeal, an award of summary judgment is reviewed de novo. *F.D.I.C. v. Cashion*, 720 F.3d 169, 173 (4th Cir. 2013). However, the District Court's evidentiary rulings are reviewed for abuse of discretion. *Id.* Application of the

laches elements to undisputed material facts is reviewed only for abuse of discretion. *Ray Commc'ns, Inc. v. Clear Channel Commc'ns, Inc.*, 673 F.3d 294, 299 (4th Cir. 2012).

ARGUMENT

I. THE REGISTRATIONS OF PFI'S MARKS WERE PROPERLY CANCELLED

PFI's trademarks are ineligible for federal registration because they contain the ethnic slur "redskins." *See* 15 U.S.C. § 1052(a) (trademarks containing matter that "may disparage" persons are not eligible for registration). The District Court, considering overwhelming evidence that "redskins" may disparage Native Americans, correctly ruled that the marks should be cancelled. PFI's arguments that Section 2(a) only applies to "identifiable individuals" and that the District Court applied the wrong standard for disparagement are attempts to move the law beyond the facts of this case.

A. THE DISTRICT COURT CORRECTLY DETERMINED THAT PFI'S MARKS CONTAIN MATTER THAT MAY DISPARAGE NATIVE AMERICANS.

The parties agreed in the District Court that the test under Section 2(a) is:

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

2. Is the meaning of the marks one that may disparage Native Americans?

JA __ [Op.36]. The evidence in the record reveals no dispute that the trademarks contain matter – the term “redskins” – that “may disparage” Native Americans, even if PFI is able to introduce evidence that some Native Americans are not offended. This is true throughout the entire period, 1967-1990.

1. Section 2(a) prohibits registrations of trademarks containing “matter which *may* disparage”

PFI asserts that Section 2(a) “requires actual disparagement.” PFI Br. at 50. However, the statute dictates that a trademark is not eligible for registration if it consists of or comprises “matter that *may* disparage.” 15 U.S.C. § 1052(a) (emphasis added). PFI’s proposed construction improperly deletes “may” from the text.

Congress’s inclusion of “may” before “disparage” in Section 2(a) was deliberate and meaningful. While other statutory bars to registration in 15 U.S.C. § 1052 lack “may” — for example, the provision in Section 2(a) that bars registration if the mark contains matter that actually is “immoral, deceptive, or scandalous,” not merely if the matter “may” be so — the disparagement standard is lower. In crafting Section 2(a)’s disparagement provision, Congress struck “tends to” from early drafts of the legislation in favor of “may.” JA __ [D.E.75-31,75-32]. *See Doe v. Chao*, 540 U.S. 614, 622 (2004) (relying on drafting history to

interpret statute). “May disparage” is a lower standard than “tends to disparage,” which itself is a lower standard than the “actual disparagement” standard PFI proposes.

“In common and legal usage, may reflects possibility, not certainty.” *United States v. Arias-Espinosa*, 704 F.3d 616, 619 (9th Cir. 2012); *see also FTC v. Morton Salt Co.*, 334 U.S. 37, 46 (1948) (“may” requires only “reasonable possibility”); *United States v. Lexington Mill & Elevator Co.*, 232 U.S. 399, 411 (1914) (applying ordinary meaning of “may”); *Ventura v. Attorney Gen.*, 419 F.3d 1269, 1282 (11th Cir. 2005) (“‘may’ and ‘could’ are both words used to express ‘possibility.’”).

PFI contends that the inclusion of “may” demonstrates that no intent to disparage is required. PFI Br. at 50. While the inclusion of “may” is incompatible with requiring proof of an intent to disparage, the import of “may” is broader. If Congress included “may” in Section 2(a) merely to signify that intent is not required, then it would have been unnecessary for Congress to replace “tends to disparage” with “may disparage.”

Instead, by selecting “may disparage” instead of “tends to disparage,” “does disparage” or any other formulation, Congress chose not to require proof of actual disparagement. Also, it is the “matter,” not the trademark owner, that may not disparage in order for a mark to be registrable. “Matter” is inanimate and cannot

possess intent. “Disparagement” is about effects, not the speaker’s intent. *See United States v. Grunberger*, 431 F.2d 1062, 1067 (2d Cir. 1970) (stating need for appellate court to determine “whether questions by the judge had the *effect of unfairly disparaging* the defense”) (emphasis added).

2. The undisputed evidence established that the PFI’s marks contain matter that “may disparage” Native Americans.

Rather than cite to the evidence, PFI begins its assault on the District Court’s disparagement finding by quoting from the *Harjo* case, decided a decade ago on a different evidentiary record. PFI Br. at 51. An opinion based on a different evidentiary record is irrelevant to any assessment of the record below.

PFI next attacks as irrelevant any piece of Appellees’ evidence that does not, standing alone, prove that “redskins” is disparaging. *See* PFI Br. at 52, 54-55, 57. This objection is meritless. PFI ignores the standard for relevance: a fact is relevant so long as it has “any tendency to make a fact more or less probable than it would be without the evidence” if “the fact is of consequence in determining the action.” Fed. R. Evid. 401. Here, each piece of evidence submitted by the Appellees makes it more likely that the “meaning of the matter in question” is a reference to Native Americans, and that this meaning may disparage Native Americans. *See New Jersey v. T.L.O.*, 469 U.S. 325 (1985) (“it is universally recognized that evidence may be admissible even where the evidence standing alone does not prove a party’s entire case”). When the entire record is considered,

only one conclusion is possible: that the word “redskins” “may disparage” Native Americans.

PFI singles out the 1967 registration, arguing there is not enough evidence to find that “redskin” was disparaging when the first mark was registered. PFI Br. at 52. That is not true. Appellees presented dictionary definitions, scholarly articles, a linguistic analysis of the use of “redskins” in newspapers dating back to 1920, and personal testimony of Native American leaders that demonstrated that “redskins” was a slur long before 1967 and continued to be so through the relevant time of the registrations. As the District Court explained, there are *no* court or agency decisions upholding a registration where the record included usage labels indicating that the matter is “often contemptuous,” scholarly, literary, and media sources identifying the matter as an ethnic slur, and first person accounts describing how the matter has been used to disparage individual members of the referenced group. JA __ [Op.62-63].

PFI also asserts that the dictionary evidence is flawed because “no usage label reflected the views of any Native American” PFI Br. at 53. But as the District Court observed, “usage labels denote when words are disparaging or offensive *to the group referenced in the underlying term.*” JA __ [Op.37] (emphasis added). Even if usage labels reflect the language as used by the broader English-speaking public, Native Americans are part of that English-speaking

public and speak the same language as everyone else. *See In re Heeb Media*, 2008 WL 5065114 (relying in part on dictionary usage labels to find that “heeb” “may disparage” Jews).

Scholarly sources of the period agreed that this reference was disparaging. For instance, the 1962 article *Ethnophaulisms and Ethnocentrism*, which described the link between the creation of “derogatory terms” for ethnic groups and the amount of prejudice against that group, described “redskin” as a “derogatory nickname” used against Native Americans. JA __ [D.E.72-18]. Likewise, the article examining slang among the Native American student body at Haskell Institute found that in 1962 “[a]most all the students resent[ed] being called *redskins*.” JA __ [D.E.73-21].²

The record included direct testimony from Native Americans about how the word “redskin” was used as part of the abuse and discrimination these individuals suffered during the 1950s and ‘60s. JA __ [D.E.71-2,71-4,71-5]. This evidence was consistent with Dr. Nunberg’s findings that “redskin,” a slur, was consistently used with negative modifiers in newspapers dating from the early 20th century. And PFI’s lexicography expert admitted that the word “certainly might be

² PFI asserts this article is hearsay, but it plainly falls within recognized hearsay exceptions; the article is an ancient document and responses of the students upon being called “redskins” were present sense impressions. PFI Br. at 54; Fed. R. Evid. 803(1),(16). The District Court did not err – let alone abuse its discretion – in relying on the article.

offensive” to a Native American in 1967, 1975, or 1985. [D.E.72-14at180:20-181:12,182:4-12]. Even PFI’s President conceded that the language in the team fight song in effect in 1967 was “mocking” Native Americans. This last fact rebuts PFI’s absurd claim that the term “redskins” may be disparaging, but not when the team uses it.

PFI criticizes as self-serving NCAI’s resolution unequivocally stating that redskins “*has always been and continues to be* a pejorative, derogatory, denigrating, offensive, scandalous, contemptuous, disreputable, disparaging and racist designation for Native American[s].” PFI Br. at 55. But NCAI passed this resolution in the service of and as representative of its Native American constituents.

Furthermore, contrary to PFI’s assertion, evidence from the time period after 1967 – especially the early 1970s – is relevant to whether “redskins” may disparage as of 1967. The record, in fact, shows significant Native American opposition to “redskins” in the early 1970s, including the 1972 meeting with PFI President Edward Bennett Williams.

PFI asserts that there is no evidence that the Native American leaders who met with Williams represented the views of their organizations, much less a substantial composite of Native Americans. PFI Br. at 56. If they had not been representative of their vast membership, they would not have been able to meet

with Williams. Indeed, Williams recognized them as “leaders” in the Native American community, and reported to the NFL Commissioner that Native Americans “vigorously object[ed] to the continued use of the name ‘Redskins’” and noted that they “set[] out their position quite cogently.” JA __ [D.E.71-3¶12;D.E.72-27].

NCAI’s opposition to the team name was reconfirmed by a 1973 resolution passed unanimously by the NCAI General Assembly condemning the team name. JA __ [D.E.71-3¶14;D.E.71-5¶15]. Both Leon Cook and Suzan Harjo offered sworn declarations attesting to this resolution. *Id.* PFI asserts that because there is no longer any written record of the text of the resolution or who voted for it, it was improper for the District Court to credit this testimony. PFI Br. at 57. However, while a court deciding summary judgment should draw all reasonable inferences in favor of the non-moving party, the court is not obligated to infer that all witnesses on behalf of the moving party are lying. *See Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986); Fed. R. Civ. P. 56(c). (a party seeking summary judgment may rely on affidavits or declarations, based on personal knowledge and attested to under penalty of perjury, to show that there is no genuine issue of material fact).

The many newspaper articles and editorials discussing Native American opposition to the name support an inference that the disparaging nature of the team name is and was an issue of widespread importance to Native Americans. *See JA*

__ [D.E.72-30—72-32;D.E.73-12—73-15,73-29—73-35]. These articles often quote Native Americans, and describe the work being done to oppose the team name and why Native Americans felt so strongly about the issue. Furthermore, the amount of attention paid to the issue is itself evidence that Native American opposition to the name and to other offensive mascots was widespread, forceful, visible, and persuasive.

During this same period, the University of Utah dropped “Redskins” as the name for its sports teams because of concerns over Native American opposition. JA __ [D.E.73-36,73-37].

Moreover, press accounts make clear that opposition to the name continued throughout the relevant period, with new Native American groups arising in the 1980s to oppose the team name. JA __ [D.E.72-24,72-36—72-40;D.E.73-1—73-18,73-44—73-46].

Dictionary definitions and usage labels from throughout the period at issue reinforce the inference that “redskins” referred to Native Americans and was disparaging to Native Americans at every date the team sought a new registration. *See* JA __ [D.E.72-8—72-11; D.E.72-12at23:18-26:11;D.E.72-14at143:13-25, 183:15-184:16;D.E.72-13at11]. Although PFI argues that these usage labels only reflect a minority of dictionaries, its own dictionary expert repeatedly counted virtually identical releases of the same dictionaries as separate instances of

dictionaries lacking usage labels, artificially lowering the percentage of dictionaries applying usage labels to the term. *See* PFI Br. at 57; JA ___ [D.E.81-2 at 2-3]. PFI offers no objection to the other post-1967 scholarly articles relied on by the District Court. JA ___ [Op.49,51]. Therefore, it is uncontested that “redskin” is a “slur” and that “[t]o many Native Americans, redskin is as derogatory as 'nigger' is for black Americans.” JA ___ [D.E.72-25at206;D.E.72-19at3,18].

The only evidence PFI provided to counter Appellees’ evidence is scattered instances of Native Americans using the term “redskin” or expressing support for the team name, or instances like the 1977 halftime show where PFI argues that the court should infer support for the name from a failure to voice opposition. PFI Br. at 60-61. However, even if PFI were able to show with this evidence that a significant number of Native Americans supported the team’s use of the word “redskins” between 1967 and 1990 – which they have not -- this would not be relevant. The test for whether matter is unregistrable under Section 2(a) requires, at most, that the matter “may disparage.” It does not require a majority, much less unanimity.³ As the TTAB explained:

³ PFI alludes to a 2003-04 National Annenberg Election Survey. PFI Br. at 61. On summary judgment, PFI sought to introduce a two-page press release purporting to state the results of the survey, and one of PFI’s experts mentioned having read the press release. *See* JA ___ [D.E.100at9]. Appellees objected to both references as inadmissible hearsay, because the press release was not covered by the parties’

[PFI] has introduced evidence that some in the Native American community do not find the term ‘Redskin’ disparaging when it is used in connection with professional football. While this may reveal differing opinions within the community, it does not negate the opinions of those who find it disparaging.... *[O]nce a substantial composite has been found, the mere existence of different opinions cannot change the conclusion.*

Blackhorse, 2014 WL 2757516, at *29 (emphasis added).

Considering the record as a whole, there is no dispute of material fact that at the time of each registration the word “redskins” was a term that “may disparage” Native Americans. The District Court properly granted summary judgment.

B. PFI’S PROPOSED TESTS FOR DISPARAGEMENT HAVE NO BASIS IN THE STATUTE OR PRECEDENT.

1. Section 2(a) is Not Limited to “Identifiable Individuals.”

PFI argues it is “fairly possible” to construe Section 2(a)’s disparagement provisions as applying only to “identifiable individuals or corporations,” not groups like Native Americans. PFI Br. at *46. But PFI admits this argument was not raised in the District Court. PFI Br. at *46. PFI has therefore waived the contention, and cannot introduce it on appeal. *Am. Canoe Ass’n v. Murphy Farms, Inc.*, 326 F.3d 505, 515 (4th Cir. 2003) (holding that, “in most contexts, issues not raised below are considered waived”); PFI’s reliance on *Almendarez-Torres v.*

evidentiary stipulations and the expert was not competent to testify to the survey’s “methodology or results beyond recounting the hearsay.” JA __ [D.E.118at4]; *see Swatch, S.A. v. Beehive Wholesale, LLC*, 888 F.Supp.2d 738, 743-44, n. 1 (E.D.Va. 2012); Fed. R. Evid. 702-03, 801(c), 802.

U.S., 523 U.S. 224 (1998); is misplaced. *Almendarez-Torres* did not address waiver and does not stand for the proposition that a court should consider a waived argument to avoid Constitutional issues.

On the merits, PFI's argument likewise fails. The requirement that those disparaged are "identifiable individual persons or corporations" is inconsistent with the plain language of the statute. Section 2(a) refers to "persons," which the Lanham Act defines to include a "natural person." 15 U.S.C. § 1127. There is no requirement that the disparaged person be individually identified. Native Americans – and Appellees – as individual "natural persons" and as part of a group of persons are therefore covered by the statute. PFI's argument also flies in the face of decades of precedent and disrupts the settled understanding that Section 2(a) applies to disparaged groups of persons, not just identifiable individuals. *See, e.g. In re Geller*, 751 F.3d 1355 (Fed. Cir. 2014) (finding mark may disparage Muslim Americans); *In re Lebanese Arak Corp.*, 2010 WL 766488 (TTAB 2010) (finding mark may disparage Muslim Americans); *In re Heeb Media, LLC*, 2008 WL 5065114 (TTAB 2008) (finding mark may disparage Jews); *In re Squaw Valley Development Co.*, 2006 WL 1546500 (TTAB 2006) (finding marks may disparage Native Americans); *Boswell v. Mavety Media Grp. Ltd.*, 1999 WL 1040108 (TTAB 1999) (finding marks may disparage African-American women).

2. Section 2(a) Does Not Require Proof That a “Majority” or a “Representative Cross-Section” of the Relevant Population Has Been Disparaged.

PFI argues that Section 2(a) cancellation requires proof that a mark is disparaging to a “majority,” a “representative sample” or a “cross-section” of the referenced group. PFI Br. at 48-50. The District Court properly rejected the proposed “majority” requirement. The other two arguments were never raised below and are waived. *See Am. Canoe Ass’n*, 326 F.3d at 515.

Section 2(a) provides that a mark is not eligible for registration if it contains matter that “may disparage.” It does not require proof that a majority of the referenced group is disparaged. Noting that the TTAB and the Federal Circuit had held that a mark is not registrable if it may disparage a “substantial composite” of the referenced group, the District Court cited Federal Circuit precedent that a “substantial composite is not necessarily a majority.” JA __ [Op. 36, 61] (*citing Boulevard Entm’t*, 334 F.3d at 1340; *In re Mavety Media Grp.*, 33 F.3d 1367, 1370 (Fed. Cir. 1994)); *see also In re Heeb Media, LLC*, 2008 WL 5065114, at *8 (T.T.A.B. 2008). PFI argues that since this is an *inter partes* proceeding, *ex parte* cases that are inconvenient to PFI should be ignored. *See* PFI Brief at 49.

However, the Lanham Act is the same whether *inter partes* or *ex parte*; in either case, a trademark with matter that “may disparage” is not eligible for registration.

PFI never argued below that a disparagement finding should require a “representative sample” or a “cross-section;” therefore, these arguments have been waived. Moreover, PFI’s references to obscenity law and its analogy to the composition of jury pools as justifications for its sampling requirements are untethered from the statute and Section 2(a) precedent. The Court should reject these invitations to legislate.

PFI did argue below that anyone who claimed to be Native American and supported the team name represented “mainstream” opinion, but offered no explanation as to how a court is to determine who is “mainstream” and who is not. Here, the uncontested evidence is that the NCAI is the oldest and largest Native American organization, with about 150 tribal members in the early 1970s and 300 tribal members in the 1980s, and the NCAI has consistently opposed the term “redskins” and PFI’s team name.

II. THE CANCELLATION OF THE REGISTRATIONS DOES NOT INFRINGE PFI’S FIRST AMENDMENT RIGHTS.

PFI’s argues that the First Amendment *forbids* Section 2(a)’s disparagement prohibitions and *requires* the federal government to issue registrations for racist trademarks. This flawed argument must be rejected. First, PFI conflates its right to use its trademarks with the government’s registration program. *See e.g.* PFI Br. at *13, *21, *43. Cancellation of the registrations will not reduce any of PFI’s rights protected by the Free Speech Clause; the team may still use the “redskins”

name and even maintain common law trademark rights in it. Second, cancellation of the registrations is exempt from First Amendment scrutiny under the government speech doctrine and because Section 2(a) is a permissible condition imposed on participation in a government program. Third, even if viewed as a regulation affecting PFI's speech, Section 2(a) satisfies the test for commercial speech regulation because it closely fits and advances a substantial government interest. Finally, PFI's repeated claim that trademark registration are just like copyrights and patents is simply incorrect and ignores important differences between those Constitutionally protected fields (U.S. Const Art. I, § 8) and the federal trademark program.

The Federal Circuit's recent decision in *In re Simon Shiao Tam*, 808 F.3d 1321 (Fed. Cir. 2015), held that Section 2(a) violates the First Amendment. For reasons set forth below, *Tam* was wrongly decided and should not be followed.

A. CANCELLATION OF THE REGISTRATIONS DOES NOT BURDEN PFI'S SPEECH.

The District Court correctly recognized the distinction between use of a trademark and the federal registration of that mark. PFI analogizes registration to a "license" or "permit" to engage in expressive activity. PFI Br. at *27-28, *42. However, the right to use a trademark is completely unaffected by refusal or cancellation of federal registration of the mark. *In re McGinley*, 660 F.2d 481 (C.C.P.A. 1981); *Test Masters Educ. Servs. Inc. v. Singh*, 428 F.3d 559, 578 n. 9

(5th Cir. 2005); *In re Fox*, 702 F.3d 633, 635 (Fed. Cir. 2012); *In re Boulevard Entm't, Inc.*, 334 F.3d 1336, 1343 (Fed. Cir. 2003); *In re Mavety Media*, 33 F.3d 1367, 1374 (Fed. Cir. 1994). *See also Natl. A-1 Advertising, Inc. v. Network Solutions, Inc.*, 121 F. Supp. 2d 156, 177 (D.N.H. 2000).

Indeed, PFI can even bring an infringement action for an injunction or damages to enforce its unregistrable trademarks under the Lanham Act and the common law. 15 U.S.C. § 1125(a); *Volkswagenwerk Aktiengesellschaft v. Wheeler*, 814 F.2d 812, 819 (1st Cir. 1987); *In re Simon Shiao Tam*, 808 F.3d 1321, 1375 (Lourie, J. dissenting) (Fed. Cir. 2015); Brief for Pro-Football Inc. as Amicus Curiae at 8n.4, *In re Simon Shiao Tam*, 808 F.3d 1321 (Fed. Cir. 2015) (No. 14-1203).

PFI's contention that Section 2(a) restricts a trademark owner's First Amendment rights turns trademark law on its head. Trademark law is not a device to protect the First Amendment free speech rights of the trademark holder, but to decrease the speech rights of everyone else by preventing them from using the words and symbols of their choice. For instance, the Amateur Sports Act specifically grants the United States Olympic Committee expanded trademark rights over the word "Olympic," which the USOC used to enjoin an event from being called the "Gay Olympic Games." *San Francisco Arts & Athletics, Inc. v. U. S. Olympic Comm.*, 483 U.S. 522, 525-27 (1987) ("S.F.A.A."). The Court

recognized that this, like all trademark enforcement, was a restriction on private speech that was only permissible so long as it was no greater than necessary to advance a substantial government interest.

Indeed, this Circuit has recognized how important it is “that trademarks not be transformed from rights against unfair competition to rights to control language.” *CPC Int’l, Inc. v. Skippy, Inc.*, 214 F.3d 456, 462 (4th Cir. 2000) (internal quotation omitted). As the Ninth Circuit noted, “the primary cost of recognizing property rights in trademarks is the removal of words from (or perhaps non-entrance into) our language.” *New Kids on the Block v. News Am. Publ’g, Inc.*, 971 F.2d 302, 306 (9th Cir. 1992). Trademark owners may abuse their rights of exclusive use to squelch public debate related to their marks by using the courts as a vehicle to attack parodies of their marks, social commentary, journalism, or criticism. *See, e.g., id.* at 304-05 (newspaper poll); *Anheuser-Busch, Inc. v. L & L Wings, Inc.*, 962 F.2d 316 (4th Cir. 1992) (parody); *Mattel, Inc. v. MCA Records*, 296 F.3d 894 (9th Cir. 2002) (social commentary); *CPC*, 214 F.3d 456 (criticism); *Bosley Med. Inst., Inc. v. Kremer*, 403 F.3d 672, 679 (9th Cir. 2005) (same). Even if a member of the public is able to defeat a trademark owner’s injunction action, the mere threat of a trademark lawsuit chills public speech. *See CPC*, 214 F.3d at 462 (quoting *New Kids*, 971 F.2d at 307).

Indeed, PFI and the ACLU both admit that cancelling PFI's registrations would result in reducing PFI's ability to restrict the speech of others, while increasing the rights of the public to speak. As the ACLU observed:

[C]ancelling the Washington team's trademark [registration]. . . doesn't prevent the team from using it. *It does, however, make it easier for other people to disseminate it. So the Trademark Office decision in this case might result in even more use of a distasteful term – not less.*

Esha Bandari, 'You're Not Wrong, You're Just an A**hole,' ACLU Blog of Rights (Mar. 6, 2015), <https://www.aclu.org/blog/free-speech/youre-not-wrong-youre-just-ahole> (emphasis added). PFI also acknowledged that the cancellation of its registrations could lead to more speech being legally permissible, *i.e.*, the "unlicensed" and "diluting uses" of its trademarked words and symbols. JA ____ [D.E.56at16].

PFI analogizes Section 2(a) to the Vermont statute in *Sorrell v. IMS Health Inc.*, 131 S. Ct. 2653 (2011), to argue that cancellation of a trademark registration is a "content-based burden" that should be given the same heightened scrutiny as an outright ban on speech. PFI Br. at 17 (*quoting Sorrell*, 131 S. Ct. at 2664). This argument is flawed and does not fairly present the Vermont statute at issue in *Sorrell*.

The statute in *Sorrell* allowed the Vermont attorney general to bring an action for civil penalties against pharmacies that disclosed "prescriber-identifiable information" to drug marketers, as well as against pharmaceutical manufacturers or

marketers who used such information for marketing. Vt. Stat. Ann., Tit. 18, § 4631(d); *Sorrell*, 131 S. Ct. at 2660. When the Court described this as a burden on the speakers, it acknowledged that the burden included marketers effectively being “barred from using the information for marketing” under threat of prosecution. *Sorrell*, 131 S. Ct. at 2663, 2666. By contrast, Section 2(a) does not penalize anyone from using any matter in their marketing, no matter how disparaging. Contrast Vt. Stat. Ann., Tit. 18, § 4631 with 15 U.S.C. § 1052. The government cannot use Sections 2(a) as a basis to impose civil liability, nor is there any other threat of prosecution. *Id.* PFI’s right to use disparaging matter is not burdened by cancellation of the registrations, let alone burdened in a manner that gives rise to First Amendment considerations.

B. CONGRESS HAD THE RIGHT TO DESIGN THE FEDERAL REGISTRATION PROGRAM SO AS NOT TO SUBSIDIZE TRADEMARKS THAT MAY DISPARAGE PERSONS.

The District Court properly held that the cancellation of trademarks under Section 2(a) is a permissible exercise of government speech. JA__[Op.19] Section 2(a) meets the criteria for government speech set forth in *Walker v. Tex. Div., Sons of Confederate Veterans, Inc.*, 135 S. Ct. 2239 (2015) and *Sons of Confederate Veterans, Inc. v. Comm’r of the Va. Dept. of Motor Vehicles*, 288 F.3d 610 (4th Cir. 2002) (“SCV”). In addition, Congress is free to establish the contents and limits, including content-based criteria, of the federal registration program.

1. Government Speech Is Exempt From First Amendment Scrutiny And Need Not Be Viewpoint-Neutral.

Under the government speech doctrine, “the Government’s own speech ... is exempt from First Amendment scrutiny.” *Johanns v. Livestock Mktg. Assn.*, 544 U.S. 550, 553, (2005). “The Free Speech Clause restricts government’s regulation of private speech; it does not regulate government speech.” *Pleasant Grove City, Utah v. Summum*, 555 U.S. 460, 467 (2009). When the Government engages in its own expressive conduct, it need not be viewpoint neutral. *Walker v. Texas Div., Sons of Confederate Veterans, Inc.*, 135 S. Ct. 2239, 2245-46 (2015).

A government entity is “entitled to say what it wishes,” *Rosenberger v. Rector and Visitors of Univ.*, 515 U.S. 819, 833 (1995), and to select the views that it wants to express. *See Rust v. Sullivan*, 500 U.S. 173, 194 (1991).

2. Section 2(a) Is An Appropriate Exercise of Government Speech.

The federal registration program constitutes government speech under the factors identified by the Supreme Court in *Walker*, and by this Court in *SCV*.

In *Walker*, the Court rejected a Free Speech challenge to the State of Texas’s refusal to issue specialty license plates featuring the Confederate battle flag. The Texas statute permitted the relevant State agency to refuse to create a specialty license plate “if the design might be offensive to any member of the public.” Tex. Transp. Code Ann. § 504.801(c); *Walker*, 135 S. Ct. at 2244-45. The Supreme

Court held that the refusal to issue a possibly offensive specialty license plate was an exercise of government speech and therefore not subject to challenge on Free Speech Clause grounds. *Walker*, 135 S. Ct. at 2246, 2252-53.

Rather than establish a specific test to identify government speech, the Supreme Court in *Walker* identified three factors that it used to find that rejection of the offensive plate design was government speech. First, the Court found that license plates had historically communicated government messages. *Walker*, 135 S.Ct. at 2248. Second, the Court found that the public closely associates the messages on license plates with the government, in part because the name of the issuing state is a part of every plate. *Id.* Finally, the Court found that the state had “effectively controlled” the messages it conveyed by having “final approval authority” over the messages. *Id.* at 2249 (quoting *Johanns*, 544 U.S. at 560-61).

As the District Court found, application of each of these three factors supports finding that *trademark registrations* are government speech. JA ____ [Op.12-13]. First, a trademark registration and the federal trademark registries are the means by which the PTO communicates to the public that the trademark is valid, the identity of the owner, and that the owner has the exclusive right to use the mark, subject to any limitations that the PTO also communicates via the registration certificate. 15 U.S.C. § 1057(b).

Second, a registration certificate – unlike the underlying trademark itself – satisfies the second factor in *Walker*, that the certificate be associated with the Government. Registration certificates are “issued in the name of the United States of America, under the seal of the United States Patent and Trademark Office, and shall be signed by the Director or have his signature placed thereon.” *Id.* § 1057(a). Like license plates bearing the name of the issuing state, a certificate reveals on its face that it is a Government document. Indeed, when parties seek to oppose or cancel the registration of another party’s trademark, they must petition the TTAB because a registration certificate is a Government communication and the Principal Register containing all trademarks with a registration is a Government database. *See* 15 U.S.C. §§ 1063-64.

The third *Walker* factor also weighs in favor of finding that PTO registrations are government speech. Congress created the standards for registration in Section 2 of the Lanham Act, and the PTO exclusively administers the registration program. The Government thus possesses “final approval authority” over what is included in the Principal Register and which registration certificates it issues. Just as the State of Texas retained authority to refuse to create license plate designs that “might be offensive to any member of the public” in *Walker*, Congress retained the right to deny federal trademark registrations to those trademarks that “may disparage.”

This Circuit has identified four “instructive” factors to consider in whether speech is that of the Government or a private party: (1) the central purpose of the program in which the speech in question occurs; (2) the degree of editorial control exercised by the government or private entities over the content of the speech; (3) the identity of the literal speaker; and (4) whether the government or the private entity bears the ultimate responsibility for the content of the speech. *See SCV*, 288 F.3d at 618. These factors are considered as part of a “flexible approach” and are neither “exhaustive nor always uniformly applicable.” *ACLU v. Tata*, 742 F.3d 563, 569 (4th Cir. 2014) (internal quotation omitted). Here, each factor weighs in favor of concluding that trademark registration and cancellation decisions constitute government speech.

First, the “central purpose” of the program is to advance traditional governmental functions — consumer protection and the protection of private property. *See Park ‘N Fly, Inc. v. Dollar Park & Fly, Inc.*, 469 U.S. 189, 2078 (1985). The objective of the Lanham Act is “the protection of trade-marks, securing to the owner the goodwill of his business, and protecting the public against spurious and falsely marked goods.” S. Rep. No. 79-1333, at 3 (1946) *reprinted in* 1946 U.S.C.C.A.N. 1274. Furthermore, the message conveyed by a registration is a Governmental message, not a private message. A registration communicates certain evidentiary presumptions about a mark, namely, *prima facie*

evidence that the mark is valid, that the registrant owns the mark, and that the owner has an exclusive right to use the registered mark in commerce. *See* 15 U.S.C. §1057(b), 1115(a). Only the Government can establish or cancel evidentiary presumptions, and it is the Government that communicates whether it has granted the evidentiary presumptions through the Principal Register.

This Circuit's "editorial control" factor parallels the "final approval authority" factor examined in *Walker*. As discussed above, the PTO has the exclusive authority to apply the Lanham Act and determine which marks can be placed on the Principal Register or on an official registration certificate.

Third, the Government is the "literal speaker." The PTO is the publisher of the Principal Register and is the agency that makes registration and cancellation decisions. The registration certificate, which is offered as proof of the evidentiary presumptions that come with registration, is issued in the name of the United States of America under the seal of the PTO, is signed by the PTO Director, and a record of it is kept in the PTO. 15 U.S.C. § 1057. Likewise, the PTO is the speaker when it cancels registrations, such as when the TTAB issued its lengthy opinion ordering cancellation of PFI's registrations and their removal from the Principal Register.

Fourth, the Government bears responsibility for the content of the speech, *i.e.*, the cancellation of PFI's registration on grounds that it may disparage. Congress enacted the Lanham Act, including the criteria for registration eligibility,

and the PTO is responsible for applying the criteria and maintaining the Principal Register. *See WV Ass'n of Club Owners and Fraternal Servs., Inc. v. Musgrave*, 553 F.3d 292, 299 (4th Cir. 2009) (“The fact that the state is conveying a message for which it is politically accountable suggests that the speech at issue is government speech.”).

Thus, under *Walker* and *SCV*, the PTO’s cancellation of trademark registrations is government speech not subject to First Amendment scrutiny.

3. The Government Does Not Violate the First Amendment When It Establishes the Contents and Limits of a Federal Program.

“*Rust* [*v. Sullivan*, 500 U.S. 173 (1991)] stands for the principle that when the government creates and manages its own program, it may determine the contents and limits of that program.” *Planned Parenthood of S.C. v. Rose*, 361 F.3d 786, 796 (4th Cir. 2004). Accordingly, “[w]hen Congress established a National Endowment for Democracy to encourage other countries to adopt democratic principles ..., it was not constitutionally required to fund a program to encourage competing lines of political philosophy such as Communism and Facism.” *Rust*, 500 U.S. at 194; *see also Regan v. Taxation with Representation of Washington*, 461 U.S. 540, 550-51 (1983) (Congress could allow lobbying by tax-exempt veterans groups but not by other tax-exempt organizations). Under *Rust* and

Regan, Congress is permitted to limit the federal registration program to non-disparaging marks and exclude marks that may disparage.

PFI contends that the District Court's reliance on *Rust* is "profoundly disturbing" and contends *Regan* is inapposite because the subsidy provided by the government under the trademark registration program is not a direct monetary grant.⁴ PFI Br. at 29-31. But there is nothing disturbing about the government placing conditions on those who wish voluntarily to participate in a government program. It is for the political process, not the courts, to alter the scope of a federal program, and Congress has chosen to keep Section 2(a) unchanged for 70 years. No First Amendment rights are impacted by this legislative decision. Disgruntled applicants like PFI may still use their marks and sue on them without federal registration.⁵ 15 U.S.C. §1125(a).

⁴ PFI's purported distinction between the non-cash benefits provided by federal trademark registration and cases involving "financial benefits" is illogical. Federal registration is voluntary and requires payment of an application fee. Rational economic actors, like PFI, determine that the fee is worth less than the cash value of the registration benefits. Or they don't, in which case trademark owners rely on their common law and statutory rights to enforce unregistered marks.

⁵ While the Federal Circuit suggested that a disparaging mark might be ineligible for enforcement under section 43(a), 15 U.S.C. § 1125(a), this view is inconsistent with the plain language of the statute and the settled understanding of trademark experts. See *In re Simon Shiao Tam*, 808 F.3d 1321, 1344 n.11 (Moore, J.), 1375 (Lourie, J. dissenting) (Fed. Cir. 2015).

4. The Government Does Not Place Unconstitutional Conditions On Federal Trademark Registration Applicants.

In *Agency for Int'l Dev. v. Alliance for Open Soc'y Int'l, Inc.*, 133 S. Ct. 2321, 2330 (2013), the Supreme Court further clarified that the Government may impose speech conditions on parties who wish to participate in Government programs. The Court explained that the Government *may restrict* participants in programs from engaging certain speech but *may not leverage participation* in the program as a means of restricting the participant's speech outside the program. The Court distinguished "between conditions that define the federal program [permissible] and those that reach outside it [impermissible]." *Id.* at 2330.

In *Open Society*, the Court considered whether federal grants to combat HIV/AIDS could be conditioned on grant applicants (i) not using funds to advocate the legalization of prostitution or sex trafficking and (ii) adopting a "policy explicitly opposing prostitution and sex trafficking" (the "Policy Requirement"). *Id.* at 2324. There was no challenge to the first condition, which was permissible under *Rust*. *Id.* at 2330. However, the Court held the second condition violated the First Amendment because it imposed a speech restriction that went beyond the federal program. *Id.* at 2332. As the Court explained, "[a] recipient cannot avow the belief dictated by the Policy Requirement when spending [Government] funds, and then turn around and assert a contrary belief, or claim neutrality, when participating in activities on its own time and dime. By requiring recipients to

profess a specific belief, the Policy Requirement goes beyond defining the limits of the federally funded program to defining the recipient.” *Id.* at 2330.

The federal trademark registration program qualifies as permissible government speech under *Open Society*. The Lanham Act’s registration criteria *define* the Government’s program and do not limit anyone’s freedom of expression when “participating in activities on [their] own time and dime.” *Id.* at 2330. The Lanham Act sets forth overarching rules for eligibility in the federal registration program. And not just prohibiting registration of disparaging or scandalous marks. Under 15 U.S.C. § 1052(a), a mark may not be registered if it contains a geographical indication for wine or spirits other than the place of origin of the goods; depicts an insignia of the United States, a state, or a municipality; identifies a living person without consent; bears a confusing similarity to a prior mark or trade name; is generic; is primarily a surname; or is functional. 15 U.S.C. § 1052(a)-(e). These are the permissible requirements of the registration program, not devices to leverage speech outside of the program. Moreover, a trademark owner can continue to disparage anyone it wants with any words it chooses, without losing the ability to register marks that are not themselves disparaging.

PFI claims that the government’s power to control the contours of the registration program is limited because the program is not a direct exercise of

Congress's powers under the Spending Clause.⁶ PFI Br. at *31-32. This argument has no application here. While income from application fees makes the PTO roughly revenue-neutral, it is still dependent on the Congressional appropriations process to spend the money that it brings in. *See* USPTO, Performance and Accountability Report (2015) 30, *available at* <http://www.uspto.gov/sites/default/files/documents/USPTOFY15PAR.pdf>. Since Congress has ultimate control over what is done with registration revenue, it retains control over the registration program funded by these registration fees.

C. IN THE ALTERNATIVE, SECTION 2(A) IS A VALID REGULATION OF COMMERCIAL SPEECH.

Even if Section 2(a) were examined not as government speech, but as a commercial speech regulation, it is nonetheless permissible. Regulation of commercial speech passes First Amendment muster if the regulation “directly advances a substantial government interest and the measure is drawn to achieve that interest.” *Sorrell v. IMS Health, Inc.*, 131 S.Ct. 2653, 2667-68 (2011). Here, the Section 2(a) prohibition against registering marks that may disparage satisfies the test.

⁶ In *In re Tam*, 808 F.3d at 1354, the Federal Circuit cited this alleged distinction between Section 2(a) and other government program cases involving direct financial grants. But the distinction is flawed: whether money is paid directly to recipients, paid to PTO employees administering the program, or paid to cover the PTO's overhead, government money is spent on the registration program.

While it may have other substantial interests as well, the Government certainly has a substantial interest in dissociating itself from commercial trademarks that may disparage fellow American citizens or others, especially marks that may disparage based on ethnicity or race.⁷ See *Perry v. McDonald*, 280 F.3d 159, 169 (2d Cir. 2001) (recognizing Vermont's interest in "not associating the State with such [offensive] speech" when it issues vanity license plates); *Air Transp. Ass'n of Am. V. City & Cnty. of San Francisco*, 992 F. Supp. 1149, 1164 (C.D. Cal. 1998) (recognizing San Francisco's interest in dissociating itself from contractors whose employee benefit plans discriminated between employees with opposite-sex spouses and employees with same-sex domestic partners); *Bd. of Trs. of the Emps' Retirement Sys. of Balt. v. Mayor and City Council of Balt.*, 562 A.2d 720,755 (Md. 1989) (recognizing city's interest in to dissociating itself from businesses that invested in South Africa during apartheid).

Finally, Section 2(a) closely fits the Government's interest. It bars marks that "may disparage" persons, closely fitting the Government's interest of dissociating from words and symbols that may harm members of the public. See *Bd. of Trs., State Univ. of N.Y. v. Fox*, 492 U.S. 469, 480 (1989) (requiring a reasonable fit, proportionate to the interest served).

⁷ PFI claims the government interest in dissociating itself from racist marks is inapposite here because the registrations were issued decades ago. PFI Br. at 25. However, as the record demonstrates, "redskins" was a disparaging slur at the time of the registrations and it continued to be disparaging thereafter.

Accordingly, even if Section 2(a) were viewed as a regulation of commercial speech, it is permissible under the First Amendment.

D. PFI'S COMPARISONS OF TRADEMARK REGISTRATIONS TO COPYRIGHT REGISTRATIONS ARE MISPLACED.

In its brief, PFI erroneously analogizes trademark rights and federal registrations to copyrights. PFI Br. at *4, 11, 23, 25-28, 31. But the Supreme Court has long held that a trademark right has little or no analogy to a copyright. *See, e.g., Del. & Hudson Canal Co. v. Clark*, 80 U.S. 311, 322 (1871); *United Drug Co. v. Theodore Rectanus Co.*, 248 U.S. 90, 96-97 (1918). Likewise, the federal trademark and copyright registration schemes are meaningfully distinct.

First, the aims of trademark and copyright protection are different. Copyright law is meant to incentivize an author's creative expression, whereas trademark law is intended solely to prevent consumer confusion and protect the value of source-indicating marks. *See McCarthy on Trademarks* § 6:3 (2015). Because of the expressive aims of copyright, content-based restrictions on copyright registration are subject to greater scrutiny. *See Mitchell Bros. Film Grp. v. Cinema Adult Theater*, 604 F.2d 852, 856 (5th Cir. 1979).

Second, copyright registration is based on a separate clause of the Constitution. U.S. Const., Art. 1, Sec. 8, Cl. 8 – the “Copyright Clause” – empowers Congress to “promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their

respective Writings and Discoveries.” The Copyright Clause, however, is inapplicable to the federal trademark registration program. Thus, while some content-based restrictions on copyright registration may violate the Copyright Clause, similar restrictions on trademark registration would not, as the Founders included no similar Trademark Clause in the Constitution. Thus, even without regard to the First Amendment, the Copyright Clause itself prevents Congress from refusing to award copyright protection based on content. *See Mitchell Bros.*, 604 F.2d at 856.

Third, as noted above, trademark owners may sue for trademark infringement without federal registration and even over an unregistrable trademark. *See* 15 U.S.C. § 1125(a). By contrast, federal copyright registration is a prerequisite to filing a copyright infringement suit. 17 U.S.C. § 411(a); *Petrella v. Metro-Goldwyn-Mayer, Inc.*, 132 S. Ct. 1962 (2014); *Alaska Stock, LLC v. Houghton Mifflin Harcourt Publishing Co.*, 747 F.3d 673 (9th Cir. 2014). Cancelling or refusing to register a copyright would therefore effectively eliminate the copyright entirely, whereas cancelling or refusing to register a trademark merely denies the trademark owner certain advantages over and above the baseline rights already established at common law and by state trademark regimes. Thus, the denial of a copyright registration has a very significant impact on a writer,

whereas a trademark owner can still enforce an unregistered or unregistrable trademark.

Fourth, there is a fundamental difference in the matter appearing on copyright and trademark registration certificates. A trademark registration certificate bears the entire mark, is published in the Official Gazette of the PTO and ultimately registered on the Principal Register to inform the public of marks registered with the federal government. 15 U.S.C. § 1062. In contrast, a copyright registration certificate contains only certain details of a registered work, such as the title and author. *See* 17 U.S.C. § 410. A copyright registration certificate issued for a written work, such as a novel, does not display the copyrighted content. Thus, the denial of a copyright registration does not implicate the Government speech doctrine, as the denial of a trademark registration does.

III. SECTION 2(A) IS NOT UNCONSTITUTIONALLY VAGUE

The District Court correctly held that Section 2(a) is not void for vagueness; the Constitution tolerates a greater degree of vagueness when economic regulations, rather than criminal or civil penalties, are at issue. JA__ [Op.30-31]; (citing *Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 498-99 (1982); *Nat'l Endowment for the Arts v. Finley*, 524 U.S. 569, 589 (1998)). Section 2(a) neither prohibits speech or conduct, nor subjects trademark owners to criminal sanctions or civil penalties if they adopt a mark for use that is ineligible

for registration. Thus, a relaxed vagueness review standard applies. *See Finley*, 524 U.S. at 589.

PFI argues that because Section 2(a) may chill speech, a more stringent vagueness test applies. PFI Br. at *33. This argument is squarely foreclosed by *Finley*, which held that a relaxed vagueness standard applied to review of a statute setting criteria for NEA subsidies, notwithstanding the fact that those criteria may affect the artistic decisions of artists. *Finley*, 524 U.S. at 589 (“We recognize, as a practical matter, that artists may conform their speech to what they believe to be the decision making criteria in order to acquire funding.”). *Finley* postdates *Village of Hoffman Estates* and *City of Lakewood* and is controlling.

A. SECTION 2(A) PROVIDES FAIR NOTICE

The district court correctly held that Section 2(a) gives “people of ordinary intelligence a reasonable opportunity to understand what conduct it prohibits.” JA ___ [Op.32]. The Supreme Court has recognized that “the Constitution does not require perfect clarity and precise guidance,” *Ward v. Rock Against Racism*, 491 U.S. 781, 794 (1989), and because we are “condemned to the use of words, we can never expect mathematical certainty from our language.” *Grayned v. City of Rockford*, 408 U.S. 104, 110 (1972).

PFI argues that the term “may disparage” is “hopelessly subjective, indefinite, and discretionary,” because “marks may trigger feelings of

disparagement in some but not others.” PFI Br. at *34. The existence of differing views, however, falls far short of proving that the statute fails to provide adequate notice. As the District Court recognized and as PFI conceded below, at the time the Lanham Act was enacted, multiple dictionaries contained materially identical definitions of “disparage.” JA ____ [Op.32] (citing D.E.56at19n.14). These definitions, while not “mathematically certain,” provided enough notice to applicants to pass constitutional muster.

PFI cites a single case finding “disparage” to be impermissibly vague. PFI Br. at *35. But other courts, including the Supreme Court, have upheld its constitutionality. *See Town of Greece v. Galloway*, 134 S. Ct. 1811, 1823-24 (2014); *Marsh v. Chambers*, 463 U.S. 783, 794-95 (1983); *Ridley v. Mass Bay Transp. Auth.*, 390 F.3d 65, 74 (1st Cir. 2004). PFI’s argument that the *Marsh* and *Town of Greece* cases are inapposite because they involve government conduct is mistaken – vagueness challenges may be raised against statutes controlling government conduct, such as statutes requiring schools to set aside time for silent prayer or reflection. *See, e.g., Sherman ex rel. Sherman v. Koch*, 623 F.3d 501, 519-20 (7th Cir. 2010).

In addition, “may disparage” is less vague than other legislative and regulatory terms that have survived vagueness challenges before the Supreme Court and in the Fourth Circuit. *See, e.g., Finley*, 524 U.S. at 572, 590 (upholding

statute directing the NEA to fund works based on “artistic excellence and artistic merit..., taking into consideration general standards of decency and respect for the diverse beliefs and values of the American public”).

PFI argues that the vagueness of the “substantial composite” language introduces further uncertainty, since the required percentage of disparaged individuals is not clearly defined. PFI Br. at *37. However, the TTAB has held that the “substantial composite” determination is a fact-specific inquiry to be made in the context of each individual case, *PFI v. Harjo*, 284 F.Supp.2d 96, 133 n. 32 (D.D.C. 2003), and explained its reasoning for approving the 30% threshold in the instant case, JA ___ [TTAB Op.*28-29]. This is constitutionally sufficient. It would be illogical – as PFI suggests ought to be done – for the TTAB to set a specific percentage threshold at which disparagement is found, since survey evidence is not available in the vast majority of trademark cases.

PFI further argues that the lengthy procedural history in this case shows that fair notice was not present. PFI Br. at *38. It compares the instant case to *FCC v. Fox Television Stations, Inc.*, where the FCC at the time of a television broadcast had adopted a policy permitting fleeting expletives and retroactively changed course. 132 S.Ct. 2307 (2012). This case, however, is not like *Fox*. There is no regulatory change. The PTO is not abruptly departing from any previous policy permitting registration of disparaging marks. Furthermore, *Fox* involved potential

civil and criminal sanctions, which elevated the strictness of the constitutional vagueness test, and are not at issue here. *See Fox*, 132 S.Ct. at 2312.⁸

B. ENFORCEMENT OF SECTION 2(A) IS NOT ARBITRARY

PFI contends that Section 2(a) fosters arbitrary and discriminatory treatment because decisions to refuse registration are driven by the subjective views of PTO officials. PFI Br. at *39. PFI's argument holds government agencies to an impossibly high standard. Most registration decisions under Section 2 require an Examiner's subjective views (for instance, the decision to refuse registration on "likelihood of confusion" grounds). This is inevitable, and does not run afoul of the Constitution.

Nor does inconsistency among Examining Attorney decisions prove that the Lanham Act "authorizes" or "encourages" "arbitrary or discriminatory conduct." *See Boulevard Entm't*, 334 F.3d at 1343. Disagreement between officials regarding the application of a rule, especially in the absence of a full factual record, does not make a rule impermissibly vague. *See United States v. 1866.75 Board Feet And 11 Doors and Casings, More or Less, Of Dipteryx Panamensis Imported from Nicaragua*, 587 F.Supp.2d 740, 752 (E.D. Va. 2008).

⁸ Nor is the federal registration program in any way analogous to *Holder v. Humanitarian Law Project (HLP)*, 561 U.S. 1, 20 (2010) which examined the federal criminal statute for providing material support to terrorist organizations.

Moreover, PFI has not shown that Section 2(a) has been *applied* inconsistently, only that there appear to be *some* inconsistent *results*. Inconsistent results may result from differences in the evidentiary records presented, or even the willingness of different applicants to continue pursuing registration after receiving refusals. Inconsistent results cannot be used as a proxy to conclude inconsistent treatment by the PTO.

PFI argues that “there is no rhyme or reason to the PTO’s approval of some marks and disapproval of others.” *See* PFI Br. at *40. But the results table PFI provides in its own brief proves no such thing. *See* PFI Br. at *39. The table suggests that individual PTO examiners have both approved and refused registration of applications containing the terms DAGO, HEEB, FAG, INJUN, and SQUAW. *Id.* The table is grossly misleading, however, because it fails to consider the differences between the evidence presented in each set of cases.⁹ Simply providing a list of apparently inconsistent results without analyzing the

⁹ For instance, in the DAGO SWAGG case where registration was granted, the applicant was named “Dago Vasconez,” and confirmed this in a sworn statement to the PTO. *See* Application File Wrapper for Reg. No. 4,347,624 available at uspto.gov. Similarly, Reg. No. 3,322,061 – SQUAW was only granted registration after a 4 year legal battle with the PTO, which culminated in a TTAB decision holding the term registrable for ski-related goods because it would be viewed as a shorthand reference to “Squaw Valley, California,” but disparaging and unregistrable for other goods. *In re Squaw Valley Development Co.*, 2006 WL 1546500 (TTAB 2006).

reasoning behind each case proves nothing.¹⁰ Furthermore, PFI has not provided (and cannot provide) a set of inconsistent TTAB decisions regarding a single disparaging term.

PFI also contends that Examining Attorneys lack sufficient guidelines for making registration decisions under Section 2(a), since the disparagement test set forth in TMEP § 1203.03(b)(i) is not precise. PFI Br. at *40. However, the Manual does much more than that. It provides guidance as to the meaning of “substantial composite.” TMEP § 1203.03(b)(i). It explains that disparagement is considered in relation to the goods and services at issue. *Id.* It explains that intent is not a factor in the analysis. *Id.* It contains citations to the holdings of numerous disparagement cases explaining where disparagement was found, where it was not found, and why. TMEP § 1203.03(b)(ii). As the District Court held, these guidelines are more than sufficient to assist applicants in identifying matter which “may disparage,” and do not authorize or encourage arbitrary or discriminatory enforcement. JA ___ [Op.33].

¹⁰ For instance, GRINGO STYLE SALSA was permitted registration after applicant successfully argued the English translation of “Gringo” was “foreigner.” *See* PFI Br. at *4, Application File Wrapper for Reg. No. 4,252,304 available at uspto.gov. OH! MY NAPPY HAIR was permitted registration after applicant cited several articles using “nappy” to refer to the texture of hair and not as a derogatory term. *See* PFI Br. at *24, Application File Wrapper for Reg. No. 4,784,122 available at uspto.gov.

IV. THE CANCELLATION OF PFI'S REGISTRATIONS DOES NOT INFRINGE THE TEAM'S DUE PROCESS RIGHTS

PFI argues that the government's delay between issuance and cancellation of its registrations violates due process because PFI has a constitutionally protected property interest in its registrations. PFI Br. at *42-44. This argument was waived by PFI below, *emphatically*.

Before the District Court, PFI argued that the effect of cancellation on its underlying *trademarks* caused the Due Process violation. JA ___ [D.E.119at*38-39] ("PFI argued that its *trademarks* are constitutional property under the Takings and Due Process Clauses, and that cancellation of the marks' registrations constitutes a taking of the *underlying* marks.") (emphasis in original). Indeed, for strategic reasons, PFI expressly disavowed any reliance on the argument that its *registrations* were the constitutionally protected property in question. PFI insisted that "the relevant inquiry" is whether trademarks – and not the registrations – are "constitutional property." *Id.* PFI has now reversed course and argues that the relevant inquiry is whether the registrations – not the trademarks – are constitutional "property," but the argument has been waived. *See Am. Canoe Ass'n*, 326 F.3d at 515; *Bornstein*, 977 F.2d 977 F.2d 112, 115 (4th Cir. 1992).

Waiver aside, it is incorrect that a federal trademark registration is constitutionally protected property. *In re Int'l Flavors & Fragrances Inc.*, 183 F.3d 1361, 1366 (Fed. Cir. 1999). PFI attempts to distinguish *In re Int'l Flavors*

and Fragrances, Inc. on the ground that it deals with *obtaining* a federal registration and not cancelling registrations that have already issued, but the Federal Circuit's analysis shows that distinction is irrelevant to the Due Process analysis. 183 F.3d 1361, 1368 (Fed. Cir. 1999) ("There is no constitutionally protected right to federal registration of any mark. IFF may still use the marks to identify its goods and IFF still retains all common law rights associated with trademark use and ownership.").

PFI relies on two dated cases for the proposition that its registrations constitute constitutionally protected property, but in neither case was that question addressed by the court. Rather, both cases involve questions of procedural due process that happen to involve trademark registrations. *J.C. Eno (U.S) Ltd. v. Coe*, 106 F.2d 858, 859-60 (D.C. Cir. 1939) (addressing the question of joinder of necessary parties to cancellation actions under a precursor statute to the Lanham Act); *P.A.B. Produits et Appareils de Beaute v. Satinine Societa in Nome Collettivo di S.A.e.M. Usellini*, 570 F.2d 328, 333 (C.C.P.A. 1978) (addressing the question of a party's duty to supplement its responses to an adverse party's interrogatories).

PFI further argues that "stigmatizing charges" paired with "damage to tangible interest" triggers due process, citing to *Johnson v. Morris*, 903 F.2d 996 (4th Cir. 1990). PFI Br. at *44. However, *Johnson v. Morris*, which held that a Department of Corrections employee's due process had not been violated by

publication of the reasons for his demotion, is inapposite. First, the “stigmatizing charges” in that case were brought by the government, not private actors. Here, however, PFI claims the disparagement charge brought by *Appellees* is stigmatizing. Second, the “tangible interest” at issue in *Johnson* was the plaintiff’s employment status, which is not an issue here – but to the extent the cases can be analogized, *Johnson* would support Appellee’s position that denying a benefit does not impair any “tangible interest” of PFI. *Johnson*, 903 F.2d at 999-1000 (“It may be true that Johnson’s chances for advancement within the Department of Corrections may now be limited. ‘But if that were a basis for claiming damages for a deprivation of liberty...the federal courts would become the grievance machinery for public sector employees.’”).

Furthermore, PFI has waived its right to rely on the list of ways in which it has allegedly been prejudiced by the passage of time. *See* PFI Br. at *45. PFI made only vague, conclusory allegations of prejudice before the district court and should be precluded from throwing open the curtains now. JA ____ [D.E.100at39-40]. In any event, PFI’s arguments do not show prejudice. They largely describe evidence PFI hoped to collect that the term “REDSKIN” is not offensive. Evidence of contrary views would not effectively rebut Appellees’ evidence that PFI’s marks “may disparage.” Moreover, the inability to gather more information has affected both parties equally in this case.

Finally, the Lanham Act put PFI on clear notice that a petition to cancel its registration could be filed “at any time,” 15 U.S.C. § 1064, and PFI knew or should have known that trademarks that contain “redskin” could be vulnerable to a challenge under Section 2(a) – especially after the 1972 meeting between Native American leaders and Edward Bennett Williams.

V. THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION IN FINDING THAT LACHES DID NOT BAR APPELLEES’ TTAB PETITION.

A. LACHES DOES NOT APPLY BECAUSE OF THE PUBLIC INTERESTS AT STAKE.

Public interest is a factor that weighs against application of laches. *See Resorts of Pinehurst, Inc. v. Pinehurst Nat’l Corp.*, 148 F.3d 417, 423 (4th Cir. 1998); *Sara Lee Corp. v. Kayser-Roth Corp.*, 81 F.3d 455, 461-62 (4th Cir. 1996). The District Court, agreeing with the TTAB, correctly found that “there is an overriding public interest in removing from the register marks that are disparaging to a segment of the population beyond the individual petitioners.” JA __ [Op.67] . In response, PFI refers to 15 USC § 1069, which merely permits consideration of laches “where applicable.” But the public interest in this case makes laches inapplicable.

B. APPELLEES DID NOT UNREASONABLY DELAY.

PFI argues that Appellees, including Tsothigh and Pappan who were 18 years old and 19 years, 3 months old at the time of filing, unreasonably delayed in

bringing the cancellation petition. To prevail on laches, PFI needed to prove that, after turning age 18, each Defendant unreasonably delayed in petitioning the TTAB. *Brittingham v. Jenkins*, 914 F.2d 447, 456 (4th Cir. 1990); *Pro-Football, Inc. v. Harjo*, 415 F.3d 44, 48-49 (D.C. Cir. 2005) (holding that laches does not begin to run until party reaches age of majority).

There is no evidence of unreasonable delay. PFI implies that Appellees were required to file their petition as soon as they turned 18, but the law imposes no such obligation. Appellees were permitted a reasonable time to assess their claim after reaching the age of majority.

Moreover, each of the Appellees was under age 18 in April 1999 when the TTAB granted the *Harjo* petition to cancel, and they filed their petitions while the federal proceedings in *Harjo* were pending. See JA __ [D.E.51 at 2; D.E.1¶¶17,20,23-27]. It would be nonsensical and wasteful to insist that Appellees needed to file their petition before *Harjo* was concluded. The District Court agreed, stating that it was sensible, not unreasonable, to see how *Harjo* proceeded in federal court. JA __ [Op.67].

C. PFI WAS NOT PREJUDICED FROM ANY DELAY.

PFI's laches defense also fails because PFI cannot demonstrate material prejudice resulting from any delay by Appellees in filing their petition. See *Ray Commc'ns, Inc. v. Clear Channel Commc'ns, Inc.*, 673 F.3d 294, 305 (4th Cir.

2012). Mere continued expenditure to promote a challenged name is not sufficient to show economic prejudice. *See id.*; *Tisch Hotels, Inc. v. Americana Inn, Inc.*, 350 F.2d 609, 615 (7th Cir. 1965). PFI knew that its trademark registrations were vulnerable to cancellation from at least the time the TTAB granted the *Harjo* cancellation petition in 1999, long before Appellees turned 18. Any money spent to promote the trademarks after the TTAB ruled in *Harjo* was expended at PFI's peril. "[O]ne who uses debatable marks does so at the peril that his mark may not be entitled to registration." *In re McGinley*, 660 F.2d 481, 485.

CONCLUSION

For the foregoing reasons, the District Court judgment should be affirmed.

Dated: February 4, 2016

By: /s/ Jesse A. Witten

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STATEMENT IN SUPPORT OF ORAL ARGUMENT

Appellees request oral argument. PFI has challenged the constitutionality of a longstanding federal statute on several grounds. Given the number and complexity of the issues raised, oral argument will materially assist the Court.

Dated: February 4, 2016

By: /s/ Jesse A. Witten

Jesse A. Witten

CERTIFICATE OF COMPLIANCE

I certify, pursuant to Federal Rule of Appellate Procedure 32(a)(7)(C), that the attached Brief of Appellee contains 13,750 words and complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type style requirements of Federal Rule of Appellate Procedure 32(a)(6) because it has been prepared in a proportionally spaced typeface using Word 2010, in 14-point Times New Roman font.

Dated: February 4, 2016

By: /s/ Jesse A. Witten

Jesse A. Witten

CERTIFICATE OF SERVICE

I hereby certify that on February 4, 2016, I electronically filed the foregoing document with the United States Court of Appeals for the Fourth Circuit by using the appellate CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

Dated: February 4, 2016

By: /s/ Jesse A. Witten

Jesse A. Witten