

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Alexandria Division**

PRO-FOOTBALL, INC.,

Plaintiff,

v.

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

Defendants,

and

UNITED STATES OF AMERICA,

Intervenor.

Civil Action No. 1:14-cv-1043-GBL-IDD

**PRO-FOOTBALL, INC.’S MOTION FOR SUMMARY JUDGMENT ON
CONSTITUTIONAL CLAIMS III-VI**

Pursuant to Rule 56 of the Federal Rules of Civil Procedure, Plaintiff Pro-Football, Inc. moves the Court to enter summary judgment in its favor on Claims III-VI of its Complaint [Dkt. 1]. The grounds and reasons for granting this relief are stated with particularity in PFI’s accompanying Memorandum of Law in Support of Its Motion for Summary Judgment on Constitutional Claims III – VI and brief and the accompanying declarations of Todd Anten and Jeffery A. Handelman.

Dated: February 23, 2015

Respectfully submitted,

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TABLE OF CONTENTS

	<u>Page</u>
INTRODUCTION	1
STATEMENT OF UNDISPUTED FACTS	2
LEGAL STANDARD.....	5
ARGUMENT	5
I. SECTION 2(A) VIOLATES THE FIRST AMENDMENT.....	5
A. Section 2(a) Restricts Protected Speech, Including The Redskins Marks, And So Must Be Subject To First Amendment Scrutiny.....	7
1. Section 2(a) Regulates Protected Speech, As Applied And On Its Face	7
2. Section 2(a) Imposes Burdens On PFI And Trademark Holders.....	8
3. Section 2(a) Conditions Access To Federal Benefits On Restrictions Of PFI's And Other Brand Owners' Speech	11
B. Section 2(a) Is Unconstitutional On Its Face And As Applied to PFI	14
1. The Government Has No Substantial Interest In Enforcing Section 2(a).....	14
2. There Is No "Fit" Between The Government's Interests And Section 2(a).....	16
II. SECTION 2(A) IS UNCONSTITUTIONALLY VAGUE.....	18
A. Section 2(a) Does Not Provide Notice As To Which Marks "May Disparage".....	18
B. Section 2(a) Authorizes Arbitrary And Discriminatory Enforcement.....	20
C. Section 2(a) Is Impermissibly Vague As Applied To PFI	22
III. THE TTAB'S ORDER UNCONSTITUTIONALLY TAKES PFI'S PROPERTY.....	23
A. The Redskins Marks Are Property Protected By The Takings Clause.....	24
B. Cancellation of the Redskins Marks Effects A Regulatory Taking.....	25

C. The Taking of PFI’s Property Was For A Public Use But Exceeds
Constitutional Limitations27

D. PFI Was Unconstitutionally Denied Just Compensation28

IV. PFI HAS BEEN DEPRIVED OF ITS PROPERTY WITHOUT DUE PROCESS28

A. The Redskins Marks Are “Property” Under The Due Process Clause29

B. PFI Was Denied Due Process By Delay Causing Substantial Prejudice29

CONCLUSION.....30

TABLE OF AUTHORITIES

<u>Cases</u>	<u>Page</u>
<i>Adolph Coors Co. v. Bentsen</i> , 2 F.3d 355 (10th Cir. 1993)	17
<i>Agency for Int’l Dev. v. Alliance for Open Soc’y Int’l, Inc.</i> , 133 S. Ct. 2321 (2013)	11
<i>Am. Legion Post 7 of Durham, N.C. v. City of Durham</i> , 239 F.3d 601 (4th Cir. 2001)	14
<i>Anderson v. Liberty Lobby, Inc.</i> , 477 U.S. 242 (1986)	5
<i>Autor v. Pritzker</i> , 740 F.3d 176 (D.C. Cir. 2014)	12
<i>Bad Frog Brewery, Inc. v. N.Y. State Liquor Auth.</i> , 134 F.3d 87 (2d Cir. 1998)	8, 17
<i>Bd. of Regents v. Roth</i> , 408 U.S. 564 (1972)	29
<i>Bd. of Trs. of State Univ. of N.Y. v. Fox</i> , 492 U.S. 469 (1989)	16
<i>Berman v. Parker</i> , 348 U.S. 26 (1954)	27
<i>Bolger v. Youngs Drug Prods. Corp.</i> , 463 U.S. 60 (1983)	15, 17
<i>Brown v. Cal. Dep’t of Transp.</i> , 321 F.3d 1217 (9th Cir. 2003)	13
<i>Bullfrog Films, Inc. v. Wick</i> , 847 F.2d 502 (9th Cir. 1988)	11, 12, 19, 20
<i>Central Hudson Gas & Elec. Corp. v. Public Serv. Comm’n of N.Y.</i> , 447 U.S. 557 (1980)	14, 16
<i>CPC Int’l, Inc. v. Skippy, Inc.</i> , 214 F.3d 456 (4th Cir. 2000)	8
<i>Child Evangelism Fellowship of S.C. v. Anderson Sch. Dist. Five</i> , 470 F.3d 1062 (4th Cir. 2006)	13, 22
<i>City of Chi. v. Morales</i> , 527 U.S. 41 (1999)	18, 20

City of Lakewood v. Plain Dealer Publ’g Co.,
486 U.S. 750 (1988).....22, 23

Clatterbuck v. City of Charlottesville,
708 F.3d 549 (4th Cir. 2013)6

Cleveland Bd. of Educ. v. Loudermill,
470 U.S. 532 (1985).....29

Coll. Sav. Bank v. Florida Prepaid Postsecondary Educ. Expense Bd.,
527 U.S. 666 (1999).....25, 29

Columbia Union Coll. v. Clarke,
159 F.3d 151 (4th Cir. 1998)12

Cuffley v. Mickes,
208 F.3d 702 (8th Cir. 2000)6, 12, 17

Dambrot v. Cent. Mich. Univ.,
55 F.3d 1177 (6th Cir. 1995)19

Dep’t of Texas, Veterans of Foreign Wars of U.S. v. Texas Lottery Comm’n,
760 F.3d 415 (5th Cir. 2013)12

Edenfield v. Fane,
507 U.S. 761 (1993).....16

Educ. Media Co. at Va. Tech, Inc. v. Insley,
731 F.3d 291 (4th Cir. 2013)8, 14

Fields v. Prater,
566 F.3d 381 (4th Cir. 2009)11

Glynn v. EDO Corp.,
710 F.3d 209 (4th Cir. 2013)5

Goldberg v. Kelly,
397 U.S. 254 (1970).....29

Grayned v. City of Rockford,
408 U.S. 104 (1972).....18, 21

Hannegan v. Esquire, Inc.,
327 U.S. 146 (1946).....12

Harjo v. Pro-Football, Inc.,
50 U.S.P.Q.2d 1705 (T.T.A.B. 1999).....19, 20

In re Boulevard Entm’t, Inc.,
334 F.3d 1336 (Fed. Cir. 2003).....13

In re Deister Concentrator Co.,
289 F.2d 496 (C.C.P.A. 1961)27

In re Heeb Media, LLC,
89 U.S.P.Q.2d 1071, 2008 WL 5065114 (T.T.A.B. 2008).....20, 21

In re In Over Our Heads Inc.,
16 U.S.P.Q.2d 1653 (T.T.A.B. 1990).....21

In re Mavety Media Grp. Ltd.,
33 F.3d 1367 (Fed. Cir. 1994).....13

In re Squaw Valley Dev. Co.,
80 U.S.P.Q.2d 1264 (T.T.A.B. 2006).....21

In re Under Seal,
749 F.3d 276 (4th Cir. 2014)2

Hornell Brewing Co., Inc. v. Brady,
819 F. Supp. 1227 (E.D.N.Y. 1993)8, 16

Hoschar v. Appalachian Power Co.,
739 F.3d 163 (4th Cir. 2014)5

Hustler Magazine, Inc. v. Falwell,
485 U.S. 46 (1988).....15

Jartech, Inc. v. Clancy,
666 F.2d 403 (9th Cir. 1982)17

Keebler Co. v. Rovira Biscuit Corp.,
624 F.2d 366 (1st Cir. 1980).....25

Kelo v. City of New London, Conn.,
545 U.S. 469 (2005).....28

Legal Servs. Corp. v. Velazquez,
531 U.S. 533 (2001).....11

Lytle v. Doyle,
326 F.3d 463 (4th Cir. 2003)22

McAirlaids, Inc. v. Kimberly-Clark Corp.,
756 F.3d 307 (4th Cir. 2014)29

In re McGinley,
660 F.2d 481 (C.C.P.A. 1981)13, 14

Miami Herald Publ'g Co. v. Tornillo,
418 U.S. 241 (1974).....9

N.C. Right to Life, Inc. v. Leake,
525 F.3d 274 (4th Cir. 2008)20

Nat'l Abortion Fed'n v. Metro. Atlanta Rapid Transit Auth.,
112 F. Supp. 2d 1320 (N.D. Ga. 2000).....20

Norfolk 302, LLC v. Vassar,
524 F. Supp. 2d 728 (E.D. Va. 2007)18, 20, 22

PSINet, Inc. v. Chapman,
362 F.3d 227 (4th Cir. 2004)9

Park ‘N Fly, Inc. v. Dollar Park & Fly, Inc.,
469 U.S. 189 (1985).....12

Penn Cent. Transp. Co. v. City of New York,
438 U.S. 104 (1978).....25

Penn. Coal Co. v. Mahon,
260 U.S. 393 (1922).....25, 26

Perry v. Sindermann,
408 U.S. 593 (1972).....11, 29

Piazza’s Seafood World, LLC v. Odom,
448 F.3d 744 (5th Cir. 2006)7

Pro-Football, Inc. v. Harjo,
284 F. Supp. 2d 96 (D.D.C. 2003).....2, 19, 20

PruneYard Shopping Ctr. v. Robins,
447 U.S. 74 (1980).....25

R.A.V. v. City of St. Paul, Minn.,
505 U.S. 377 (1992).....6

Rex, Inc. v. Kusha, Inc.,
2001 WL 209899 (W.D.N.Y. Feb. 23, 2001).....29

Rodriguez v. Maricopa Cty. Comm. Coll. Dist.,
605 F.3d 703 (9th Cir. 2010)15

Rosenberger v. Rector & Visitors of the Univ. of Va.,
515 U.S. 819 (1995).....5, 6, 11, 13

Ruckelshaus v. Monsanto Co.,
467 U.S. 986 (1984).....24, 25, 26

Sambo’s Restaurants, Inc. v. City of Ann Arbor,
663 F.2d 686 (6th Cir. 1981)8, 17

Simon & Schuster, Inc. v. Members of N.Y. State Crime Victims Bd.,
502 U.S. 105 (1991).....9, 10

Smith v. Goguen,
415 U.S. 566 (1974).....18

Snyder v. Phelps,
562 U.S. 443, 131 S. Ct. 1207 (2011).....7, 17

Sons of Confederate Veterans, Inc. v. Glendening,
954 F. Supp. 1099 (D. Md. 1997).....6, 13

Sorrell v. IMS Health, Inc.,
131 S. Ct. 2653 (2011).....8, 14, 17

Stoller v. Ponce,
113 F. App'x 403 (Fed. Cir. 2004)28

Stop the Beach Renourishment, Inc. v. Florida Dep't of Env'tl. Prot.,
560 U.S. 702 (2010).....25

Texas v. Johnson,
491 U.S. 397 (1989).....16

In re Trade-Mark Cases,
100 U.S. 82 (1879).....24

United Food & Commercial Workers Union, Local 1099 v. Sw. Ohio Reg'l Transit Auth.,
163 F.3d 341 (6th Cir. 2006)22, 23

United States v. Eichman,
496 U.S. 310 (1990).....15

United States v. Lanning,
723 F.3d 476 (4th Cir. 2013)18, 23

Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.,
425 U.S. 748 (1976).....8, 15

Wishnatsky v. Rovner,
433 F.3d 608 (8th Cir. 2006)6

Withrow v. Larkin,
421 U.S. 35 (1975).....30

Zoltek Corp. v. United States,
442 F.3d 1345 (Fed. Cir. 2006).....24

Statutes and Regulations

15 U.S.C. § 1051.....29

15 U.S.C. § 1057.....4, 13

15 U.S.C. § 1060.....25

15 U.S.C. § 1065.....4

15 U.S.C. § 1067.....28

15 U.S.C. § 1115.....4

15 U.S.C. § 1116.....4
 15 U.S.C. § 1117.....4
 15 U.S.C. § 1072.....4
 15 U.S.C. § 1125.....4
 37 C.F.R. § 2.129(a).....28
 Act of July 5, 1946, Pub. L. No. 79-489, 60 Stat. 427 (1946).....17, 26
 Haw. Rev. Stat. § 482-21(2)26
 N.M. Stat. Ann. § 57-3B-4(2).....26
 W. Va. Code, § 47-2-2(2)26

Additional Authorities

Brief for Appellee—Director of the PTO, *In re Tam*, No. 14-1203,
 Dkt. 36 (Fed. Cir. Aug. 4, 2014)8, 15
 Bartholomew Diggins, *The Lanham Trade-Mark Act*, 35 GEO. L. J. 147 (1947).....27
*Hearings on H.R. 4744 Before the Subcomm. on Trademarks of the
 H. Comm. on Patents, 76th Cong., 1st Sess. (1939)*.....15, 19
 J. Thomas McCarthy, *MCCARTHY ON TRADEMARKS & UNFAIR COMPETITION*
 (4th ed.).....24, 26
 Trademark Manual of Examining Procedure § 1203.03(b).....21

INTRODUCTION

“Washington Redskins” is among the most famous trademarks in sports. Adopted in 1933, it was first approved and registered by the United States Patent and Trademark Office (“PTO”) in 1967. Five additional variations of “Redskins” trademarks were approved and registered between 1974 and 1990 (collectively, the “Redskins Marks”). Now, almost *fifty years* later, the PTO has changed its mind, scheduling the cancellation of the Redskins Marks under Section 2(a) of the Lanham Act, 15 U.S.C. § 1052(a),¹ on the ground that they “may [have] disparage[d]” Native Americans when they were first registered. This recent about-face improperly singles out Pro-Football, Inc. (“PFI”) for disfavored treatment based solely on the content of its protected speech, interfering with the ongoing public discourse over the Redskins’ name by choosing sides and cutting off the debate. This the U.S. Constitution does not tolerate.

The June 18, 2014 cancellation order of the Trademark Trial and Appeal Board (the “TTAB Order,” at A13977-14153)² violates the U.S. Constitution in four separate ways:

1. By enabling the PTO to cancel PFI’s registrations, and their concomitant benefits, based solely on the perceived viewpoint of PFI’s protected First Amendment speech, and certainly without directly advancing a substantial and legitimate state interest;
2. By offering no meaningful notice to PFI or other trademark owners as to what is a “disparaging” mark, nor objective standards for the PTO to apply;
3. By enabling a regulatory taking of PFI’s property for an unconstitutional public use without just compensation under the Takings Clause; and

¹ As used in this memorandum, the term “Section 2(a)” refers only to the portion of 15 U.S.C. § 1052(a) addressing whether a mark “may disparage . . . persons, living or dead, institutions, beliefs, or national symbols, or bring them into contempt, or disrepute.”

² Citations to “A_____” are to the certified record of the proceedings below, which has been transmitted and admitted to this Court. (*See* Declaration of Todd Anten (“Anten Decl.”) ¶¶2-4).

4. By depriving PFI of its long-held registrations without the due process required by the Fifth Amendment.

Of course, this Court need not even address the instant motion if the Court determines—as it should—that the Redskins Marks were not disparaging to a substantial composite of Native Americans at the time that each mark was registered. *See In re Under Seal*, 749 F.3d 276, 293 (4th Cir. 2014) (affirming “long-established constitutional-avoidance rule”); *Pro-Football, Inc. v. Harjo*, 284 F. Supp. 2d 96, 100-01 (D.D.C. 2003) (refusing to address constitutional claims on nearly identical record because of an absence of evidence that the Redskins Marks disparaged a substantial composite of Native Americans at the time of their respective registrations). But if this Court does not so hold, it should nonetheless recognize that the TTAB Order offends the U.S. Constitution on multiple grounds. PFI’s motion for summary judgment should be granted.

STATEMENT OF UNDISPUTED FACTS

1. The team name “Redskins” was selected in 1933 by the Redskins’ then-owner George Preston Marshall, when the franchise was located in Boston. The name “Redskins” has been used by the franchise continuously since 1933. (Dkt. 1 ¶34; Dkt. 41 ¶34).

2. The Redskins Marks were registered by the PTO in 1967, 1974, 1978, and 1990. (Dkt. 51 ¶8(a)-(f)). The registrations for the Redskins Marks were renewed in 1987, 1994, 1998, and 2004. (*Id.*). The registrations for the Redskins Marks were again renewed in 2004, 2005, 2007, 2014, and 2015. (*Id.*). PFI owns, and has always owned, the Redskins Marks. (*Id.*).

3. At the various times that each of the Redskins Marks was registered, the word “redskins” was used by Native Americans as a name for Native American sports teams. (*See Anten Decl.* ¶5(a)-(mm) & Exs. 2-40).

4. Since they were registered, PFI has invested millions of dollars in the use, promotion, registration, and protection of the Redskins Marks. For example, PFI invested ██████████ in marketing and promotional expenses for the years 1975, 1976, and 1980-1992 combined, as well as an additional ██████████ in marketing and promotional expenses between April 1, 1999 and March 31, 2007. (A310-12 ¶¶4-8; Anten Decl. ¶¶7(a)-(h), 8 & Exs. 41-48).

5. Since the Redskins Marks were registered, PFI and NFL Properties LLC and its predecessor corporation National Football League Properties, Inc. (collectively, “NFLP”) have also expended money and other resources to protect PFI’s trademark rights from infringement and dilution. (A312 ¶9).

6. Corporate sponsors vie to associate products and services with the Redskins Marks, and merchandise bearing the Redskins Marks is widely sold, purchased, and recognized. (A310 ¶5).

7. The Redskins’ brand, including the Redskins Marks, is extraordinarily valuable. For example, according to *Forbes* magazine, the team’s value increased from approximately \$741 million in 2000 to approximately \$1.423 billion in 2006. (A314 ¶13). Further, *Forbes*’ valuations of PFI’s brand management were approximately \$112 million and \$130 million for the years 2005 and 2006, respectively. (*Id.* ¶14). As of August 2014, the team was valued at \$2.4 billion, with its brand management valued at \$214 million. (Anten Decl. ¶11 & Ex. 51).

8. Cancellation of Redskins Marks’ registrations would affect the value of PFI’s Marks. (A314 ¶15).

9. A federal trademark registration provides numerous legal benefits to registrants, including, *inter alia*: (1) *prima facie* evidence of validity, ownership, and exclusive use (*see* Declaration of Jeffery A. Handelman, Ex. 1 (“Handelman Rep.”), at 7); (2) constructive notice of ownership (*id.*); (3) constructive use priority from the filing date of the application (*id.* at 7-8); (4)

allowing the registrant to pursue counterfeiting claims and remedies (*id.* at 9); (5) allowing the registrant to stop the importation of infringing goods (*id.* at 10); and (6) providing a basis for obtaining registration in foreign countries (*id.* at 10-11). *See also* 15 U.S.C. §§ 1057(b)-(c), 1115(a), 1116(d), 1117(b)-(c), 1072.

10. A federal trademark registration provides additional benefits to trademarks that have been registered for many years, including allowing a mark to become “incontestable” after five years of registration, which provides *conclusive* evidence of: (1) the mark’s validity; (2) the registrant’s ownership of the mark; and (3) registrant’s exclusive right to use the mark. (Handelman Rep. at 14-15). Each of the Redskins Marks was incontestable at the time of its cancellation. (Dkt. 51 ¶¶8(a)-(f)). In addition, federal registration provides supporting evidence that a mark is famous—a prerequisite for a Lanham Act dilution claim. (Handelman Rep. at 9-10); *see also* 15 U.S.C. §§ 1125(c), 1065, 1115(b).

11. A federal trademark registration also provides an easily accessible public record of trademark rights, which: (1) prevents unwitting infringement by users (Handelman Rep. at 11); (2) prevents trademark examiners from approving confusingly similar marks for registration (*id.* at 7-9); and (3) serves as a strong enforcement tool to deter infringement (*id.* at 6-7, 11).

12. The benefits described above in ¶¶9-11 above are not available to trademark owners who have been denied a federal registration, nor to trademark owners such as PFI whose federal registrations for their marks have been cancelled. (*Id.* at 16-17).

13. On March 7, 2013, the announced panel of three TTAB judges—Administrative Trademark Judges Kuhlke, Cataldo, and Bergsman—held a hearing on the merits of Defendants’ petition for cancellation of the Redskins Marks. (A13976-77).

LEGAL STANDARD

A motion for summary judgment shall be granted if the pleadings and supporting documents “show[] that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law.” Fed. R. Civ. P. 56(a). The Court is to “view the facts and draw all reasonable inferences in the light most favorable to the non-moving party.” *Glynn v. EDO Corp.*, 710 F.3d 209, 213 (4th Cir. 2013). “However, to show that a genuine issue of material fact exists, the non-moving party must set forth specific facts that go beyond the ‘mere existence of a scintilla of evidence.’” *Hoschar v. Appalachian Power Co.*, 739 F.3d 163, 169 (4th Cir. 2014) (quoting *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 252 (1986)).

ARGUMENT

I. SECTION 2(A) VIOLATES THE FIRST AMENDMENT

As applied by the TTAB, Section 2(a) discriminates against PFI for using its eighty-year-old “Washington Redskins” team name. Notwithstanding the TTAB’s erroneous conclusion that the Redskins Marks “may [have] disparage[d]” Native Americans at the time each was first registered, the reality is that the connotation of the team’s name is the subject of considerable public debate. The TTAB Order regulates only one side of that debate by punishing PFI’s use of the Redskins Marks, which transmits PFI’s message that the “Redskins” name, considered in its proper context, is being used in a respectful manner. By improperly singling out PFI for disfavored treatment based on its use of the Redskins Marks, the TTAB Order “distort[s] public debate” “with a censorial intent to value some forms of speech over others.” *Clatterbuck v. City of Charlottesville*, 708 F.3d 549, 556 (4th Cir. 2013). And it does so without directly advancing any legitimate and substantial state interest, in violation of the First Amendment.

Moreover, although “[i]t is axiomatic that the government may not regulate speech based on its *substantive content* or the *message it conveys*,” Section 2(a) does both on its face. *Rosenberger*

v. Rector & Visitors of the Univ. of Va., 515 U.S. 819, 828 (1995) (emphases added). Section 2(a)'s plain text regulates marks based on whether their content “may disparage ... persons.” This is a particularly “egregious form of content discrimination,” *id.* at 829, because it distinguishes between marks based on their viewpoints—a mark that is determined to **disparage** certain persons, *e.g.*, Native Americans, cannot hold a federal registration, but a mark that is **neutral** toward or **celebrates** the same persons may be registered. *See, e.g.*, INDIAN MOTORCYCLE (Reg. No. 4,676,623),³ CHIEF BE BRAVE (Reg. No. 4,272,316); AMERICAN INDIAN HERITAGE MONTH (Reg. No. 3,224,673); SIOUX CHIEF (Reg. No. 4,543,647). Viewpoint-based regulations such as Section 2(a) generally amount to “blatant” violations of the First Amendment. *Rosenberger*, 515 U.S. at 829. This effectively ends the analysis here—the Court can and should find Section 2(a) unconstitutional on the basis of its viewpoint-based restrictions alone. *See, e.g., Wishnatsky v. Rovner*, 433 F.3d 608, 611-12 (8th Cir. 2006) (viewpoint discrimination violates First Amendment principles).⁴

Even if this Court does not determine that Section 2(a) is an impermissible viewpoint-based restriction, Section 2(a) nonetheless violates the First Amendment, both as applied to PFI and facially, because it: (1) restricts protected speech; and (2) does not directly advance a substantial and legitimate state interest.

³ The INDIAN MOTORCYCLE mark, registered for motorcycle tents, includes a profile of a man wearing a Native American headdress. The owner's additional mark, INDIAN (Reg. No. 921,459), is registered for motorcycles—one of which is popularly referred to as the “Iron Redskin.” (A9850-60).

⁴ *See also, e.g., Rosenberger*, 515 U.S. at 830-32 (policy that denied funding to student newspapers that expressed a religious viewpoint violated First Amendment); *Cuffley v. Mickes*, 208 F.3d 702, 708, 711-12 (8th Cir. 2000) (regulation preventing Adopt-A-Highway applicants from expressing discriminatory viewpoint violated the First Amendment); *Sons of Confederate Veterans, Inc. v. Glendening*, 954 F. Supp. 1099, 1102 (D. Md. 1997) (guidelines that proscribed “hostile and racially derogatory expressions from any point of view” violated First Amendment); *cf. R.A.V. v. City of St. Paul, Minn.*, 505 U.S. 377, 389 (1992) (“State may not prohibit only that commercial advertising that depicts men in a demeaning fashion”).

A. **Section 2(a) Restricts Protected Speech, Including The Redskins Marks, And So Must Be Subject To First Amendment Scrutiny**

The application of the First Amendment to Section 2(a) is straightforward: because it burdens and denies benefits to protected speech, both facially and as applied to the Redskins Marks, it implicates First Amendment principles and thus must be subjected to First Amendment scrutiny. Defendants and the Government may attempt to sidestep application of the First Amendment by arguing that Section 2(a) does not prohibit the use of the Redskins Marks or other unregistered trademarks; that position, however, contravenes decades of jurisprudence recognizing that the denial of federal benefits to disfavored speech squarely implicates the First Amendment and thus must satisfy its exacting standards.

1. **Section 2(a) Regulates Protected Speech, As Applied And On Its Face**

As applied here, Section 2(a) regulates PFI's protected speech. The TTAB Order affects PFI's message in the ongoing public debate about the Washington Redskins' team name, which PFI has consistently maintained is, in this context, respectful of Native Americans. What PFI says in this debate, as well as "the whole context of how and where it [chooses] to say it," "is entitled to 'special protection' under the First Amendment" as a form of protected speech. *Snyder v. Phelps*, 562 U.S. 443, 131 S. Ct. 1207, 1219 (2011).

Moreover, the TTAB Order, as well as all other applications of Section 2(a), affect trademarks, which the Government has already conceded "are a form of commercial speech." Br. for Appellee—Dir. of the USPTO at 34 n.5, *In re Tam*, No. 14-1203, Dkt. 36 (Fed. Cir. Aug. 4, 2014) ("PTO *Tam* Br."); *see also Piazza's Seafood World, LLC v. Odom*, 448 F.3d 744, 752-53 (5th

Cir. 2006) (trade names “Cajun Boy” and “Cajun Delight” are commercial speech).⁵ As the Fourth Circuit recognizes, “commercial speech is protected by the First Amendment.” *Educ. Media Co. at Va. Tech, Inc. v. Insley*, 731 F.3d 291, 297 (4th Cir. 2013). Indeed, because trademarks “provide consumers with information about the quality of goods” and services, *see CPC Int’l, Inc. v. Skippy, Inc.*, 214 F.3d 456, 461 (4th Cir. 2000), they are central to the First Amendment’s protection of the “free flow of commercial information,” *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 763 (1976); *see also Sambo’s Restaurants, Inc. v. City of Ann Arbor*, 663 F.2d 686, 694 (6th Cir. 1981) (trade name conveyed information “because of the associations that have grown up over time between the name and the [price and quality of goods and services]”). Because Section 2(a) by definition regulates this protected speech, it necessarily implicates the First Amendment.

2. Section 2(a) Imposes Burdens On PFI And Trademark Holders

The First Amendment prohibits lawmakers from “silenc[ing] unwanted speech by burdening its utterance,” just as it prohibits them from banning speech outright. *Sorrell v. IMS Health, Inc.*, 131 S. Ct. 2653, 2664 (2011). Section 2(a) thus infringes First Amendment rights because it burdens the Redskins Marks and other marks that the PTO determines to be disfavored.

Specifically, the denial or cancellation of a federal trademark registration under Section 2(a) penalizes the use of certain trademarks. Without a federal registration, enforcement of trademark rights becomes exponentially more burdensome. (*See supra* SUF ¶¶9-12; Handelman Rep. at 16-17). At the same time, future infringement is more likely because federal registration provides a

⁵ *See also, e.g., Bad Frog Brewery, Inc. v. N.Y. State Liquor Auth.*, 134 F.3d 87, 96-97 (2d Cir. 1998) (source-identifying product label akin to trademark and thus commercial speech); *Hornell Brewing Co., Inc. v. Brady*, 819 F. Supp. 1227, 1233 (E.D.N.Y. 1993) (“The Crazy Horse Malt Liquor label is indisputably commercial speech.”).

strong message and warning of the existence of exclusive rights. (Handelman Rep. at 6-7). Further, denial of a federal registration under Section 2(a) may affect a trademark holder's state and common-law rights. *See infra* Part III.B.

And when the TTAB *cancel*s a previously-granted registration, as it has done here, the penalties suffered by the trademark owner are even more severe. Having already used and promoted its mark—in some cases, for decades, such as PFI—the owner must choose between abandoning its valuable investment (and the invaluable goodwill associated with its longstanding marks) or paying the hefty cost of enforcement without a registration. Owners of marks that have been registered for more than five years also lose the additional benefits of owning an “incontestable” mark, including possession of conclusive evidence of key elements of an infringement claim. (Handelman Rep. at 14-15, 17). And, of course, the very fact of a public cancellation is likely to spur infringement. PFI, whose Redskins Marks were incontestable after nearly fifty years of federal registration, will bear all of these burdens. (*See id.* 16-17).

The First Amendment requires that speech-based burdens be closely scrutinized because, even though they may not outright prohibit speech, they may nonetheless “effectively drive certain ideas or viewpoints from the marketplace.” *Simon & Schuster, Inc. v. Members of N.Y. State Crime Victims Bd.*, 502 U.S. 105, 116 (1991).⁶ Section 2(a)'s application to PFI's marks does just that—by cancelling the registrations for the Redskins Marks, the TTAB Order dampens PFI's side of the healthy public discourse over the Washington Redskins' name. *See, e.g., Miami Herald Publ'g Co. v. Tornillo*, 418 U.S. 241, 256-57 (1974) (statute that “exact[ed] a penalty” that would “dampen[] the

⁶ Even regulations that do not impose direct financial burdens raise First Amendment concerns. *See, e.g., PSINet, Inc. v. Chapman*, 362 F.3d 227, 236-37 (4th Cir. 2004) (restriction on online access to indecent material an unconstitutional burden on adult speech, even though it did not prevent speech).

vigor and limit[] the variety of public debate” was unconstitutional). Moreover, by moving the debate from the public forum to the PTO’s closed offices, Defendants’ in effect sought to drive PFI to abandon its use of the “Redskins” name *entirely*.⁷

In addition, Section 2(a) chills the speech of other brand owners. Faced with the possibility of being denied a federal registration—or worse, cancellation after years of investment-backed brand development—new brand owners are more likely to be chilled by avoiding brand names that may be arguably controversial, or that otherwise contribute to the public discourse, for fear of later being deemed “disparaging.” Similarly, trademark owners whose registrations are cancelled may choose to remove their cancelled trademarks from the marketplace entirely, rather than continue devoting resources to a mark that cannot receive the Lanham Act’s crucial federal protections. The little relevant legislative history on Section 2(a) demonstrates that this was actually the intended effect of Section 2(a). *See infra* Part I.B.1.

Because Section 2(a) burdens and chills the use of the Redskins Marks and other trademarks—even though it does not directly ban their use—it raises First Amendment concerns, and must be scrutinized to determine whether such restrictions are justified. *See, e.g., Simon & Schuster*, 502 U.S. at 115 (law that burdened criminals’ speech by denying them profits from authoring books about their crimes implicated the First Amendment and was subject to scrutiny).

⁷ *See, e.g.,* A8546 (Ms. Blackhorse’s Responses to PFI’s First Set of Interrogatories) (objecting to “[t]he team’s name and symbols,” contending she will feel disrespected as long as the team “uses the term ‘redskins,’” and concluding that “the trademarks owned by [PFI] must be eliminated”).

3. **Section 2(a) Conditions Access To Federal Benefits On Restrictions Of PFI's And Other Brand Owners' Speech**

Even if Section 2(a) did not so heavily burden and discourage disfavored marks, it nonetheless impinges upon PFI's and other trademark owners' free speech rights by conditioning access to the federal registration program on whether a mark "may disparage."

The Supreme Court has unequivocally stated that the Government "may not deny a benefit to a person on a basis that infringes his constitutionally protected interests—especially, his interest in freedom of speech." *Perry v. Sindermann*, 408 U.S. 593, 597 (1972); *see also Fields v. Prater*, 566 F.3d 381, 391 (4th Cir. 2009) ("there are some reasons upon which the government may not rely" when denying benefits) (citation and quotation marks omitted). A statute that conditions benefits on the curtailment of speech impinges on First Amendment rights when the benefits themselves: (1) are "designed to facilitate private speech" rather than to "subsidize transmittal of a message [the government] favors," *Legal Servs. Corp. v. Velazquez*, 531 U.S. 533, 542 (2001) (quoting *Rosenberger*, 515 U.S. at 834); or (2) "regulate speech *outside* the contours of the [benefits] program itself," *Agency for Int'l Dev. v. Alliance for Open Soc'y Int'l, Inc.*, 133 S. Ct. 2321, 2328 (2013) (emphasis added).

Accordingly, in *Bullfrog Films, Inc. v. Wick*, 847 F.2d 502 (9th Cir. 1988), the Ninth Circuit held that regulations that conditioned foreign filmmakers' ability to obtain benefits under the Beirut Agreement—including, *inter alia*, exemption from customs duties and import licenses for their films—interfered with the filmmakers' First Amendment rights. The broad purpose of the Agreement was to "facilitate the international circulation" of "educational, scientific and cultural" audio-visual materials. *Id.* at 504. The regulations at issue included a requirement that the works not "appear to have as their purpose or effect to attack or discredit economic, religious, or political views or practices." *Id.* at 505. The Ninth Circuit ruled that the regulations disadvantaged some

materials on the basis of their content, thereby “forc[ing] film makers to choose between exercising their right to free speech and foregoing benefits under the Agreement, or curtailing their speech and obtaining the benefits.” *Id.* at 511. After finding that the restrictions “infringe[d] the First Amendment,” the Ninth Circuit applied First Amendment scrutiny. *Id.*⁸

The same outcome is warranted here. Congress provided the benefits of federal registration to facilitate the private use and enforcement of trademarks, “secur[ing] to the owner of the mark the goodwill of his business.” *Park ‘N Fly, Inc. v. Dollar Park & Fly, Inc.*, 469 U.S. 189, 198 (1985). Section 2(a) conditions access to these important benefits on brand owners’ curtailing of their right to use an identifier that “may disparage,” thereby requiring owners to choose between the benefits of federal registration and their right to use their preferred mark—here, PFI has been denied these benefits based on its choice to use its long-held “Washington Redskins” team name. No more is needed to conclude that Section 2(a) restricts First Amendment rights, both facially and as applied, so the Court must proceed to scrutinize the conditions to determine whether such restrictions comply with the First Amendment. *See Bullfrog Films*, 847 F.2d at 512 (applying First Amendment scrutiny after finding benefits were conditioned on speech restriction); *Dep’t of Texas, Veterans of Foreign*

⁸ *See also, e.g., Autor v. Pritzker*, 740 F.3d 176, 182-83 (D.C. Cir. 2014) (the unconstitutional conditions doctrine has been extended “to a broad range of non-monetary benefits” and no circuit “has found a benefit too insignificant”); *Cuffley*, 208 F.3d at 708 (state could not condition participation in adopt-a-highway program on applicants not discriminating on the basis of race, religion, color, national origin, or disability); *Columbia Union Coll. v. Clarke*, 159 F.3d 151, 156 (4th Cir. 1998) (requirement that grants given to private colleges not be used for “sectarian purposes” triggered First Amendment scrutiny); *cf. Hannegan v. Esquire, Inc.*, 327 U.S. 146, 157-59 (1946) (denying second-class mailing privileges to a magazine because it is indecent or morally improper violates the First Amendment).

Wars of U.S. v. Texas Lottery Comm'n, 760 F.3d 415, 438 (5th Cir. 2013) (First Amendment scrutiny applied where statute conditioned benefits on restricting exercise of free speech).⁹

Notwithstanding that Section 2(a) denies benefits on this basis and places burdens on marks deemed “disparaging,” the Government has previously relied on *In re McGinley*, 660 F.2d 481 (C.C.P.A. 1981), and its progeny¹⁰ for the proposition that *no* First Amendment concerns can be triggered by Section 2(a) because “the PTO’s refusal to register [a speaker’s] mark does not affect his right to use it.” *Id.* at 484. *McGinley*, which is not binding on this Court, is wrong on the merits—as detailed above, Section 2(a) burdens certain disfavored marks and denies federal benefits to those marks, which indisputably “affect[s]” their use. In any event, *McGinley* was decided almost thirty-five years ago.¹¹ First Amendment law has changed significantly, and the Supreme Court has

⁹ Some courts have analyzed conditions on the receipt of government benefits as restrictions on access to a government forum. *See, e.g., Rosenberger*, 515 U.S. at 829-30 (student activity funding was a government forum in a “metaphysical” sense); *Sons of Confederate Veterans*, 288 F.3d at 623 (analyzing specialty license plate program as a government forum). But regardless of whether a program is considered a government forum, content- and viewpoint-based conditions on access must be reviewed for consistency with the First Amendment, and viewpoint discrimination—like that imposed by Section 2(a)—is *always* impermissible. *See Child Evangelism Fellowship of S.C. v. Anderson Sch. Dist. Five*, 470 F.3d 1062, 1067 (4th Cir. 2006) (“*CEF S.C.*”) (“The ban on viewpoint discrimination is a constant.”). In any event, if the federal trademark program were considered a government forum for private speech, Section 2(a)’s restrictions on speech would be impermissible for the additional reason that its restrictions are not even reasonable in light of the purposes served by the federal registration program. *See, e.g., Brown v. Cal. Dep’t of Transp.*, 321 F.3d 1217, 1222-23 (9th Cir. 2003) (exemption from permit requirements for American flags hung over highway overpasses was not reasonably related to the purpose of the permit program).

¹⁰ While subsequent decisions followed *McGinley*, they adopted *McGinley*’s reasoning based on precedent, without analyzing the First Amendment issues presented by Section 2(a). *See, e.g., In re Boulevard Entm’t, Inc.*, 334 F.3d 1336, 1343 (Fed. Cir. 2003) (citing *McGinley* without analysis); *In re Mavety Media Grp. Ltd.*, 33 F.3d 1367, 1374 (Fed. Cir. 1994) (“our precedent forecloses ... challenges to [Section 2(a)] as unconstitutional on its face or as applied”) (citing *McGinley*).

¹¹ Amendments since 1981 have resulted in the Lanham Act imposing even greater burdens on unregistered marks. For example, the Trademark Law Revision Act of 1989 allows a party with a bona fide intent to use a mark in commerce to file an “intent-to-use” application and gain priority through constructive use. *See* 15 U.S.C. § 1057(c); (Handelman Rep. at 7-8).

since confirmed that the “Government’s content-based *burdens* must satisfy the same rigorous scrutiny as its content-based *bans*.” *Sorrell*, 131 S. Ct. at 2664 (quoting *United States v. Playboy Entm’t Grp., Inc.*, 529 U.S. 803, 812 (2000)) (emphases added). Indeed, “the amount of burden on speech needed to trigger First Amendment scrutiny as a threshold matter is minimal.” *Am. Legion Post 7 of Durham, N.C. v. City of Durham*, 239 F.3d 601, 607 (4th Cir. 2001). Thus, *McGinley* is certainly not persuasive now (to the extent it ever was).

B. Section 2(a) Is Unconstitutional On Its Face And As Applied to PFI

Because Section 2(a) imposes restrictions on protected speech, it must be scrutinized for compatibility with the First Amendment. Commercial speech regulations are traditionally subjected to an “intermediate” level of scrutiny. *See, e.g., Sorrell*, 131 S. Ct. at 2667-68 (describing commercial speech scrutiny).¹² Under that standard, the regulation of lawful, non-misleading commercial speech is unconstitutional unless the Government demonstrates that “the statute directly advances a substantial government interest and that the measure is drawn to achieve that interest.” *Id.* at 2668 (citing, *inter alia*, *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm’n of N.Y.*, 447 U.S. 557, 566 (1980)). The Government cannot meet that burden here, either facially or with respect to the TTAB’s application of Section 2(a) to PFI.

1. The Government Has No Substantial Interest In Enforcing Section 2(a)

Section 2(a) fails intermediate scrutiny at the outset because the Government has no substantial government interest generally in withholding federal registration from marks that “may disparage,” nor specifically in cancelling the registrations for the Redskins Marks.

¹² The Supreme Court recently suggested that content-based regulations (like Section 2(a)) must satisfy a more “heightened scrutiny,” even when the regulation affects only commercial speech. *See Sorrell*, 131 S. Ct. at 2664; *see also Educ. Media Co.*, 731 F.3d at 297-98 (discussing *Sorrell*). The Court need not reach this issue because Section 2(a) fails even the intermediate scrutiny traditionally afforded to regulations on commercial speech. *See Sorrell*, 131 S. Ct. at 2667 (so concluding).

The cancellation of PFI's registrations was specifically brought about by Defendants' desire to *deter* the use of the Redskins Marks because PFI's use of the Redskins' name "offends" them. (A4 ¶1; *see also supra* n.7) Congress in fact enacted Section 2(a) for the purpose of suppressing the use of disparaging marks to shield the public from offensiveness. These "policy objectives" are clear from the face of the statute. *See PTO Tam Br.* at 33-4 n.4. The sparse legislative history addressing Section 2(a) confirms that the provision's purpose was to "take care of" the possibility of brand owners "abus[ing]" persons with their marks by not "permit[ing]" this type of mark. *Hearings on H.R. 4744 Before the Subcomm. on Trademarks of the H. Comm. on Patents, 76th Cong., 1st Sess. 18-21 (1939) (statement of Rep. Thomas E. Robertson) (Rep. Rogers) (available at Anten Decl. ¶12 & Ex. 52 at 19).*

Deterrence or suppression of purportedly offensive speech is *never* a valid substantial government interest. *See Bolger v. Youngs Drug Prods. Corp.*, 463 U.S. 60, 71 (1983) (offensiveness is "classically not a justification validating the suppression of expression") (quoting *Carey v. Population Servs. Int'l*, 431 U.S. 678, 701 (1977)); *see also Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46, 55 (1988) ("[T]he fact that society may find speech offensive is not a sufficient reason for suppressing it.") (quoting *FCC v. Pacifica Found.*, 438 U.S. 726, 745 (1978)).¹³ "If there is a bedrock principle underlying the First Amendment, it is that the Government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable." *United States v. Eichman*, 496 U.S. 310, 319 (1990). The Government thus cannot rely on its interest in discouraging use of, or preventing offense caused by, the Redskins Marks or any other

¹³ *See also, e.g., Virginia State Bd.*, 425 U.S. at 765 (commercial speech cannot be denied First Amendment protection just because the speech might be "tasteless and excessive"); *Rodriguez v. Maricopa Cty. Comm. Coll. Dist.*, 605 F.3d 703, 708 (9th Cir. 2010) ("[I]t is axiomatic that the government may not silence speech because the ideas it promotes are thought to be offensive.").

trademarks to justify restricting speech. *See Hornell Brewing Co.*, 819 F. Supp. at 1234-35 (purpose of “protecting Native Americans from the offensive exploitation of a former Sioux leader’s name” through product name that was a “cultural insult to the Indian people” was **not** a substantial interest that justified speech restriction).

2. ***There Is No “Fit” Between The Government’s Interests And Section 2(a)***

Even if the Government’s supposed interest were legitimate and substantial, there is no “‘fit’ between the legislature’s ends and the means chosen to accomplish those ends.” *Bd. of Trs. of State Univ. of N.Y. v. Fox*, 492 U.S. 469, 480 (1989). Rather, Section 2(a) “provides only ineffective or remote support for the [G]overnment’s purpose[s].” *Central Hudson*, 447 U.S. at 564. The Government certainly is unable to meet its burden of showing that “the harms it recites are real and that its restriction will in fact alleviate them **to a material degree**.” *Edenfield v. Fane*, 507 U.S. 761, 771 (1993) (emphasis added). It cannot do so here.

As an initial matter, Section 2(a) does not even directly diminish the use of “disparaging” trademarks. Although the cancellation or denial of registration chills the use of certain marks, *see supra* Part I.A.2, it does not **directly** remove “disparaging” speech from public discourse because brand owners may try to use their unregistered marks. And where, as here, the unregistered trademarks are popular, the lack of registration is in fact likely to **increase** the overall use of the marks by encouraging counterfeit, unlicensed, and otherwise infringing or diluting uses.

Moreover, even if the Government were to succeed in reducing use of purportedly “disparaging” marks through application of Section 2(a), this would have only a *de minimis* impact on the stated purpose of discouraging or shielding the public from speech that is deemed “offensive.” Forms of speech patently more offensive than **any** trademark use abound in the marketplace of ideas. *See, e.g., Texas v. Johnson*, 491 U.S. 397, 405-06 (1989) (burning of the American flag protected by

First Amendment); *Snyder*, 580 F.3d at 222-23 (display of signs such as “Thank God for Dead Soldiers” protected by Constitution); *Cuffley*, 208 F.3d at 708 (“message of racial superiority and segregation” protected by Constitution). The removal through Section 2(a) “of a few grains of offensive sand from a beach of vulgarity” simply does not directly and materially advance the Government’s interest. *Bad Frog Brewery*, 134 F.3d at 100; *see also Adolph Coors Co. v. Bentsen*, 2 F.3d 355, 358-59 (10th Cir. 1993) (regulation restricting alcohol content on labels did not directly advance state interest in preventing “strength wars” between alcohol producers).

Nor can the Government show that Section 2(a) is part of a larger “substantial effort” to reduce disparagement. *Bad Frog Brewery*, 134 F.3d at 100. To the contrary, the law generally *protects* purportedly disparaging speech, *see supra* Part I.B.1 & n.13, and the federal government grants intellectual property protection to even obscene speech that is *not* protected by the First Amendment. *See, e.g., Jartech, Inc. v. Clancy*, 666 F.2d 403, 406-08 (9th Cir. 1982) (obscene works of authorship protected by federal copyright law). At bottom, Section 2(a) is only a minimal, “isolated response” to a larger perceived problem, and any limited effect it has does not justify its limitations on commercial speech. *Bad Frog Brewery*, 134 F.3d at 100.

* * *

It is not surprising that Congress has no legitimate and tailored justification for Section 2(a)’s restrictions on trademarks, given that the statute was enacted nearly thirty years before the Supreme Court first recognized that the First Amendment protects commercial speech at all. *See Bolger*, 463 U.S. at 64; *Sambo’s*, 663 F.3d at 692-93; Act of July 5, 1946, Pub. L. No. 79-489, § 2(a), 60 Stat. 427, 428. But today, commercial speech “remains protected even when it may ‘stir people to action,’ ‘move them to tears,’ or ‘inflict great pain,’” *Sorrell*, 131 S. Ct. at 2670 (quoting *Snyder*,

131 S. Ct. at 1220). Section 2(a)'s restrictions on commercial speech do not stand up under First Amendment scrutiny.

Because there is no constitutionally sound interest furthered by the cancellation of the Redskins Marks or *any* application of the statute, Section 2(a) violates the First Amendment both on its face and as applied to PFI.

II. SECTION 2(A) IS UNCONSTITUTIONALLY VAGUE

The Due Process clause of the Fifth Amendment shields the public from enforcement of a statute “if its prohibitions are not clearly defined.” *Grayned v. City of Rockford*, 408 U.S. 104, 108 (1972). Where, as here, a statute reaches speech protected by the First Amendment, even “greater specificity” is demanded. *Smith v. Goguen*, 415 U.S. 566, 573 (1974). Due process thus requires that Section 2(a) be declared void for vagueness because it “leaves the public uncertain as to the conduct it prohibits” and “authorizes . . . arbitrary and discriminatory enforcement.” *United States v. Lanning*, 723 F.3d 476, 482 (4th Cir. 2013) (citation and quotation marks omitted). Further, Section 2(a) is impermissibly vague as applied to PFI.

A. Section 2(a) Does Not Provide Notice As To Which Marks “May Disparage”

Section 2(a) is void for vagueness because it “fail[s] to provide the kind of notice that will enable ordinary people to understand what conduct it prohibits.” *Norfolk 302, LLC v. Vassar*, 524 F. Supp. 2d 728, 739 (E.D. Va. 2007) (quoting *City of Chi. v. Morales*, 527 U.S. 41, 56 (1999)).

First, the statute itself provides no guidance as to which trademarks will be deemed disparaging. Congress did not provide a definition of “may disparage,” and the ordinary meaning of those words is necessarily subjective. “Disparage” means “to describe (someone or something) as unimportant, weak, bad, etc.,” or “to lower in rank or reputation: degrade,” or “to depreciate by

indirect means (as invidious comparison): speak slightly about.” (Anten Decl. ¶13 & Ex. 53 (Merriam-Webster)).¹⁴ Whether or not something is “unimportant” or “weak” or “lower,” and hence, “disparaging,” necessarily will depend on who is asked and when; thus, brand owners cannot reasonably predict whether a particular trademark examiner will deem a mark “disparaging”—much less whether the mark “may disparage.” *Cf. Dambrot v. Cent. Mich. Univ.*, 55 F.3d 1177, 1184 (6th Cir. 1995) (“[D]ifferent people find different things offensive.”). As the Assistant Commissioner of Patents during the Congressional hearings on the Lanham Act testified, “it is ***always going to be just a matter of the personal opinion*** of the individual parties as to whether they think it is disparaging.” *Hearings on H.R. 4744 Before the Subcomm. on Trademarks of the H. Comm. on Patents*, 76th Cong., 1st Sess. 21 (1939) (statement of Leslie Frazer) (emphasis added) (*available at* Anten Decl. ¶12 & Ex. 52 at 21). Thus, the text of Section 2(a), like other restrictions on disparaging and offensive speech, leaves people of ordinary intelligence guessing at its meaning and unable to select marks they can be confident will be (and remain) registered. *See, e.g., Dambrot*, 55 F.3d at 1183-84 (school policy against, *inter alia*, “demeaning or slurring individuals” unconstitutionally vague); *Bullfrog Films*, 847 F.2d at 513-14 (statute denying benefits to materials that “appear to have as their purpose or effect to attack or discredit economic, religious, or political views or practices” unconstitutionally vague).

Second, the PTO’s interpretation of Section 2(a) does not provide any more clarity than the statute itself. In 1999, relying on dictionary definitions of the word “disparage,” the TTAB stated for the first time that a mark that “may disparage” is one which “may dishonor by comparison with what is inferior, slight, deprecate, degrade, or affect or injure by unjust comparison,” measured by “the

¹⁴ Dictionaries contemporaneous with the passage of the Lanham Act in 1946 provided materially identical definitions of “disparage.” *See Harjo v. Pro-Football, Inc.*, 50 U.S.P.Q.2d 1705, 1738 & n.99 (T.T.A.B. 1999), *rev’d, Harjo*, 284 F. Supp. 2d 96 (D.D.C. 2003).

views of a substantial composite” of the referenced group. *Harjo*, 50 U.S.P.Q.2d at 1738-39. This standard, however, is no less subjective or more specific than the circular dictionary definition for a mark that “may disparage.”¹⁵

Because neither the statutory language nor the PTO’s interpretations provide any guidance to brand owners as to whether their marks “may disparage,” Section 2(a) is void for vagueness on its face. *See, e.g., Bullfrog Films*, 847 F.2d at 513-14 (regulations facially vague where “[o]ne might perhaps make some educated guesses as to the meaning of the[] regulations, but one could never be confident that the [Government] would agree”); *Norfolk 302*, 524 F. Supp. 2d at 740 (enjoining enforcement of statute where both statute and judicial gloss left individuals guessing at its meaning).

B. Section 2(a) Authorizes Arbitrary And Discriminatory Enforcement

Section 2(a) is also void for vagueness because its inherent subjectivity “authorize[s] and even encourage[s] arbitrary and discriminatory enforcement.” *Norfolk 302*, 524 F. Supp. 2d at 739 (quoting *Morales*, 527 U.S. at 56). Trademark examiners have no objective standards to use in applying Section 2(a). The statute itself, and the TTAB’s interpretations, do not provide any more guidance to trademark examiners than they do to the general public. Nor has the PTO promulgated any additional guidelines to assist examiners; to the contrary, the Trademark Manual of Examining Procedure (“TMEP”) contains *less* guidance than the TTAB’s decisions because it provides *no*

¹⁵ The judicially-created “substantial composite” requirement adds an additional layer of vagueness. The PTO has never defined that term—except to say that it is “not necessarily a majority,” *In re Heeb Media, LLC*, 89 U.S.P.Q.2d 1071, 2008 WL 5065114, at *5 (T.T.A.B. 2008)—and that the term has no inherent meaning. *See, e.g., N.C. Right to Life, Inc. v. Leake*, 525 F.3d 274, 283-84 (4th Cir. 2008) (phrase “significant number of registered voters” was unconstitutionally vague); *Nat’l Abortion Fed’n v. Metro. Atlanta Rapid Transit Auth.*, 112 F. Supp. 2d 1320, 1327-28 (N.D. Ga. 2000) (phrase “substantial number of people” was unconstitutionally vague). In this case, for example, the TTAB Order states that 30% of the Native American population “without doubt” constitutes a “substantial composite” (A14047), while the district court in *Harjo* held that, “in the context of this case,” 36.6% of the Native American population was *not* a “substantial composite,” *Harjo*, 284 F. Supp. 2d at 133 n.32.

definition of “may disparage.” See TMEP § 1203.03(b)(i)-(ii) (*available at* Anten Decl. ¶14 & Ex. 54 at 19-21).¹⁶ Indeed, even the TTAB has noted that “the guidelines for determining whether a mark is scandalous or disparaging are somewhat vague and the determination of whether a mark is scandalous or disparaging is *necessarily a highly subjective one.*” *In re In Over Our Heads Inc.*, 16 U.S.P.Q.2d 1653, 1654 (T.T.A.B. 1990) (emphasis added, citation and quotation marks omitted).

Section 2(a) accordingly delegates trademark examiners unbridled discretion to deny applications for registrations on an “ad hoc and subjective basis, with the attendant dangers of arbitrary and discriminatory application.” *Grayned*, 408 U.S. at 108-09. In practice, Section 2(a) has yielded arbitrary and inconsistent results. For example:

REGISTRATION GRANTED	REGISTRATION DENIED AS DISPARAGING
HEEB (Reg. No. 2,858,011) (June 29, 2004)	HEEB , <i>In re Heeb Media, LLC</i> , 89 U.S.P.Q.2d 1071, 2008 WL 5065114, at *1 (T.T.A.B. 2008)
DYKE NIGHT (Reg. No. 4,146,588) (May 22, 2012)	2 DYKE MINIMUM (Serial No. 77/219,520) (Office Action Oct. 11, 2007)
F·A·G FABULOUS AND GAY (Reg. No. 2,997,761) (Sept. 20, 2005)	MARRIAGE IS FOR FAGS (Serial No. 77/477,549) (Office Action Nov. 19, 2008)
DAGO SWAGG (Reg. No. 4,347,624) (June 4, 2013)	DAGO MARY’S (Serial No. 78/954,137) (Office Action Jan. 17, 2007)
WILD INJUN (Reg. No. 1,673,489) (Jan. 28, 1992)	URBAN INJUN (Serial No. 77/186,637) (Office Action Nov. 19, 2007)
SQUAW (Reg. No. 3,322,061) (Oct. 30, 2007)	SQUAW , <i>In re Squaw Valley Dev. Co.</i> , 80 U.S.P.Q.2d 1264, 1279 (T.T.A.B. 2006)
REDSKINS Marks (registered 1967 – 1990) (Dkt. 51 ¶8(a)-(f))	REDSKINS Marks (A13977-14153) (scheduled for cancellation June 18, 2014) ¹⁷

¹⁶ Instead, it provides circular instructions, requiring that an examining attorney “determine[] whether a proposed mark is disparaging” by looking to “whether that meaning may be disparaging to a substantial composite of the referenced group.” TMEP § 1203.03(b)(i) (*available at* Anten Decl. ¶14 & Ex. 54 at 19; *see also supra* n.15).

¹⁷ Further adding to the confusion created by Section 2(a), the PTO often analyzes marks that reference certain people or groups as “scandalous” or “immoral” marks, rather than “disparaging” marks. *See, e.g.*, Serial No. 86/089,512 (Office Action Jan. 30, 2014) (refusing registration of FAG: FOREVER A GENIUS because the mark “consists of or includes immoral or scandalous matter”). Refusals premised on scandalousness are just as inconsistent.

This discretion in the hands of trademark examiners, and resultant arbitrary decision-making, is particularly problematic because Section 2(a) regulates speech protected by the First Amendment. *See supra* Part I.A. Trademark examiners may be “decid[ing] who may speak and who may not” based on their personal beliefs and opinions about the content of the marks or the viewpoints of the applicants, or other “illegitimate criteria.” *CEF S.C.*, 470 F.3d at 1068 (quoting *City of Lakewood v. Plain Dealer Publ’g Co.*, 486 U.S. 750, 758-59, 763-64 (1988)). The Court “cannot presume that [trademark examiners] will act in good faith and respect [an applicant’s] First Amendment rights.” *United Food & Commercial Workers Union, Local 1099 v. Sw. Ohio Reg’l Transit Auth.*, 163 F.3d 341, 359 (6th Cir. 2006) (“*Local 1099*”). Rather, because the Government has imposed no limits on the PTO’s discretion through “textual incorporation, binding judicial or administrative construction, or well-established practice,” Section 2(a) is facially unconstitutional. *City of Lakewood*, 486 U.S. at 770; *see also, e.g., Norfolk 302*, 524 F. Supp. 2d at 740 (enjoining enforcement of statute that was not tied to any “explicit standard” for enforcement).

C. Section 2(a) Is Impermissibly Vague As Applied To PFI

Regardless of whether Section 2(a) in its entirety is void for vagueness, it is at least impermissibly vague as applied to PFI. The Redskins Marks were registered *decades* before the TTAB provided any gloss on the text of Section 2(a); thus PFI had no way to know that its marks would be adjudicated as disparaging years after the fact based on the later-professed views of a “substantial composite” of Native Americans. With only the vague text of Section 2(a) to guide it, PFI could not have reasonably understood that the Redskins Marks would fall within the purview of Section 2(a)—especially given that various Native American groups were using the word “redskins” to describe their *own* athletic teams in 1967-1990 (Anten Decl. ¶¶5(a)-(mm) & Exs. 2-40), and that no oppositions or cancellations were filed until twenty-five years after the first registration (Anten Decl. ¶10 (RFAs 53 & 54)). *Cf. Lytle v. Doyle*, 326 F.3d 463, 469 (4th Cir. 2003) (loitering statute

unconstitutionally vague as applied to protesters, who would not reasonably understand their protest to fall within the common definition of loitering).

After registering and renewing each of the Redskins Marks on multiple occasions (Dkt. 51 ¶8(a)-(f)), the PTO has now reversed course and decided to enforce the provision against PFI only *after* Native American activists launched a campaign against the “Redskins” name. Because the PTO lacks objective standards for determining whether the Redskins Marks “may [have] disparage[d]” Native Americans, the TTAB may have reached its conclusion on bases that infringe PFI’s First Amendment rights, including current political opinions about the Washington Redskins’ team name and PFI’s viewpoint. *See supra* Part II.B. In the absence of objective standards for evaluating disparagement fairly, evenly, and consistently, the Court cannot “presume that the [TTAB] act[ed] in good faith” and that the political climate ‘had no effect on the outcome of the proceedings below. *Local 1099*, 163 F.3d at 358; *cf. Lanning*, 723 F.3d at 483 (fact that disorderly conduct statute was enforced as part of a sting operation targeting gay men highlighted that it could be applied in a discriminatory and arbitrary fashion). This *post hoc*, discriminatory and political determination—on the basis of shifting criteria that could not have been known to PFI in advance—is precisely what the prohibition on vagueness and unbridled discretion is intended to prevent. *See, e.g., City of Lakewood*, 486 U.S. at 758-59 (“Standards provide the guideposts that check the licensor. . . Without these guideposts, *post hoc* rationalizations by the licensing official and the use of shifting or illegitimate criteria are far too easy.”).

III. THE TTAB’S ORDER UNCONSTITUTIONALLY TAKES PFI’S PROPERTY

The TTAB’ Order contravenes the Takings Clause’s guarantee that “private property [shall not] be taken for public use, without just compensation.” U.S. CONST. amend. V.

A. The Redskins Marks Are Property Protected By The Takings Clause

The Redskins Marks constitute “property” for Takings Clause purposes, and are therefore subject to the Fifth Amendment’s constitutional protections.

The Supreme Court has long recognized “[t]hat intangible property rights protected by state law are deserving of the protection of the Taking Clause.” *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1003 (1984). Thus, trade secrets are constitutionally protected property under the Takings Clause in accordance with the “basic axiom” that “property interests ... are created ... by existing rules or understandings that stem from an independent source such as state law.” *Id.* at 1001 (citations and quotation marks omitted). Similarly, trademarks are property for Takings Clause purposes because “trade-mark[s] as property” had “been long recognized by the common law and the chancery courts of England and of this country, and by the statutes of some of the States ... [and] existed long anterior to the [first federal trademark legislation in 1870].” *In re Trade-Mark Cases*, 100 U.S. 82, 92 (1879); 1 J. Thomas McCarthy, MCCARTHY ON TRADEMARKS & UNFAIR COMPETITION (“MCCARTHY”) § 5:2 (4th ed.) (discussing the long common law history of protecting trademarks as a property interest).¹⁸

Trademarks are also “property” under the Takings Clause because they bear “many of the characteristics of more tangible forms of property.” *Monsanto*, 467 U.S. at 1002. Like tangible property, trademarks can be assigned, bought, sold, and licensed. *See* 15 U.S.C. § 1060 (providing for the assignment of trademarks); *Monsanto*, 467 U.S. at 1002 (tangible property can be assigned).

¹⁸ In this way, trademarks are distinguishable from patents which, as pure “creature[s] of federal law,” are not protected property under the Takings Clause. *Zoltek Corp. v. United States*, 442 F.3d 1345, 1352 (Fed. Cir. 2006), *vacated on other grounds on reh’g en banc*, 672 F.3d 1309 (Fed. Cir. 2012). Unlike patents, “registration does not create the underlying right in a trademark. That right ... accrue[s] from the use of a particular name or symbol ... [and is] essentially a common law property right.” *Keebler Co. v. Rovira Biscuit Corp.*, 624 F.2d 366, 372 (1st Cir. 1980).

Trademarks also bear “[t]he hallmark of a protected property interest [that] is the right to exclude others.” *Coll. Sav. Bank v. Florida Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666, 673 (1999); *see also Monsanto*, 467 U.S. at 1011 (“The right to exclude others is generally ‘one of the most essential sticks in the bundle of rights that are commonly characterized as property.’”) (citation omitted).

B. Cancellation of the Redskins Marks Effects A Regulatory Taking

Cancellation of the Redskins Marks significantly impedes a core characteristic that makes trademarks economically viable—the right to exclude—thereby effecting a regulatory “taking” of PFI’s property. Whether a regulation “goes too far,” *Penn. Coal Co. v. Mahon*, 260 U.S. 393, 415 (1922), and thereby effects a taking, is an “ad hoc, factual inquir[y],” *Penn Cent. Transp. Co. v. City of New York*, 438 U.S. 104, 124 (1978). Three factors are considered: (1) “the character of the governmental action,”¹⁹ (2) its “economic impact,” and (3) “the extent to which [it] interferes with distinct investment-backed expectations.” *Penn Cent.*, 438 U.S. at 124. Where the regulation’s “effects are so complete as to deprive the owner of all or most of his interest in the subject matter, [this] amount[s] to a taking.” *Monsanto*, 467 U.S. at 1005 (citation and quotation marks omitted).

As to economic impact, cancellation of the Redskins Marks has the requisite “impair[ment of] the value or use of [PFI’s] property.” *PruneYard Shopping Ctr. v. Robins*, 447 U.S. 74, 83 (1980). PFI’s marks are extraordinarily valuable. In 2006, for example, *Forbes* ranked the Redskins as the NFL’s most valuable franchise at \$1.423 billion. (A314 at ¶13). And as of August 2014—the

¹⁹ Here, the character of government action implicated is regulatory by virtue of Section 2(a). Alternatively, the TTAB’s order scheduling the cancellation of the Redskins Marks is a judicial taking by declaring “that [PFI’s] once . . . established right of private property no longer exists.” *Stop the Beach Renourishment, Inc. v. Florida Dep’t of Env’tl. Prot.*, 560 U.S. 702, 715 (2010).

most recent offered by *Forbes*—the team was valued at \$2.4 billion, with its brand management valued at \$214 million. (Anten Decl. ¶11 & Ex. 51).

A trademark’s value is based on *exclusive* use of the mark to distinguish goods or services in commerce. Cancellation of the Redskins Marks not only divests PFI of statutory protections accompanying federal registration that enforce exclusivity (*see* Handelman Rep. at 16-17),²⁰ but also substantially interferes with PFI’s ability to protect the exclusivity of its marks under state statutes and common law. This is because federal cancellation not only deems PFI’s marks *unregistered* under the Lanham Act but potentially *unregistrable* under the Model State Trademark Bill.²¹ In such circumstances, PFI’s common law use of its trademark is also impaired because equitable doctrines may interfere with the protection of PFI’s exclusivity in its marks. Consequently, it is “irrelevant to the determination of ... economic impact” that PFI’s marks may “retain [some post-cancellation] usefulness” at common law because “[t]he economic value of that property right lies in the competitive advantage over others that [PFI] enjoys by virtue of its exclusive [use of] the [trademarks].” *Monsanto*, 467 U.S. at 1012. Interference with PFI’s ability to fully protect the exclusivity of its marks by cancellation of its registrations interferes with the value of PFI’s trademark rights, thereby constituting an unconstitutional taking.²² *See Mahon*, 260 U.S. at 414-15

²⁰ *See supra* SUF ¶¶9-12; 3 MCCARTHY § 19:3 n.3(“[W]hile registration does not create the common-law ‘trademark,’ registration does create those rights to exclude spelled out in the Lanham Act.”).

²¹ The Model State Trademark Bill, which has been adopted in 49 states, provides that marks containing “matter which may disparage ... persons ... or bring them into contempt, or disrepute” are unregistrable. *See* 3 MCCARTHY § 22:8; *see also id.* § 22:5 & n.1 (“As of 1992, 46 states have used the Model Bill as the basis for trademark registration legislation.”). Since 1992, every state except Wisconsin has adopted this provision. *See* W. Va. Code, § 47-2-2(2); Haw. Rev. Stat. § 482-21(2); N.M. Stat. Ann. § 57-3B-4(2).

²² To be sure, if the Redskins Marks ultimately are cancelled, PFI will retain its common law rights and (to the extent that they remain unchallenged) state law rights, and may enforce those rights against third parties. However, for the purposes of a Takings Clause analysis, it cannot be disputed

(*footnote continued*)

(substantially impairing right to mine coal constituted a regulatory taking of coal); *see also In re Deister Concentrator Co.*, 289 F.2d 496, 501 n.5 (C.C.P.A. 1961) (“If the law will not protect one’s claim of right to exclude others from using an alleged trademark, then he does not own a ‘trademark,’ for that which all are free to use cannot be a trademark.”).

Cancellation would also substantially interfere with reasonable investment-backed expectations. By the time Section 2(a) became operative in July 1947,²³ the Redskins Marks had already been used for 14 years.²⁴ (Dkt. 1 ¶82; Dkt. 41 ¶82). Another two decades of use preceded PFI’s first federal registration in 1967, only further entrenching its investment-backed expectations. (*Id.*). Each unchallenged registration, followed by unchallenged renewals, occurring over the course of a further two decades each cemented prior significant investments into the marks and expectations for the Redskins Marks’ continued use through corporate sponsorships, merchandising, and marketing and promotion. (*See supra* SUF ¶¶4-6; Dkt. 51 ¶8(a)-(f)).

C. The Taking of PFI’s Property Was For A Public Use But Exceeds Constitutional Limitations

For a taking to be for a public use, it must be “within the authority of Congress” by not exceeding “specific constitutional limitations.” *Berman v. Parker*, 348 U.S. 26, 32-33 (1954). Because the legislative purpose in cancelling the Redskins Marks under Section 2(a) violates the First Amendment, *see supra* Part I, the taking is invalid and the registrations must be restored. But even if the Court disagrees with PFI’s First Amendment arguments, the purposes of Section 2(a) are

that deprivation of federal registrations will: (1) require PFI to expend greater resources to enforce such protections; (2) place PFI at a competitive disadvantage; and (3) possibly result in courts ultimately (albeit improperly) refusing to enforce PFI’s state or common law rights.

²³ Act of July 5, 1946, Pub. L. No. 79-489, 60 Stat. 427 (1946) (effective July 6, 1947).

²⁴ Before the Lanham Act, statutes did not regulate purportedly “disparaging, contemptuous, or offensive” marks. Bartholomew Diggins, *The Lanham Trade-Mark Act*, 35 GEO. L. J. 147, 154 (1947) (*available at* Anten Decl. ¶15 & Ex. 55).

“rationally related to a conceivable public purpose” and therefore constitute a “public use” for which PFI has been unconstitutionally denied just compensation. *Kelo v. City of New London, Conn.*, 545 U.S. 469, 490 (2005) (Kennedy, J. concurring). Section 2(a)’s professed purpose is to protect from offense—this is rationally achieved by denying allegedly disparaging marks a federal registration, which thereby purportedly discourages use of such marks. *See id.* at 480 (“Without exception, the Court has defined [‘public use’] broadly, reflecting its longstanding policy of deference to legislative judgments as to what public needs justify the use of the takings power.”). The taking of the Redskins Marks therefore constitutes a “public use.”

D. PFI Was Unconstitutionally Denied Just Compensation

The Takings Clause mandates receipt of “just compensation.” In contravention of the Takings Clause, the Lanham Act does not provide, and so PFI has not and will not receive, any compensation—let alone “just” compensation—for cancellation of the Redskins Marks.

IV. PFI HAS BEEN DEPRIVED OF ITS PROPERTY WITHOUT DUE PROCESS

The Fifth Amendment’s Due Process Clause guarantees that “[n]o person shall ... be deprived of life, liberty, or property, without due process of law.” U.S. CONST. amend. V. In the context of TTAB proceedings, due process requires notice, “a complete hearing ... in accordance with the Rules of Practice in Trademark Cases,” and “a full opportunity to argue ... at the hearing before the Board.” *Stoller v. Ponce*, 113 F. App’x 403, 406 (Fed. Cir. 2004); 15 U.S.C. § 1067(a) (providing for “notice to all parties” and a TTAB determination and decision of “the respective rights of registration” of the parties); 37 C.F.R. § 2.129(a) (providing for oral argument before the TTAB if desired by a party). PFI was denied due process before the TTAB based on the inordinate passage of time between Redskins Marks’ registrations and the instant challenge, which interfered with PFI’s right to a hearing at a meaningful time.

A. The Redskins Marks Are “Property” Under The Due Process Clause

The Redskins Marks are “property” for Due Process Clause purposes. “[C]onstitutionally cognizable property interests” under the Due Process Clause include “trademarks, which are the ‘property’ of the owner because he can exclude others from using them.” *Coll. Sav. Bank*, 527 U.S. at 673 (under Fourteenth Amendment Due Process Clause); *see also id.* at 693 (Stevens, J., dissenting) (“good will” is “property” for the Due Process Clause). Other courts have confirmed that trademarks are “protected by the Due Process Clause of the Fifth Amendment to the Constitution.” *Rex, Inc. v. Kusha, Inc.*, 2001 WL 209899, at *1 (W.D.N.Y. Feb. 23, 2001).²⁵

B. PFI Was Denied Due Process By Delay Causing Substantial Prejudice

The inordinate delay of almost fifty years between PFI’s first registration and these cancellation proceedings violates the Due Process Clause’s guarantee of a hearing at a “meaningful time and in a meaningful manner.” *Goldberg v. Kelly*, 397 U.S. 254, 267 (1970). Here, PFI has been substantially prejudiced by being forced to defend itself against the cancellation of its valuable property rights where the delay has resulted in, *inter alia*, lost records, the death of witnesses, and faded memories. At base, it is unfair that PFI has been placed in the position of having to defend its

²⁵ While this precedent alone establishes that PFI has a property interest in the Redskins Marks, this conclusion is bolstered by PFI’s “legitimate claim of entitlement” to the marks. *Bd. of Regents v. Roth*, 408 U.S. 564, 577 (1972). This inquiry looks to whether the claimed property is defined by “existing rules or understandings that stem from an independent source [from the Constitution] such as state law” which “secure certain benefits and support claims of entitlement to those benefits.” *Id.* Here, PFI’s claim of entitlement arises from, *inter alia*: (1) the longstanding recognition of trademarks as property under state common law, *see supra* Part III.A; (2) the Lanham Act’s creation of an entitlement to federal registration by PFI’s continual use of the marks, 15 U.S.C. § 1051(a)(1) (“owner of a trademark used in commerce may request registration”); and (3) the Lanham Act’s creation of an understanding of indefinite protection of those marks during continued use, *see McAirlaids, Inc. v. Kimberly-Clark Corp.*, 756 F.3d 307, 310 (4th Cir. 2014) (explaining that “trademark law indefinitely protects” identifiers). These rules and understandings generate PFI’s “legitimate claim of entitlement” to the Redskins Marks. *See, e.g., Perry*, 408 U.S. at 599-601 (“understanding” of “permanent tenure” “foster[ed]” in contract was “property interest”); *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 539 (1985) (statutorily conferred tenure was “property”).

registrations nearly half a century after they were first registered by the PTO without opposition. (Anten Decl. ¶10 (RFA 53)). Indeed, PFI was effectively lulled into a false sense of security when, in 1972, Leon Cook threatened to commence an action against PFI on behalf of Native Americans over the team's name, but no such suit was filed until twenty years later. (*Id.* ¶10 (RFA 54); *see also id.* ¶9 & Ex. 49 (deposition of Leon Cook at 62:6-63:7)).

The Court should recognize that, at some point, it is no longer just for a registrant to be required to defend its marks decades after the fact, where nothing prevented a more proximate challenge, where the registrant reasonably relied on the lack of opposition to develop the goodwill in its marks, and where the delay substantially prejudices the registrant's ability to present all evidence, including witness testimony and documentary evidence, that would have been available with a more timely challenge. To hold otherwise would allow potential challengers to simply "wait out" a registration until decades after the registrant's percipient witnesses or documents are no longer available, substantially prejudicing the registrant's ability to defend itself. PFI was therefore denied a "fair trial," which "is a basic requirement of due process." *Withrow v. Larkin*, 421 U.S. 35, 46 (1975) (citation and quotation marks omitted).

CONCLUSION

Defendants' motion for summary judgment should be granted in its entirety.

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Respectfully submitted,

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