

No. 22-704

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IN THE  
**Supreme Court of the United States**

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

*Petitioner,*

v.

STEVE ELSTER,

*Respondent.*

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

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**BRIEF OF AMICUS CURIAE PUBLIC CITIZEN  
IN SUPPORT OF PETITIONER**

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## INTEREST OF AMICUS CURIAE<sup>1</sup>

Amicus curiae Public Citizen is a nonprofit consumer-advocacy organization with members in all 50 states. Public Citizen appears on behalf of its members before Congress, administrative agencies, and courts on a wide range of issues involving protection of consumers and workers, public health and safety, and maintaining openness and integrity in government. Since its founding in 1971, Public Citizen has sought in many ways to protect the rights of consumers, citizens, and employees to voice their views.

Public Citizen acknowledges that the law at issue in this case, 15 U.S.C. § 1052(c), which gives well-known individuals the ability to veto trademarks to which they object, may be problematic in some applications. Nonetheless, Public Citizen is concerned that respondent in this case, in his effort to protect the rights of activists like himself against constructions of the trademark laws that disfavor political speech, has overlooked the serious impact on free speech rights that would be caused by a rule that allowed political slogans like his, which criticize government officials and other public figures, to be registered as trademarks. Such registrations would enable a private party to invoke government power to prevent other members of the public from using the same political slogans. Public Citizen files this brief to urge the Court not to allow trademark registrations in such circumstances.

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<sup>1</sup> This brief was not authored in whole or part by counsel for a party. No one other than amicus curiae and its counsel made a monetary contribution to preparation or submission of the brief.

## INTRODUCTION AND SUMMARY OF ARGUMENT

The Lanham Act, although enforced by trademark holders suing for infringement, is a consumer-protection statute: It provides consumers with protection against deceptive advertising that misleads them into doing business with companies masquerading as the source of brands that they have come to trust. Nonetheless, where a trademark claim implicates core political speech, the terms on which liability for trademark infringement is premised—that an infringing use is merely “likely” to cause “confusion” about source or affiliation—are not easily squared with the First Amendment’s heightened protection of political speech. Many courts, therefore, hold that the Lanham Act does not apply to noncommercial speech, or at least construe the Act in ways that avoid conflict with the First Amendment when noncommercial use of trademarks is at issue.

Here, Respondent seeks to register a trademark for a phrase, “Trump Too Small,” for printing on shirts and similar items of clothing. He concedes that his aim is to place core political speech on the shirts: a slogan invoking an insult that a political rival hurled at Donald Trump in a 2016 debate. The speech is unambiguously intended to express Respondent’s disdainful view of former President Trump, not to identify the source of a line of shirts.

In seeking registration, Respondent did not attempt to show either that members of the consuming public would be likely to identify him as the source or sponsor of that political slogan, or that consumers seeing the slogan on shirts made by other antagonists of Donald Trump would be confused about the source or

sponsorship of those shirts. He sought to demonstrate only that the insult was a subject of public discussion and controversy and that his use of it reflected his own low opinion of the then-president. He urged the Patent and Trademark Office to find that the First Amendment requires registration of his proposed trademark notwithstanding a statute, 15 U.S.C. § 1052(c), that otherwise bars registration of a trademark including the name of a living individual without that individual's consent. Although the agency rejected that argument, the Court of Appeals for the Federal Circuit accepted it, holding that the statute was unconstitutional as applied to trademarks critical of government officials or public figures.

The First Amendment, however, does not require registration of the proposed trademark. Respondent does not need trademark rights to print his speech on shirts that he will offer for sale. Further, registration would allow him to seek to prevent other members of the public from promoting their shared political antagonism using the same or similar words on shirts offered for sale. Political messages printed on shirts and other items of clothing, however, are fully protected, noncommercial speech even if the clothing is offered for sale. The First Amendment would not tolerate the enforcement of such a trademark against other people's expressive use of language similar to "Trump Too Small," and by the same token it bars a federal agency from giving Respondent a limited monopoly in that core political speech.

Moreover, Respondent's proposed use of the mark does not even fall within the legitimate realm of trademark, because he makes no pretense of genuinely using it to identify the source of a line of clothing products. He seeks only control over the expressive use of

a political slogan. Whatever First Amendment issue might be implicated by the application of § 1052(c) to other proposed marks that incorporate criticism of specific individuals, the First Amendment does not permit, let alone require, the registration of the proposed mark at issue in this case.

### ARGUMENT

The Lanham Act “benefit[s] consumers and producers alike.” *Jack Daniel’s Props., Inc. v. VIP Prods. LLC*, 143 S. Ct. 1578, 1583 (2023). As this Court recently explained, “[a] source-identifying mark enables customers to select ‘the goods and services that they wish to purchase, as well as those they want to avoid.’” *Id.* (quoting *Matal v. Tam*, 582 U.S. 218, 224 (2017)). Such a mark “quickly and easily assures a potential customer that *this* item—the item with the mark—is made by the same producer as other similarly marked items that he or she liked (or disliked) in the past.” *Id.* (citation omitted); see *Two Pesos, Inc. v. Taco Cabana, Inc.*, 505 U.S. 763, 784 n.19 (1992) (Stevens, J., concurring) (noting that the Lanham Act helps consumers make purchases, “confident that they can identify brands they prefer, made by companies that they prefer, and can purchase those brands without being confused or misled” about the qualities of the goods).

At the same time, because trademarks can be a shorthand way of referring to well-known people and companies, people often use a trademark to identify the subject of their commentary. Because the First Amendment protects the right to engage in such commentary, the enforcement and application of the Lanham Act is not immune from First Amendment scrutiny. Unlike the Copyright Act, which contains express statutory exceptions and limitations that largely

safeguard the interests in free expression that the First Amendment protects, *Harper & Row, Publishers v. Nation Enters.*, 471 U.S. 539, 560 (1985), the Lanham Act’s registration and infringement provisions lack such explicit protections. Those must be found, therefore, by express reference to the First Amendment. Thus, in *Matal*, 582 U.S. at 223, the Court struck down as unlawful viewpoint discrimination a subsection of 15 U.S.C. § 1052(a) that forbade the issuance of marks that “disparage” or “bring ... into contempt ... persons, living or dead.” And in *Iancu v. Brunetti*, 139 S. Ct. 2294, 2302 (2019), the Court struck down on the same ground a subsection that forbade marks that are “immoral” or “scandalous.”

A. In the decision below, the Federal Circuit overturned an adjudication by the Trademark Trial and Appeal Board that refused to register a trademark for “Trump Too Small” for use on shirts, on the ground that 15 U.S.C. § 1052(c) forbids registration of a mark using the name of a living person without that person’s consent. The court held that the Board’s application of the provision was unconstitutional as applied because it disfavored private speech by a private party on a controversial subject, and thus that it was subject to strict scrutiny under the First Amendment. The Federal Circuit held that the adjudication could not withstand such scrutiny and reversed the determination that the mark is unregistrable.

The Federal Circuit’s decision, however, ignores the First Amendment problems with registration and enforcement of a trademark consisting of political commentary about the former president of the United States and a current political candidate. The very point of registering a trademark is to facilitate its enforcement through infringement actions under 15

U.S.C. § 1114, which provides for damages and injunctive relief against uses of a registered mark that are “likely to cause confusion.” Registration of a political slogan serves little purpose other than to allow the registrant to target competing users of the slogan to protect his claimed “exclusive right to use the registered mark in commerce on or in connection with the good or services specified in the certificate.” 15 U.S.C. § 1057; see *Matal*, 582 U.S. at 226–27 (describing benefits of registration).

Providing Respondent access to those means of enlisting courts to suppress competing uses of the slogan directly implicates the First Amendment. Courts, like federal agencies, are government bodies whose actions are subject to First Amendment scrutiny. And an injunction sought by a private party and directed at speech by a private party is subject to First Amendment limits. See *Madsen v. Women’s Health Center*, 512 U.S. 753 (1994); *Org. for a Better Austin v. Keefe*, 402 U.S. 415 (1971). So, too, a suit by a private party seeking damages against another private party invokes government power to award a remedy for private speech and, for that reason, is subject to First Amendment scrutiny. *E.g.*, *Snyder v. Phelps*, 562 U.S. 443 (2011); *Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46 (1988).

To be sure, the First Amendment may not protect the use of a mark as a source identifier for goods sold in the marketplace. Such speech is commercial and, insofar as such a source identification is false or misleading, unprotected. See *Jack Daniel’s*, 143 S. Ct. at 1591–92. But it does not follow from that premise that all expressive uses of trademarks are unprotected by the First Amendment, as this Court recently recognized by cautioning that its rejection of a First

Amendment-derived infringement defense was limited to cases involving the use of marks as source identifiers. *See id.* at 1587, 1588.

**B.** A statutory provision that forbids speech that is not false, but only potentially confusing or misleading, rests in an uneasy relationship to the protections usually accorded to noncommercial speech. Unlike fully protected speech, commercial speech can be regulated even if it is “not provably false, or even wholly false, but only deceptive or misleading,” *Friedman v. Rogers*, 440 U.S. 1, 9 (1979), allowing “regulation ... that might be impermissible in the realm of noncommercial expression,” *id.* at 9 n.9. Thus, although a “company has the full panoply of protections available to its direct comments on public issues, ... there is no reason for providing similar constitutional protection when such statements are made in the context of commercial transactions.” *Bolger v. Youngs Drug Prods. Corp.*, 463 U.S. 60, 68 (1983); *accord Bates v. State Bar of Ariz.*, 433 U.S. 350, 383 (1977) (“[T]he leeway for untruthful or misleading expression that has been allowed in other contexts has little force in the commercial arena.”); *Smith v. United States*, 431 U.S. 291, 318 (1977) (stating that “misleading statements in a political oration cannot be censored” but “misleading representations in a securities prospectus may surely be regulated”); *Young v. Am. Mini Theatres, Inc.*, 427 U.S. 50, 68 & n.31 (1976) (stating that “regulatory commissions may prohibit businessmen from making statements which, though literally true, are potentially deceptive”).

The Court’s acceptance of regulation of potentially misleading *commercial* speech, however, has never been extended to *political* speech. The Court has continued to insist on significantly greater protection for

fully protected speech. The imposition of liability potentially affecting fully protected speech generally requires special safeguards to avoid “discourag[ing] the ‘uninhibited, robust, and wide-open debate that the First Amendment is intended to protect.’” *Counter-man v. Colorado*, 143 S. Ct. 2106, 2116 (2023) (citations and internal quotation marks omitted).

This Court’s analysis of Section 110 of the Amateur Sports Act, 36 U.S.C. § 380, illustrates the distinction. That statute grants broad and exclusive rights to the United States Olympic Committee (USOC) to use the term “Olympics” and the five-ring logo. When the USOC challenged a group’s use of the term “Gay Olympics” to identify its own athletic competition, for which it charged entrance fees and sold various items emblazoned with its chosen moniker, the group asserted a First Amendment defense. This Court upheld the statute on the ground that “Section 110 primarily applies to all uses of the word ‘Olympic’ to induce the sale of goods or services,” and “the application of the Act to this commercial speech is not broader than necessary to protect the legitimate congressional interest and therefore does not violate the First Amendment.” *San Francisco Arts & Athletics, Inc. v. U.S. Olympic Comm.*, 483 U.S. 522, 539–40 (1987).

In contrast, when activists used the term “Olympics” in noncommercial speech, stating “Stop the Olympic Prison” on a poster for a campaign opposing the transformation of the Olympic Village at Lake Placid into a prison, the court properly avoided a potential First Amendment problem by reading Section 110 to apply only to commercial use of a mark to promote a rival product. *See Stop the Olympic Prison v. U.S. Olympic Comm.*, 489 F. Supp. 1112, 1120–21, 1126 (S.D.N.Y. 1980); *see also San Francisco Arts &*

*Athletics*, 483 U.S. at 536 n.14 (noting the ruling without suggesting that it was mistaken).

Several circuits have responded to the potential for conflict between the Lanham Act and the First Amendment by protecting noncommercial uses of marks from liability. See *Farah v. Esquire Magazine*, 736 F.3d 528, 541 (D.C. Cir. 2013); *Utah Lighthouse Ministry v. Found. for Apologetic Info. & Research*, 527 F.3d 1045, 1052–54 (10th Cir. 2008); *Bosley Med. Inst. v. Kremer*, 403 F.3d 672, 676–77 (9th Cir. 2005); *Taubman Co. v. Webfeats*, 319 F.3d 770, 774 (6th Cir. 2003); *Porous Media Corp. v. Pall Corp.*, 173 F.3d 1109, 1120 (8th Cir. 1999). Other courts have applied the First Amendment to support constructions of the Act that avoid needless impingements on the First Amendment right to engage in expressive speech or to limit the remedies that may be awarded. E.g., *Radiance Found. v. NAACP*, 786 F.3d 316, 322–24 (4th Cir. 2015) (construing the phrase “in connection with” goods and services narrowly to avoid First Amendment concerns raised by infringement claim against online article criticizing the NAACP); *CPC Int’l, Inc. v. Skippy*, 214 F.3d 456, 462–63 (4th Cir. 2000) (holding that the First Amendment barred extending a trademark injunction to prohibit the defendant from publicly criticizing the plaintiff’s successful trademark litigation); *Consumers Union v. Gen. Signal Corp.*, 724 F.2d 1044, 1054 (2d Cir. 1983) (holding that the First Amendment required accepting a disclaimer of endorsement, rather than barring the defendant from referring to the plaintiff’s rating of its product); *Better Bus. Bureau of Metro. Houston v. Med. Dirs., Inc.*, 681 F.2d 397, 404–05 (5th Cir. 1982) (narrowing an injunction to allow truthful statements about the plaintiff’s rating of the defendant).

Similarly, the First Amendment should bar issuance or enforcement of a trademark for political slogans that criticize political officials and other public personalities or, at least, should counsel in favor of construing the Lanham Act to prohibit such registrations. Here, that the phrase “Trump Too Small” embodies core political speech is the heart of Respondent’s First Amendment argument. But he does not need trademark rights to engage in core political speech, including by placing that slogan on shirts, as he desires to do. Granting a trademark in the insult “Trump Too Small” would be needed only if he seeks to constrain others’ use of that phrase—to decide who will have permission to place that speech on shirts or use it in other ways covered by his trademark and, if he allows others to print it on apparel, on what financial terms. Stated differently, the proposed trademark registration itself would not be political speech; rather, it would be a government-authorized restraint on other people’s use of that political speech as a slogan on clothing or in the other ways covered by the registration.

The speech that would be chilled or suppressed by registration here is undoubtedly fully protected by the First Amendment. As this Court has repeatedly held, the placement of political slogans on shirts and other articles of clothing is core political speech. In *Cohen v. California*, 403 U.S. 15, 18 (1971), for example, the Court held that the First Amendment barred a conviction for disturbing the peace by offensive conduct, where the conduct consisted of wearing in a California courthouse a jacket that expressed the defendant’s views on a public issue. In *Tinker v. Des Moines Independent Community School District*, 393 U.S. 503 (1969), the Court held that the First Amendment

protected the right to wear a black armband expressing a view about the war in Vietnam. The Court explained that the view conveyed through that clothing was “akin to ‘pure speech’ ... through a silent, passive expression of opinion.” *Id.* at 508. And in *Minnesota Voters Alliance v. Mansky*, 138 S. Ct. 1876 (2018), the Court struck down a Minnesota rule extending a ban on political buttons in the polling place to “expressive apparel” bearing words and symbols showing agreement with the “Tea Party,” because the rule regulated fully protected political expression in a manner not capable of reasoned application. *Id.* at 1891.<sup>2</sup>

Similarly, many lower court decisions have held that content printed on shirts and similar items may be expression fully protected by the First Amendment. *Frudden v. Pilling*, 742 F.3d 1199, 1205, 1207 (9th Cir. 2014) (holding that a requirement that students wear a school uniform emblazoned with the slogan “tomorrow’s leaders” was compelled speech endorsing a specific viewpoint in violation of the First Amendment); *Ayres v. City of Chicago*, 125 F.3d 1010, 1014 (7th Cir. 1997) (stating that “T-shirts that plaintiff sells carry an extensive written message of social advocacy” and that “there is no question that the T-shirts are a medium of expression prima facie protected by the ... First Amendment”); *Comedy III Prods. v. Gary Saderup, Inc.*, 21 P.3d 797, 804 (Cal. 2001) (“Nor does the fact that Saderup’s art appears on a less conventional

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<sup>2</sup> More recently, in *Iancu*, the Court recognized that the use of an offensive term on articles of clothing was speech protected by the First Amendment against viewpoint discrimination. Because the use at issue was as a trademark to identify source, the Court did not consider the level of protection that attached to the speech. *See* 139 S. Ct. at 2299.

avenue of communications, T-shirts, result in reduced First Amendment protection.”).

C. Although Respondent desires to print a political slogan on shirts offered for sale, and to prevent others from printing the same slogans on shirts offered for sale, the appropriate level of scrutiny here is nonetheless the heightened scrutiny of restrictions on political speech. As the court below recognized, Pet. App. 9a–10a, speech ordinarily protected by the First Amendment does not lose that protection just “because ... written materials sought to be distributed are sold rather than given away.” *Heffron v. Int’l Soc. for Krishna Consciousness*, 452 U.S. 640, 647 (1981). In *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964), for example, the plaintiff sought to hold a publisher liable for content in a paid advertisement contained in a newspaper that was sold to its readers, in an era before this Court recognized First Amendment protection for commercial speech. Yet no opinion in the case suggested that the newspaper was engaged in commercial speech and hence entitled to a lesser degree of First Amendment protection. And this past Term in *303 Creative LLC v. Elenis*, 143 S. Ct. 2298, 2316 (2023), this Court explicitly reaffirmed that the commercial sale of products that incorporate fully protected speech does not diminish the First Amendment protection of that speech.

Permitting Respondent to monopolize the use of the slogan “Trump Too Small”—or any other political slogan—by registering it as a trademark cannot be squared with the full protection that the First Amendment provides anyone who wants to print those words on a shirt or other item to express their views. Indeed, Respondent does not deny that others have the same First Amendment right that he himself claims to print

those words on a shirt. Instead, he argues that the Court need not concern itself with the First Amendment rights of others who wish to use the slogan because his trademark will not be enforceable against those who merely print it on a shirt or other product unless they also use it as a “source identifier” for their goods. Resp. Br. in Opp. 19.

Respondent’s assurance that he will not seek to stop others from using the mark for protected expression of their political views rings hollow because that is exactly the kind of use of the mark for which he sought registration. That is, the registration application does not suggest that he seeks to use the phrase as a label identifying the source of the shirt. Rather, the example Respondent provided to the Patent and Trademark Office of the use that he intends to make of the mark “Trump Too Small” is as a message displayed prominently across the front of a shirt (above an image of a hand), with the back of the shirt providing further elaboration of various ways in which Trump is “too small”—“Small on the environment,” “Small on civil rights,” and so on.<sup>3</sup> But “a trademark is not a trademark unless it identifies a product’s source.” *Jack Daniel’s*, 143 S. Ct. at 1583. If those uses of the mark qualify as source identifiers, registration of the mark as Respondent intends to use it would imply that similar uses by others are barred. At the same time, Respondent’s assurance that he will *not* use the trademark he seeks to restrict the speech of other

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<sup>3</sup> The example supplied by Respondent to the Patent and Trademark Office is available at <https://tsdrsec.uspto.gov/ts/cd/casedoc/sn87749230/RFR20190130184553/4/webcontent?scale=1> (front) and <https://tsdrsec.uspto.gov/ts/cd/casedoc/sn87749230/RFR20190130184553/5/webcontent?scale=1> (back).

people who seek to use the slogan to express their views implicitly concedes that his own intended use of the slogan does not qualify for trademark protection because it does not identify the source of a product.

For these reasons, the United States Patent and Trademark Office generally refuses to allow the registration of “political slogans, which when applied to things like bumper stickers and t-shirts, do not usually serve as trademarks for those goods.” 1 J. Thomas McCarthy, *McCarthy on Trademarks and Unfair Competition* § 7:23 (5th ed. 2023). As the Trademark Manual of Examining Procedure (TMEP) instructs, “[m]atter that merely conveys ... social, political, religious or similar informational messages in common use ... would not be perceived as indicating source and thus is not registrable.” TMEP § 1202.04(b) (2022) (Widely Used Messages).<sup>4</sup>

As a result, slogans such as “Black Lives Matter,” “I Can’t Breathe,” “#MeToo,” and “No More RINOs!” have been denied registration, based on evidence that “consumers purchasing applicant’s goods will perceive applicant’s proposed mark as a political slogan commonly used by multiple individuals and entities rather than a sole source of products or services.” *In re Hulting*, 107 U.S.P.Q.2d 1175 2013 WL 5407310, at \*3 (T.T.A.B. 2013) (denial of registration for “No More RINOs”); *see also* Lili Liermann, *Justice for Social Movement Trademarks*, IP Bytes (Feb. 5, 2021) (denial of registration for “I Can’t Breathe” and “Black Lives Matter”)<sup>5</sup>; *In Re Go & Assocs.*, 2022 WL 1421542

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<sup>4</sup> The Manual is available at [https://tmepl.uspto.gov/RDMS/TMEP/current#/current/ch1200\\_d29b4b\\_25b93\\_92.html](https://tmepl.uspto.gov/RDMS/TMEP/current#/current/ch1200_d29b4b_25b93_92.html).

<sup>5</sup> <https://blogs.luc.edu/ipbytes/2021/02/05/justice-for-social-movement-trademarks/>.

(T.T.A.B. Apr. 20, 2022) (denying registration of “Everybody vs. Racism” because “[m]atter that is widely used to convey ordinary or familiar concepts or sentiments, or social, political, religious, or similar informational messages that are in common use, would not be perceived as indicating source and are not registrable”). Although these decisions rest on evidence that a particular political slogan is in widespread use, it should not matter that the person seeking to gain the exclusive right to control a particular phrasing of a political criticism is the first person to phrase the criticism in just that way. Phrases criticizing public figures should remain in the public domain, and the trademark laws are not properly invoked to allow their originators (or whoever first puts them on a shirt) to exclude others from using them (or to charge them for doing so).

Professor Lisa Ramsey has therefore suggested that, to protect the public domain and promote free expression, the Patent and Trademark Office should conclusively presume that “words associated with news events and social movements [and] political phrases,” like a number of other kinds of expressions that are “inherently valuable in the marketplace,” do not function as trademarks for apparel and other expressive merchandise and should flatly refuse to register them or otherwise extend the protection of trademark law. *See* Lisa Ramsey, *Using Failure to Function Doctrine to Protect Free Speech and Competition in Trademark Law*, 104 Iowa L. Rev. Online 70, 87–88, 90 (2020). In the alternative, Professor Ramsey suggests that, at the very least, the Patent and Trademark Office should adopt a standard requiring evidence that a majority of consumers believe that the phrase identifies source before registering such a

mark and thereby removing it from the public domain. If this standard were applied, based on the administrative record, Respondent's proposed registration would have to be denied, because he introduced *no* evidence of secondary meaning and no evidence that a majority of consumers would understand the phrase "Trump Too Small" as an indication of source.

Whatever the rule for assessing the registrability of affirmative slogans associated with political action, allowing the registration of phrases that openly criticize government officials, political candidates, and other public figures or companies would make it too easy to obtain enforceable government restrictions on free speech. Whether on First Amendment grounds or statutory ones, the trademark registration of critical slogans and phrases is impermissible.

**D.** Finally, allowing registration of a critical phrase as a trademark, thereby enabling the registrant to forbid others from placing that criticism on shirts, would enable public figures and companies to use trademark registration to prevent others from criticizing them. A politician or company could simply go through the motions of using a particular negative slogan in commerce, and then apply to register the mark (or, indeed, file an intent-to-use application). A similar tactic has been quite common with respect to internet domain names: Companies often register negative domain names for the purpose of preventing others from using them. For example, when Bell Atlantic and GTE Corporation merged and devised the brand name Verizon for their new company, they sought to get the jump on potential critics by themselves registering more than fifty critical domain names, including VerizonSucks.com. *See* David Streitfeld, *Making Bad Names for Themselves*, Wash. Post

A1, A30 (Sept. 8, 2000).<sup>6</sup> Similarly, the Trump Organization has many domain names that contain variations on criticisms of Donald Trump. See Jose Pagliery & Tal Yellin, *Trump has 3,643 websites that range from TrumpEmpire.com to TrumpFraud.org*, CNN (Feb. 20, 2017).<sup>7</sup>

The registration of multiple negative domain names to block others from using those names often has very limited impact on free speech, because similar domain names can generally be registered by others whose actual purpose is to criticize, either by using a different top level domain (for example, dot-info instead of dot-com), or by making a modification in the second level domain (for example, registering “verizonreallysucks.com,” see Streitfeld, *Making Bad Names*, *supra*). Even a change of a single letter can be enough to create a new domain name. By contrast, allowing the registration of critical trademarks for the purpose of blocking criticism would have far greater impact on the ability to criticize because the likelihood-of-confusion standard allows a trademark holder to obtain relief against the use of similar names. See *Qualitex Co. v. Jacobson Prods. Co.*, 514 U.S. 159, 167 (1995). Thus, a decision allowing Respondent to register a political slogan could set a precedent that would work real mischief against the right to engage in core political speech.

In sum, Respondent’s claim that the First Amendment prevents the application of 15 U.S.C. § 1052(c)

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<sup>6</sup> An abridged version is available at <https://www.capecod-times.com/story/news/2000/09/09/how-verizon-made-bad-names/51018002007/>.

<sup>7</sup> <https://money.cnn.com/2017/02/20/technology/trump-websites/index.html>.

to bar registration of his mark fails because the registration of his mark itself cannot be squared with the First Amendment, or with the Lanham Act's requirement that a trademark is available only for a mark that identifies the source of a product. However troublesome section 1052(c) might be if applied to deny registration of a potentially legitimate mark, a case in which registration of the mark would offend the First Amendment is not the proper occasion for considering its constitutionality in a different context.

### CONCLUSION

For the foregoing reasons, the decision below should be reversed.

Respectfully submitted,

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