

No. 22-704

IN THE
Supreme Court of the United States

KATHERINE K. VIDAL, UNDER SECRETARY OF
COMMERCE FOR INTELLECTUAL PROPERTY AND
DIRECTOR, UNITED STATES PATENT AND
TRADEMARK OFFICE,

Petitioner,

v.

STEVE ELSTER,

Respondent.

**On Writ of Certiorari to the
United States Court of Appeals
for the Federal Circuit**

**BRIEF FOR THE AMERICAN INTELLECTUAL
PROPERTY LAW ASSOCIATION AS
AMICUS CURIAE IN SUPPORT
OF NEITHER PARTY**

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INTEREST OF AMICUS CURIAE

Amicus Curiae American Intellectual Property Law Association (“AIPLA”) submits this brief in support of neither party.¹

AIPLA is a national bar association of approximately 7,000 members who are engaged in private and corporate practice, in government service, and in the academic community. AIPLA’s members represent a wide and diverse spectrum of individuals, companies, and institutions involved directly and indirectly in the practice of patent, trademark, copyright, trade secret, and unfair competition law, as well as other fields of law affecting intellectual property. Our members represent both owners and users of intellectual property. AIPLA’s mission includes providing courts with objective analyses to promote an intellectual property system that stimulates and rewards invention, creativity, and

¹ In accordance with Supreme Court Rule 37.6, AIPLA states that this brief was not authored, in whole or in part, by counsel to a party, and that no monetary contribution to the preparation or submission of this brief was made by any person or entity other than AIPLA and its counsel. Specifically, after reasonable investigation, AIPLA believes that (i) no member of its Board or Amicus Committee who voted to file this brief, or any attorney in the law firm or corporation of such a member, represents a party to the litigation in this matter; (ii) no representative of any party to this litigation participated in the authorship of this brief; and (iii) no one other than AIPLA, or its members who authored this brief and their law firms or employers, made a monetary contribution to the preparation or submission of this brief.

investment while also accommodating the public's interest in healthy competition, reasonable costs, and basic fairness. AIPLA has no stake in the parties to this litigation or in the result of this case other than its interest in the correct and consistent interpretation of the laws affecting intellectual property.

SUMMARY OF ARGUMENT

The Federal Circuit correctly held that the U.S. Patent and Trademark Office (USPTO) violated the First Amendment in applying Section 2(c) of the Lanham Act, 15 U.S.C. 1052(c), to refuse registration of the trademark "Trump Too Small."

Section 1052(c) prohibits the registration of a trademark containing the name of a living individual without that individual's consent.² The USPTO's application of the statute in this case improperly imposed a condition for trademark registration that impairs the exercise of applicant's First Amendment right to criticize a government official or a public figure, absent proof of both falsity and actual malice.

This Court recently confirmed trademarks may include expressive content protected by the First Amendment. *Matal v. Tam*, 582 U.S. 218 (2017); *Ianco v. Brunetti*, 139 S. Ct. 2294 (2019). In these cases, the USPTO refused to register marks under

² Subsection (c) was originally enacted in Section 5 of the Trademark Registration Act of 1905, Pub. L. No. 58-85, 33 Stat. 724 (1905) as a proviso of subsection (b). It was re-enacted in the Lanham Act as subsection (c), which also consolidates other provisions from the previous subsection (b).

Section 1052(a), which in part prohibits registration of marks that “may disparage” or that are “immoral ... or scandalous.” The Court held that those provisions of Section 1052(a) imposed a presumptively unconstitutional viewpoint-based restriction on speech.

While Section 1052(c) does not constitute a presumptively unconstitutional, viewpoint-based restriction, the USPTO’s application of that provision here was nonetheless fatally flawed. The trademark registration here was denied because the mark used the name of the former President. As applied in this case, Section 1052(c) conditioned the benefit of registration on applicant’s surrender of his First Amendment right to criticize a government official. The government has failed to present any substantial government interest justifying the content-based restriction of speech that resulted from this application of the statute.

The government argues that the Section 1052(c) does not restrict speech but, rather, is a condition for registration that places no limit on Elster’s use of the mark in commerce. It is true that Section 1052(c) is one of many conditions for trademark registration, and that Elster may freely use the mark in commerce without the benefits of federal registration. Nonetheless, it is an unlawful condition because it restricts speech in violation of the First Amendment. The government may not deny a benefit based on a condition that infringes Elster’s constitutionally protected free speech right to criticize a governmental official or public figure.

Nor does a purported need to respect the privacy and publicity interests of the named individual rise to the level of a substantial government interest justifying the restriction of speech imposed here. Given the fame of the former President, he cannot claim a privacy right in the use of his name. Nor can the publicity rights of the named individual withstand the countervailing interest of the First Amendment interest in protecting the free speech right to criticize government officials and public figures.

Although AIPLA does not take a position on the ultimate registrability of Elster's mark, it respectfully submits that, if a mark is found to comment on a government official or public figure, applying Section 1052(c) as a basis for denying of registration violates the First Amendment.

Factual Background

Elster in 2018 filed an intent-to-use application to register the phrase "Trump Too Small" as a trademark for use on T-shirts and various other types of shirts. His application stated that the phrase references a comment from the 2016 presidential primary debate, conveying that some features of former President Trump and his policies "are diminutive."³

³ With certain exceptions not relevant here, to obtain the full benefit of the Lanham Act, a trademark needs to be registered on the USPTO's Principal Register upon evidence that the mark has been "used in commerce." 15 U.S.C. § 1051(a). However, a trademark owner can obtain preliminary benefits by filing an "intent to use" application under Section 1051(b) and by

The USPTO examining attorney rejected the application under Section 1052(c) because it contained the name of a living individual (former President Trump) without consent. Pet. at 33a. The examiner rejected Elster’s First Amendment arguments, contending that Section 1052(c) does not restrict speech. The examiner also denied registration under Section 1052(a), which includes a bar against registering marks that “falsely suggest a connection with persons, living or dead.” Elster appealed the rejections to the USPTO Trademark Trial and Appeal Board, which affirmed only the Section 1052(c) refusal. Pet. at 22a. In dismissing Elster’s First Amendment argument, the Board stated that Section 1052(c) does not control an applicant’s use, but only sets the criteria for registration. Pet. at 30a.

The Federal Circuit reversed, holding that the Section 1052(c) refusal to register Elster’s mark violated the First Amendment by restricting the expressive content in the mark criticizing a government official. Pet. 1a.

ARGUMENT

I. Refusing to Register a Mark Criticizing a Government Official Restricts Speech in Violation of the First Amendment.

The USPTO’s application of Section 1052(c) to refuse registration of “Trump Too Small” because it contained the name of former President Trump

verifying the mark’s use in commerce within six months of allowance. 15 U.S.C. § 1051(d).

violated the trademark owner's First Amendment free speech rights. While the Lanham Act imposes a variety of conditions for trademark registration, it may not apply conditions violating the Constitution.

A. Lanham Act Benefits of Trademark Registration Depend On Satisfying Conditions Under Section 1052.

The 1946 passage of the Lanham Act, brought, among other things, the benefit of uniform nationwide protection to the diverse protections under state and common law. Consumers benefitted from the ability to choose goods and services based on source-identifying marks, and producers benefitted from the repeat buyers who could rely on those marks that identify quality products with their producers. See *Jack Daniel's Props., v. VIP Prods. LLC*, 143 S. Ct. 1578, 1583 (2023); *Wal-Mart Stores, Inc. v. Samara Bros., Inc.*, 529 U.S. 205, 212 (2000); *B & B Hardware, Inc. v. Hargis Indus.*, 575 U.S. 138, 142 (2015).

While state and common law offer some local alternatives, uniform nationwide protection under the Lanham Act is an important development for today's marketplace. Among other things, the benefits of federal registration on the Principal Register include nationwide constructive notice of the registrant's claim of ownership under Section 1072, and either prima facie evidence of the validity of the registered mark under Sections 1057(b) and 1115(a) or conclusive evidence of its validity under Section 1115(b).

As with most government benefits, registration is available only if the trademark satisfies a variety of

conditions set out in the Lanham Act. Section 1052 states that no mark may be refused registration unless it satisfies a list of conditions detailed in subsections of the statute. In general, those conditions serve the statutory function of promoting designations of source for goods and services that will not confuse customers. For example, Section 1052(a) bars registration of deceptive trademarks or those falsely suggesting a connection with persons, living or dead, institutions, beliefs, or national symbols.

However, some conditions in Section 1052 do not serve that function. For example, Section 1052(a) bars registration of trademarks bringing persons, institutions, beliefs, or national symbols into contempt or disrepute. Until the recent decisions in *Tam* and *Brunetti*, Section 1052(a) also barred registration of trademarks comprising immoral, scandalous, or potentially disparaging matter.

Section 1052(c) also sets out a condition not directed at promoting designations of source for goods and services. As relevant here, that provision bars registration of a trademark that:

(c) Consists of or comprises *a name, portrait, or signature identifying a particular living individual except by his written consent ...*

(Emphasis added.)⁴

⁴ The remainder of this provision, which is not relevant in this case, applies the same condition to the name, signature, or portrait of a deceased President during the life of his widow without her consent.

B. Expressive Content in Trademarks May Require First Amendment Protections.

In *Tam* and *Brunetti*, this Court confirmed that trademarks can do more than simply designate source; they can also contain expressive content subject to First Amendment protections. These cases found that provisions of Section 1052(a) barring registration of trademarks containing disfavored language unconstitutionally restricted speech. *Tam*, 582 U.S. at 236 (holding the expression in the mark to be private, not government, speech); *Brunetti*, 139 S. Ct at 2299 (analyzing the expression in the mark to hold the “immoral or scandalous” criterion to be viewpoint-based).

In *Tam*, the Section 1052(a) ban on registering trademarks that “may disparage”—the basis for refusing to register “The Slants” for an Asian music group—violated the First Amendment. In *Brunetti*, the Section 1052(a) ban on registering trademarks that are “immoral ... or scandalous”—the basis for refusing to register “FUCT” as the name of a clothing line—also violated the First Amendment. The Court held that these bans discriminated against the viewpoints expressed in the applicants’ marks because they used language disfavored by the government. The Section 1052(a) basis for refusing registration was a presumptively unconstitutional viewpoint-based restriction on the speech content of the marks. *Brunetti*, 139 S. Ct. at 2299.

Section 1052(c) also focuses on the expressive component of trademarks, banning registration of marks that contain a name, portrait, or signature

identifying a particular living individual.⁵ The USPTO requires written consent if the public would recognize and understand the applicant's mark as identifying a particular living individual.⁶ According to decisions of the Trademark Trial and Appeal Board, that circumstance exists only if: (1) the person is so well known that the public would reasonably assume a connection between the person and the goods or services; or (2) the individual is publicly connected with the business in which the mark is used.⁷

Although the criterion in this provision is viewpoint-neutral, it strikes at the heart of First Amendment rights in this case, as it hinders Elster's right to criticize a government official or public figure. The provision required Elster to surrender this right as the price for registering his trademark.

The Federal Circuit correctly applied First Amendment law to the "Trump Too Small" mark, holding the refusal to register that mark restricted content criticizing former President Donald Trump.

⁵ Applications of Section 1052(c) have expanded its scope to other recognizable indicia of a referenced individual's identity. *See, e.g., In re Sauer*, 27 U.S.P.Q.2d 1073, 1074, at *7, 1993 WL 236534, at *2-3 (T.T.A.B. 2022) ("The section operates to bar the registration of marks containing not only full names, but also surnames, shortened names, nicknames, etc., so long as the name in question does, in fact, 'identify' a particular living individual."), *aff'd*, 26 F.3d 140 (Fed. Cir. 1994).

⁶ *In re Nieves & Nieves LLC*, 113 U.S.P.Q.2d 1639, 1649-50, 2015 WL 496132, at *12 (T.T.A.B. 2015).

⁷ *In re ADCO Indus. Techs., L.P.*, 2020 U.S.P.Q.2d 53786, at *8, 2020 WL 730361, at *10 (T.T.A.B. 2020).

II. Section 1052(c) Violates First Amendment By Denying Registration of a Trademark Criticizing Former President Trump.

Tam and *Brunetti* confirmed that trademarks may contain expression, and that the First Amendment may protect this expression. The government incorrectly argues that Section 1052(c) imposes no restriction on the speech content of the mark, and that, in any event, substantial government interests justify the condition for registration in that provision.

A. Section 1052(c) Registration Condition Restricted Elster’s Free Speech Right to Criticize Government Officials.

The government denies that Section 1052(c) restricts speech, contending it simply states a condition for obtaining registration under the Lanham Act and that Elster’s use of “Trump Too Small” in commerce is unhindered.

The argument fails to recognize that the government in this case has applied Section 1052(c) as an illegal condition to limit the availability of trademark registration. The question presented by the government’s Petition poses a false dichotomy—is the statutory bar a condition for government benefits or is it a restriction on speech? In fact, it is both; it sets out a condition for registration restricting the exercise of applicant’s free speech rights.

In other contexts, this Court for more than 65 years has applied an “unconstitutional conditions” doctrine. *Speiser v. Randall*, 357 U.S. 513, 526 (1958) (government may not produce a result which it could

not command directly). In 1972, the Court made the following observation:

[E]ven though a person has no ‘right’ to a valuable governmental benefit and even though the government may deny him the benefit for any number of reasons, there are some reasons upon which the government may not rely. It may not deny a benefit to a person on a basis that infringes his constitutionally protected interests—especially, his interest in freedom of speech. For if the government could deny a benefit to a person because of his constitutionally protected speech or associations, his exercise of those freedoms would in effect be penalized and inhibited.

Perry v. Sindermann, 408 U. S. 593, 597 (1972).

The Section 1052(c) requirement to obtain former President Trump’s consent to register his name as part of a trademark is a requirement to surrender the free speech right to criticize a government official or public figure. That right is enshrined in this Court’s decision in *New York Times v. Sullivan*, 376 U.S. 254 (1964), and was extended to public figures in *Curtis Publishing Co. v. Butts*, 388 U.S. 130 (1967). Under *New York Times*, a government official’s recourse against defamation yields to the speaker’s First Amendment rights unless there is evidence of actual malice on the part of the speaker. *New York Times*, 376 at 279-280. *Curtis Publishing* extended the *New York Times* rule to public figures where there is evidence of highly unreasonable conduct and an extreme departure from reporting standards. *Curtis Publishing*, 388 at 155.

These decisions provide a limiting principle for the application of First Amendment rights to trademark registration requirements. Applying *New York Times*, Section 1052(c) may not require a named government official's consent unless the trademark expression criticizes that official falsely and with actual malice. Applying *Curtis Publishing*, Section 1052(c) may not require the consent of a named public figure unless the critical expression in the trademark represents highly unreasonable conduct and an extreme departure from reporting standards.

It is true, as argued by the government, that the provision does not impede Elster's use in commerce of the unregistered mark; he is free to criticize any past or present government official without the benefit of the Lanham Act. But this case is not about an absolute prohibition on speech. Rather it is about a statute requiring Elster to give up the critical speech expressed in the mark to obtain trademark registration.⁸

Tam and *Brunetti* held the government had violated the First Amendment by denying trademark registration based on disfavored speech in the applied-for marks at issue. The application of Section 1052(c) to refuse registration of a mark criticizing

⁸ Although an otherwise valid unregistered mark may be enforceable under Section 43(a) of the Lanham Act, 15 U.S.C. §1125(a), the Federal Circuit in *Tam* noted that "there is no authority extending §43(a) to marks denied under §2(a)'s disparagement provision." *In re Tam*, 808 F.3d 1321, 1344-1345, n. 11 (en banc). On review, this Court in *Tam* declined to decide whether a Section 43(a) action could be brought if federal registration had been lawfully denied under Section 1052(a)'s potential disparagement clause. *Tam*, 582 U.S. at 225 n.1.

former President Trump is no less a restriction on speech. As stated by the Federal Circuit, “whether Elster is free to communicate his message without the benefit of trademark registration is not the relevant inquiry—it is whether section 2(c) can legally disadvantage the speech at issue here.” Pet. at 6a.

The denial of trademark registration under Section 1052(c) in this case, where the mark criticizes a public figure as recognizable as former President Trump, unconstitutionally restricts that First Amendment right to free speech.

III. Section 1052(c) Restriction on Speech Is Subject to First Amendment Review

A. Analogies to “Government Subsidy” and “Public Forum” Cases Do Not Apply

Despite the First Amendment’s categorical language, the law recognizes some limitations on the scope of free speech rights. In both *Tam* and *Brunetti*, the government argued that the regulation of speech for trademark registration under Section 1052(a) is analogous to the regulation of viewpoint-neutral speech permitted in the “government subsidy” and “public forum” decisions of this Court. Four of eight Justices in *Tam* rejected the analogy (*Tam*, 582 U.S. at 239-244. In *Brunetti*, the analogy appears only in the concurring and dissenting opinions of Justices Breyer and Sotomayor. *Brunetti*, 139 S. Ct. at 2304 and 2308.

This analogy has also been made to the trademark registration condition in Section 1052(c), and was properly rejected by the Federal Circuit. Pet. at 6a-7a.

The government concedes that trademark registration benefits “are not precisely equivalent to the benefits that were at issue in this Court’s prior financial-subsidy or public-forum cases.” Pet. at 14-15. Yet, the government fails to produce convincing authority for the position, and claims that such failure is less significant than its conclusory statement that Section 1052(c) does not restrict speech. Pet. at 15. The analogy should be dismissed here for the same reasons it was dismissed by the Federal Circuit and by members of this Court in *Tam* and *Brunetti*.

B. Section 1052(c) Restricts Speech Without Substantial Government Interest.

Tam and *Brunetti* are not controlling here insofar as those cases addressed the viewpoint-based restrictions of disparagement, immoral, and scandalous speech in Section 1052(a).⁹ By contrast, the Section 1052(c) content-based restriction against using the name of a living individual is indisputably viewpoint-neutral.

The First Amendment uses sweeping language for all its guaranteed rights, including the “free speech” right: “Congress shall make no law ... abridging the freedom of speech, or of the press” Government actions comprising content-based discrimination are

⁹ In a footnote rejecting the government’s statutory construction argument in *Brunetti* that distinguished the “mode of expression” from the “views expressed,” Justice Kagan’s opinion for the Court in *Brunetti* observed that the opinion says nothing “about how to evaluate viewpoint-neutral restrictions on trademark registration.” 139 S. Ct. at 2302 n.*.

presumptively invalid,¹⁰ but it is well established that the law permits regulation of speech in limited areas, such as obscenity or defamation, and areas such as government speech and public forum speech discussed above. *RAV v. St. Paul*, 505 U.S. 377, 382 (1992).

And when such regulation has been evaluated, part of the analysis is to determine if “strict scrutiny” applies or if “intermediate scrutiny” applies. In both cases, the regulation must be “narrowly tailored” to serve a “compelling” government interest or “directly advance” a substantial government interest.¹¹ The Federal Circuit correctly held in this case that the First Amendment analysis can be concluded with the simple determination that no substantial or compelling government interest justifies Section 1052(c)’s regulation of speech.

The government challenges this conclusion, arguing that Section 1052(c) serves two compelling government interests: (1) preserving the right of privacy for the individual named in the mark without consent; and (2) preserving the right of publicity held by the individual named in the mark without consent. Neither privacy nor publicity rights constitute a substantial government interest justifying the Section 1052(c) restriction of speech in this case.

¹⁰ *Reed v. Town of Gilbert*, 576 U.S. 155, 163 (2015).

¹¹ See *Reed*, 576 at 163; *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm’n of N.Y.*, 447 U.S. 557, 566 (1980); see also *Boos v. Barry*, 485 U.S. 312, 321 (1988) (Content-based restriction on political speech must be necessary to serve a compelling state interest, and must be narrowly drawn to achieve that end.).

The right of privacy is protectable under common law or state law, and is defined in the Restatement (Second) of Torts as the tort of “Appropriation of Name or Likeness.” Restatement (Second) of Torts § 652C (1977). It is actionable when a tortfeasor “appropriates to his own use or benefit the name or likeness of another.” *Id.* at cmt a. Absent actual malice, however, the government has no interest in restricting speech to protect former President Trump’s privacy interests from critical comments. The longstanding principle in the law was famously stated as follows: “The right of privacy does not prohibit any publication of matter which is of public or general interest.”¹²

According to the government, the other compelling government interest justifying the restriction of speech by Section 1052(c) is the preservation of the intellectual property represented by the publicity interest of the named individual.

The statutes of various states recognize a right of publicity. The Restatement (Third) of Unfair Competition defines it as follows:

One who appropriates the commercial value of a person’s identity by using without consent the person’s name, likeness, or other indicia of identity *for purposes of trade* is subject to liability for the relief appropriate under the rules stated in §§ 48 and 49.

Restatement (Third) of Unfair Competition § 46 (1995) (emphasis added).

¹² Warren & Brandeis, “The Right to Privacy,” 4 Harv. L. Rev. 193, 214 (1890).

There is no denying that a right of publicity can be a valuable property right for famous people, and the USPTO's interpretation of Section 1052(c) has been interpreted to require consent only when the named individual is famous.¹³ Ordinarily, this could well be a compelling and substantial government interest justifying the speech restrictions in Section 1052(c). However, no such justification could withstand the First Amendment right to criticize a government official or public figure. In this respect, the statute violated Elster's free speech right as applied to a mark criticizing former President Trump.

Moreover, the right of publicity described in Section 46 of the Restatement applies to uses of a person's name or identity "for purposes of trade," which is explicitly defined in the very next section of the Restatement. Significantly, the definition in Section 47 concludes with the following: "However, use 'for purposes of trade' *does not ordinarily include the use of a person's identity in news reporting, commentary, entertainment, works of fiction or nonfiction, or in advertising that is incidental to such uses.*" (Emphasis added.)

The statement of the law of publicity in Section 46 is generally representative of state laws on this subject. Section 47's definition of "for purposes of trade" supports the Federal Circuit's conclusion: no right of publicity claim can survive a substantive First Amendment defense involving speech critical of

¹³ *ADCO Indus. Techs.*, 2020 U.S.P.Q.2d 53786, at *8, 2020 WL 730361, at *10 ("Whether consent to registration is required depends on whether the public would recognize and understand the mark as identifying a particular living individual.").

government officials or public figures. Where a right of publicity claim cannot withstand a First Amendment defense, it cannot serve as a substantial government interest justifying the speech restriction imposed by Section 1052(c).

IV. Registration Will Not Impede Public From Using Trademark Phrase To Criticize Government Officials.

Elster's desire to register the phrase "Trump Too Small" for T-shirts was no different from that of any other trademark applicant. He sought the national advantages of the Lanham Act against purveyors of similar products bearing similar marks likely to confuse consumers as to the source of his products.

The government mischaracterizes Elster's effort as an attempt to acquire exclusive rights in the claimed phrase itself. According to the government, it is the *registration* of Elster's trademark, not its *refusal*, that will chill political speech because trademark rights will permit Elster to prevent others from using the phrase. Pet. at 16-17.

This disingenuous argument obscures the legal principle that no one acquires rights in gross to a trademark. This Court clearly stated this principle more than 100 years ago:

The asserted doctrine is based upon the fundamental error of supposing that a trade-mark right is a right in gross or at large, like a statutory copyright or a patent for an invention, to either of which, in truth, it has little or no analogy. *Canal Co. v. Clark*, 13 Wall. 311, 322; *McLean v. Fleming*,

96 U.S. 245, 254. There is no such thing as property in a trade-mark except as a right appurtenant to an established business or trade in connection with which the mark is employed. The law of trade-marks is but a part of the broader law of unfair competition; the right to a particular mark grows out of its use, not its mere adoption; its function is simply to designate the goods as the product of a particular trader and to protect his good will against the sale of another's product as his; and it is not the subject of property except in connection with an existing business.

United Drug Co. v. Theodore Rectanus Co., 248 U.S. 90, 97 (1918).

Trademarks have no legal existence independent of the goods or services they represent. Elster would have no claim against a member of the public using the phrase “Trump Too Small” as a mere slogan rather than a designation of source for a product or service.¹⁴ Thus, a defendant marching through the streets of Washington chanting “Trump Too Small!” as part of a political protest would not be making a trademark use of Elster’s mark.¹⁵ Nor

¹⁴ *Indus. Rayon Corp. v. Dutchess Underwear Corp.*, 92 F.2d 33 (2d Cir.1937) (“The owner of a mark acquires the right to prevent the goods to which the mark is applied from being confused with those of others and to prevent his own trade from being diverted to competitors through their use of misleading marks. There are no rights in a trademark beyond these.”)

¹⁵ *Lucasfilm Ltd. v. High Frontier*, 622 F. Supp. 931, 934 (D.D.C. 1985) (“Defendants’ use of the phrase star wars to persuade the public of their viewpoint through television messages is not an infringing use.”)

would such a defendant use the mark in commerce, as expressly required by the Lanham Act's causes of action infringement, unfair competition, or likely dilution. 15 U.S.C. §§ 1114(a), 1125(a), 1125(c).¹⁶

However, it would be an entirely different matter if a future defendant should use "Trump Too Small" as a trademark for goods in a way creating a likelihood of confusion with Elster's prior use of his mark. Only two months ago, this Court stated clearly that no special First Amendment protection is available for an accused infringer using a trademark *as* a trademark to designate the source of its own goods. *Jack Daniel's*, 143 S. Ct. at 1591. "That kind of use falls within the heartland of trademark law," the Court declared. *Id.* at 1583.

CONCLUSION

This Court should affirm the Federal Circuit's ruling that Section 1052(c) violates Elster's First Amendment rights as applied here to deny registration for a trademark.

Respectfully submitted,

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¹⁶ See *Abitron Austria GmbH v. Hetronic Int'l, Inc.*, No. 21-1043, 2023 WL 4239255, at *6 (U.S. June 29, 2023).