

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 OF *AMICUS CURIAE* PROFESSOR
SAMUEL F. ERNST IN SUPPORT OF
RESPONDENT**

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CORPORATE DISCLOSURE STATEMENT

Amicus is an individual and has no parent corporation or corporate stock.

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INTEREST OF *AMICUS*

Amicus Samuel F. Ernst is a law professor and scholar who studies and writes about intellectual property law and constitutional law.¹ His interest in this case stems from his professional academic interest in guiding the development of the law to benefit society. *Amicus* has no personal interest in the outcome of this case. Professor Ernst's views do not necessarily represent the views of his employer, Golden Gate University.

¹ No counsel for a party authored this brief in whole or in part and no such counsel or party made a monetary contribution intended to fund the preparation or submission of this brief.

**CONSTITUTIONAL AND STATUTORY
PROVISION AT ISSUE**

The First Amendment provides as follows:

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

U.S. CONST. amend. I.

The relevant portion of Section 2 of the Lanham Act, 15 U.S.C. § 1052(c), provides as follows:

No trademark by which the goods of the applicant may be distinguished from the goods of others shall be refused registration on the principal register on account of its nature unless it—

(c) Consists of or comprises a name, portrait, or signature identifying a particular living individual except by his written consent, or the name, signature, or portrait of a deceased President of the United States during the life of his widow, if any, except by the written consent of the widow.

SUMMARY OF ARGUMENT

Section 2(c) of the Lanham Act requires the Patent & Trademark Office (“The PTO”) to deny federal registration to a mark that “[c]onsists of or comprises a name, portrait, or signature identifying a particular living individual” unless that person gives “his written consent.” 15 U.S.C. § 1052(c) (“section 2(c”). This provision thereby gives political figures and other

celebrities veto power over the registration of marks commenting on their policies or persons without any showing that the mark would cause consumer confusion, dilution, deception, false association, or any of the other legitimate harms that the Lanham Act is intended to prevent. It thereby results in *de facto* viewpoint discrimination, because celebrities are free to veto marks that are critical of themselves while consenting to marks that are neutral or convey praise.

The Court of Appeals for the Federal Circuit correctly held that this provision is unconstitutional in violation of the First Amendment as applied to the mark TRUMP TOO SMALL — a mark intended as a source identifier that also criticizes former President Donald Trump. *In re Elster*, 26 F.4th 1328, 1331 (Fed. Cir. 2022). Specifically, the court held that “section 2(c) involves content discrimination that is not justified by either a compelling or substantial government interest.” *Id.*

Under this Court’s precedent – and, in particular, its decisions in *Matal v. Tam* and *Iancu v. Brunetti* – the Federal Circuit’s decision is correct.² Section 2(c) constitutes content-based speech discrimination because it impermissibly burdens speech based solely on the subject being discussed: the political figure or celebrity identified in the trademark. Under this Court’s precedent, such content-based restrictions are subject to strict scrutiny, just like viewpoint

² See *Matal v. Tam*, 137 S.Ct. 1744, 1765 (2017) (holding that the Lanham Act’s bar on the registration of disparaging marks is facially unconstitutional); *Iancu v. Brunetti*, 139 S.Ct. 2294, 2302 (2019) (holding that the Lanham Act’s bar on the registration of immoral and scandalous marks is facially unconstitutional).

discriminatory provisions. Even if the Court were to decide that trademarks are purely commercial speech, doing nothing more than proposing a commercial transaction, section 2(c) is subject to intermediate scrutiny, whereby it must be tailored to advance a substantial government interest.

The government cannot escape this conclusion by arguing that the denial of trademark registration does not outright prohibit the expression of the political or social commentary contained in a mark. This Court's precedent applies scrutiny to provisions that burden, and not just prohibit, speech based on their content. And the Court found in *Tam* and *Brunetti* that the improper denial of trademark registration burdens free speech because of the substantial benefits federal registration provides. Nor does trademark registration constitute a government benefit or subsidy, or constitute access to a non-public speech forum, and allow the government to engage in content discrimination on those bases.

Section 2(c) fails intermediate scrutiny because the government has no substantial interest in protecting celebrities' privacy from political and social commentary. To the extent the federal government has a legitimate interest in protecting the state right of publicity, section 2(c) is not narrowly tailored to serve that purpose because, unlike the right of publicity, the provision burdens speech without taking any countervailing First Amendment interests into account. Indeed, the provision requires that the PTO take nothing into account beyond whether the mark identifies a famous person and whether the famous person has consented to its registration.

Accordingly, the provision does not serve the other purposes the government suggests, such as barring marks that fail to function or violate the other legitimate bars to registration contained in the Lanham Act that are justified by the Act's consumer protection and trade regulation purposes. To the extent the federal registration of marks solely comprised of political or social commentary threatens free speech by granting a limited right of exclusion in such commentary, the failure-to-function doctrine can be used to police such abuse. But the government has never offered evidence to show that the mark at issue here, or all of the other social and political commentary marks swept up by section 2(c), fail to function as source identifiers solely because they also identify a celebrity.

Because section 2(c) impermissibly burdens free speech in a broad range of contexts even beyond marks that criticize a political figure, the Court should declare the provision facially unconstitutional in violation of the First Amendment.

ARGUMENT

I. Section 2(c) is subject to at least intermediate scrutiny.

Section 2(c) requires the PTO to deny federal registration to a trademark that comments on a political figure or other famous person unless that person gives his or her consent. Because political figures are unlikely to give their consent to marks that are critical of their persons or policies, this results in *de facto* viewpoint discrimination that strikes at the heart of the First Amendment. Even though the provision is, as a technical matter, a content-based

restriction, because it discriminates based on the subject matter being discussed, it is nonetheless subject to strict scrutiny under the Court's precedent. At the very least the provision is subject to intermediate scrutiny, if the Court were to view trademarks as commercial speech. Because the government cannot justify the provision even under intermediate scrutiny, it devotes its brief to making arguments that the denial of trademark registration under this provision is subject to something akin to rational basis review.³ The Court has already rejected most of these arguments in previous cases.

A. As a content-based restriction, section 2(c) is subject to strict scrutiny

This case presents a somewhat different question than *Tam* and *Brunetti* because it involves a regulation that is formally viewpoint neutral. Section 2(c) bars registration of the name of a famous person without their consent whether the mark in question criticizes, praises, or expresses no opinion about the celebrity it identifies. Accordingly, most of the government's case relies on arguments that section

³ It is unclear precisely which standard of review the government is advocating. The government brief never comes right out and says the words "rational basis," but its arguments are all grounded in the notion that section 2(c) is "reasonable." For example, the government argues, "[b]ecause heightened scrutiny is unwarranted, the First Amendment inquiry turns on whether Section 1052(c) has a reasonable basis." Gov. Br. at 18. In the absence of a concession that the provision is subject to at least intermediate scrutiny, one can only assume the government is arguing that the Court subject this content-discriminatory provision to rational basis review, which would be error.

2(c) is subject only to some type of rational basis review.

However, the Federal Circuit correctly determined that section 2(c) is subject to First Amendment scrutiny because it involves “content-based discrimination.” *Elster*, 26 F.4th at 1331. As this Court held in *Reed v. Town of Gilbert*, “a speech regulation targeted at specific subject matter is content-based even if it does not discriminate among viewpoints within that subject matter.” 576 U.S. 155, 169 (2015) (holding unconstitutional a code imposing different restrictions on the manner in which people may display outdoor signs based on the subject matter—but not the viewpoints—they address). Section 2(c) does just that, burdening speech by denying federal trademark registration when the subject matter of that speech involves a famous person. And even though viewpoint discrimination “is a ‘more blatant’ and ‘egregious form of content discrimination,’” both viewpoint discrimination and content-based discrimination are subject to strict scrutiny. *Reed*, 576 U.S. at 168 (quoting *Rosenberger v. Rector and Visitors of Univ. of Va.*, 515 U.S. 819, 829 (1995)); see also *Consolidated Edison Co. of N.Y. v. Public Serv. Comm’n of N.Y.*, 447 U.S. 530, 537 (1980) (“The First Amendment’s hostility to content-based regulation extends not only to restrictions on particular viewpoints, but also to prohibition of public discussion of an entire topic.”).

In fact, section 2(c) is even more odious than the content-based restrictions at issue in *Reed* and the other cited cases, because its practical effect is to result in *de facto* viewpoint discrimination. This is

because nothing in section 2(c) prohibits political figures from registering marks containing political commentary about themselves. But section 2(c) prevents ordinary citizens from registering such marks unless the politician consents. Presumably neither former President Trump nor any other politician would register or consent to a mark criticizing their policies or persons, such as TRUMP TOO SMALL. They might register or consent to the registration of a mark praising themselves. Hence, the Lanham Act creates a regime that burdens critical political commentary while incentivizing propaganda, resulting in *de facto* viewpoint discrimination.

Indeed, the legislative history of section 2(c) demonstrates that Congress was concerned with the registration of trademarks that would sully politicians' reputations. One House member stated, "we would not want to have Abraham Lincoln gin." Hearing on H.R. 4744 Before the Subcommittee on Trademarks of the House Committee on Patents, 76th Cong., 18–21 (1939) (statement of Representative Maroney). Another member agreed, but with viewpoint-biased qualifications, stating, "Abraham Lincoln gin ought not to be used, but I would not say the use of G. Washington on coffee should not be permissible." *Id.* (statement of Representative Rogers). Hence, section 2(c) does not seek to bar registration for legitimate trademark reasons (such as consumer confusion, false association, or deception). This is apparent, not only by its plain language and application, but in accordance with the intent of Congress. Rather, Congress's intent was to protect politicians and other celebrities from trademarks that would cast them in a negative light. To quote Professor

Jennifer Rothman, “[t]he provision was adopted to preserve the dignity of those depicted without consent...” Jennifer E. Rothman, *Navigating the Identity Thicket: Trademark's Lost Theory of Personality, the Right of Publicity, and Preemption*, 135 HARV. L. REV. 1271, 1308 (2022). That is viewpoint discrimination.

Giving political figures and other celebrities the right to veto speech that might criticize or lampoon them offends a core, animating principle of the First Amendment. “Whatever differences may exist about interpretations of the First Amendment, there is practically universal agreement that a major purpose of that Amendment was to protect the free discussion of governmental affairs.” *Mills v. State of Ala.*, 384 U.S. 214, 218 (1966). As this Court has often noted, “[s]peech is an essential mechanism of democracy, for it is the means to hold officials accountable to the people. *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310, 339 (2010). For this reason, “political speech must prevail against laws that would suppress it, whether by design or inadvertence. Laws that burden political speech are subject to strict scrutiny...” *Id.* at 340.

The mark at issue here may appear to be boorish, low-brow humor, but humor is an important ingredient in much political resistance. George Orwell wrote about this in his essay, *Funny, but not Vulgar*: “Every joke is a tiny revolution.... Whatever destroys dignity, and brings down the mighty from their seats, preferably with a bump, is funny. And the bigger they fall, the bigger the joke. George Orwell, *Funny, but Not Vulgar* (1945), reprinted in GEORGE ORWELL,

FUNNY, BUT NOT VULGAR AND OTHER SELECTED ESSAYS AND JOURNALISM 119 (The Folio Society ed. 1998). There are many contemporary examples of humor being used as part of the political resistance against autocrats in, for example, North Africa, Serbia, Egypt, and Russia. See Samuel F. Ernst, *Trump Really Is Too Small: The Right to Trademark Political Commentary*, 88 BROOKLYN L. REV. 839, 856-58, 867-68 (2023). Such humor is but one aspect of critical political speech that section 2(c) impermissibly burdens.

B. Even if trademarks are viewed as “commercial speech,” section 2(c) is subject to intermediate scrutiny.

There does remain some question as to whether trademark regulations are subject to intermediate scrutiny, rather than strict scrutiny, on the basis that they regulate commercial speech. This Court defines “commercial speech” as “speech that does no more than propose a commercial transaction.” *Harris v. Quinn*, 573 U.S. 616, 648 (2014) (quoting *United States v. United Foods*, 533 U.S. 405, 409 (2001)). The uncertainty arises because many trademarks do more than simply propose a commercial transaction; they are also expressive.

As Professor Lisa Ramsey points out, in addition to identifying the source of goods and products, trademarks “can also convey political or social messages and espouse powerful viewpoints and ideas about a variety of topics in just a few words.” Lisa Ramsey, *Free Speech Challenges to Trademark Law After Matal v. Tam*, 56 HOUS. L. REV. 401, 436 (2018). JUST DO IT is a trademark of Nike that indicates the source of its clothing and footwear. JUST DO IT,

Registration No. 1,875,307 (“CLOTHING, NAMELY T-SHIRTS, SWEATSHIRTS AND CAPS”). The mark also conveys an influential social message that, according to one author, “invited dreams. It was a call to action, a refusal to listen to excuses and a license to be eccentric, courageous and exceptional.” FRIEDRICH VON BORRIES, WHO’S AFRAID OF NIKETOWN?: NIKE-URBANISM, BRANDING AND THE CITY OF TOMORROW 37 (2004). We can also take as an example of a mark that conveys a political or social message, in addition to identifying a source, the mark at issue in this case, TRUMP TOO SMALL.

In *Tam*, this Court declined to resolve the parties’ dispute as to “whether trademarks are commercial speech and are thus subject to the relaxed scrutiny outlined in *Central Hudson Gas*,” because the disparagement provision was facially invalid even under intermediate scrutiny. *Tam*, 137 S.Ct. at 1763-64 (citing *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm’n of N.Y.*, 447 U.S. 557 (1980)). Likewise the Court’s majority opinion in *Brunetti* makes no mention of which standard of review it is applying, stating simply that “[i]f the ‘immoral or scandalous’ bar similarly discriminates on the basis of viewpoint, it must also collide with our First Amendment doctrine.” *Brunetti*, 139 S.Ct. at 2299.

However, none of this confusion results in the government’s conclusion that section 2(c) is subject to rational basis review. The Federal Circuit correctly held in *Elster* that “[w]hatever the standard for First Amendment review of viewpoint-neutral, content-based restrictions in the trademark area, whether strict scrutiny or intermediate scrutiny, there must be

at least a substantial government interest in the restriction.” *Elster*, 26 F.4th at 1333-34. There can be no rational basis review, as the government appears to urge. At the very least section 2(c) must pass intermediate scrutiny, which it fails to do, as discussed below. See Ernst, *Trump Really Is Too Small*, 88 BROOKLYN L. REV. at 858-59.

C. The denial of federal trademark registration under section 2(c) places an impermissible burden on free speech.

The government also argues that the provision escapes First Amendment scrutiny because: “no speech is restricted”; “the refusal results only in the withholding of certain benefits without regard to viewpoint”; and the provision provides conditions on access to a limited public forum.” Pet. Br. at 16-24. But this Court already rejected most of these arguments in *Tam* and *Brunetti* in reasoning that had nothing to do with the fact that the provisions at issue in those cases constituted viewpoint discrimination, rather than content-based discrimination.

The Court’s decisions in *Tam* and *Brunetti* to strike down the bars on registering disparaging, immoral, and scandalous marks were grounded in the concept that the improper denial of federal trademark registration may constitute an unconstitutional burden on speech, even though “[w]ithout federal registration, a valid trademark may still be used in commerce.” *Tam* at 1753. This is because “[f]ederal registration . . . confers important legal rights and benefits on trademark owners who register their marks.” *Id.* (internal quotation marks and citation omitted); see also *Brunetti*, 139 S.Ct. at 2297-98.

The Court’s conclusion that denial of registration burdens speech makes common sense, because registrants would be dissuaded from selecting and using marks that they could not register. This conclusion did not depend on the restrictions at issue in *Tam* and *Brunetti* being view-point based. A regulation that burdens (and does not prohibit) speech is subject to First Amendment scrutiny even if it is content-based. The Court has held that “[t]o sustain the targeted, content-based burden [a regulation] imposes on protected expression, the State must show at least that the statute directly advances a substantial governmental interest and that the measure is drawn to achieve that interest.” *Sorrell v. IMS Health Inc.*, 564 U.S. 552, 572 (2011).

Nor is section 2(c) free from scrutiny based on the notion that trademark registration is a government benefit or subsidy. Under the “government subsidy” doctrine, the “Court has upheld the constitutionality of . . . programs that subsidized speech expressing a particular viewpoint.” *Tam* at 1757, 1760. The government in *Tam* argued that trademark registration was a government subsidy, and the government was therefore free to grant or withhold this subsidy based on the viewpoint expressed in marks. This argument was explicitly rejected by four members of the Court, because the cases establishing the doctrine “all involved cash subsidies or their equivalent.” *Id.* at 1761 (opinion of Alito, J.) (internal citations omitted).⁴ Unlike the programs at issue in

⁴ Although the Court voted 8-0 to invalidate the provision at issue in *Tam*, the opinion was split between two non-majority opinions. Only the opinion by Justice Alito explicitly addressed –

the government subsidy cases, “[t]he PTO does not pay money to parties seeking registration of a mark. Quite the contrary is true: An applicant for registration must pay the PTO a filing fee.” *Id.* at 1761. The government cannot grant or deny registration of a trademark based on the political content or viewpoint of the applicant’s speech any more than it can grant or deny registration of property titles, security interests, vehicle registrations, or driving, hunting, fishing, or boating licenses based on the content or viewpoint of the applicant’s speech. *See id.* Hence, section 2(c) does not escape scrutiny based on the notion that trademark registration is a government subsidy or benefit, even though it is a content-based restriction.

Nor is the Government correct that it can discriminate against trademarks based on their content because the federal trademark registration scheme is akin to a non-public forum. The Lanham Act does not create a forum “dedicated to the discussion of certain subjects.” Pet. Br. at 18 (quoting *Pleasant Grove City v. Summum*, 555 U.S. 460, 470 (2009)). In *Pleasant Grove* the Court held that the government could regulate which statues were placed in a public park because “[p]ermanent monuments displayed on public property typically represent government speech.” 555 U.S. at 470. But in *Tam* this Court unanimously and emphatically rejected the notion that trademarks are government speech. The Court reasoned:

and rejected – the Government’s argument that federal trademark registration is a government benefit.

If the federal registration of a trademark makes the mark government speech, the Federal Government is babbling prodigiously and incoherently.... It is saying many unseemly things. It is expressing contradictory views. It is unashamedly endorsing a vast array of commercial products and services. And it is providing Delphic advice to the consuming public.

Tam, 137 S.Ct. at 1758. But of course, as this Court concluded in *Tam*, the government is doing none of these things. Rather, “[t]rademarks are private, not government, speech.” *Id.* at 1760. The government cannot, therefore, discriminate against them based solely on their containing political content or commenting on celebrities. *See Ernst*, 88 BROOKLYN L. REV. at 850-56, 859-60.

II. Applying intermediate scrutiny, section 2(c) is unconstitutional

Even if the Court decides that trademarks constitute purely commercial speech, section 2(c) must pass muster under the four-part *Central Hudson* test. First, the regulated speech must concern lawful activity and not be misleading, and so deserving of First Amendment protection. Second, the regulation must be supported by a substantial government interest. Third, the regulation must directly advance that interest. Fourth, the regulation must not be more extensive than necessary to serve that interest. *Central Hudson*, 447 U.S. at 566.

A. Section 2(c) burdens lawful speech.

It is beyond question that section 2(c) burdens lawful speech. The provision does not require a finding

that a mark is misleading, deceptive, would be likely to cause consumer confusion or trademark dilution, or run afoul of any of the other legitimate bars on trademark registration that Congress is authorized to impose under the Lanham Act to regulate Commerce.⁵ Indeed, it would be difficult for the government to establish that marks such as TRUMP TOO SMALL, which criticize or lampoon public figures, would cause consumers to believe that such marks originate from, are sponsored by, approved by, or supported by those same public figures. Hence, section 2(c)'s facial validity is suspect because it burdens a wide range of marks that are not deceptive or misleading. It bars registration without requiring any inquiry into such matters.

B. The government does not have a substantial interest in protecting celebrities' privacy from political and social commentary.

In the Court of Appeals, the government's asserted substantial interest in enforcing section 2(c) was to "protect[] state-law privacy and publicity rights, grounded in tort and unfair competition law." *Elster*, 26 F.4th at 1334. It appears that the government has abandoned the privacy argument. Pet. Br. at 28. And

⁵ Congress is specifically authorized to grant exclusionary rights to "Writings and Discoveries" under the Patents and Copyright Clause of the Constitution, which grants Congress no such power with respect to trademarks. U.S. CONST. art. I, § 8, cl. 8. Congress's power to regulate trademarks necessarily arises under the Commerce Clause, and such regulations should therefore be limited to the Lanham Act's purpose of protecting consumers and regulating deceptive trade practices.

with good reason. The Federal Circuit correctly dispensed with the alleged privacy interest in short shrift: “Here, there can be no plausible claim that President Trump enjoys a right of privacy protecting him from criticism in the absence of actual malice—the publication of false information ‘with knowledge of its falsity or in reckless disregard of the truth.’” *Elster*, 26 F.th at 1335 (quoting *Time, Inc. v. Hill*, 385 U.S. 374, 388 (1967)).

Absent a showing of actual malice, the First Amendment protects all speech commenting on, not just the President and public officials, but any celebrities or famous persons. *See Curtis Pub. Co. v. Butts*, 388 U.S. 130, 135, 155 (1967) (applying the “actual malice” standard to the coach of a college football team who was employed by a private corporation). Section 2(c) cannot be justified by a government interest in protecting celebrities from public comment because it contains no requirement of actual malice to bar registration.

C. Section 2(c) is not tailored to protect the state right of publicity.

The government’s principal argument, in the Court of Appeals and in this Court, is that section 2(c) is justified to protect the state right of publicity. Pet. Br. at 28-30.

To the extent the government might have a substantial interest in protecting the state right of publicity, section 2(c) is far more extensive than necessary to protect that interest. This is because every state right of publicity requires the weighing of countervailing First Amendment considerations before restricting speech. As Professor Rothman

observes, “[a]t least five balancing approaches have been applied to evaluate First Amendment defenses in right of publicity cases.” Jennifer E. Rothman, *THE RIGHT OF PUBLICITY: PRIVACY REIMAGINED FOR A PUBLIC WORLD* 145 (2018); *see also* Robert C. Post & Jennifer E. Rothman, *The First Amendment and the Right(s) of Publicity*, 130 *Yale L.J.* 86, 125–32 (2020).

For example, the Eighth Circuit’s general balancing test requires “that state law rights of publicity . . . be balanced against first amendment considerations.” *C.B.C. Distrib. & Mktg., Inc. v. Major League Baseball Advanced Media, L.P.*, 505 F.3d 818, 823 (8th Cir. 2007).

Missouri’s test asks whether the predominant purpose of using the famous person’s name or identity is to exploit its commercial value; or, rather, whether “the predominant purpose of the product is to make an expressive comment on or about a celebrity.” *Doe v. TCI Cablevision*, 110 S.W.3d 363, 374 (Mo. 2003) (en banc) (quoting Mark S. Lee, *Agents of Chaos: Judicial Confusion in Defining the Right of Publicity-Free Speech Interface*, 23 *LOY. L.A. ENT. L. REV.* 471, 500 (2003)).

The California test borrows from copyright’s fair-use analysis. This test considers “whether the new work merely ‘supersede[s] the objects’ of the original creation, or instead adds something new, with a further purpose or different character, altering the first with new expression, meaning, or message; it asks, in other words, whether and to what extent the new work is ‘transformative.’” *Comedy III Prods., Inc. v. Gary Saderup, Inc.*, 21 P.3d 797, 808 (Cal. 2001) (internal citations and quotation marks omitted).

As a final example, an approach adopted by the Third and Ninth Circuits inquires whether the use of the plaintiff's identity was not merely imitative, but rather "for purposes of lampoon, parody, or caricature," and therefore entitled to First Amendment protection. *See, e.g., Hart v. Elec. Arts, Inc.*, 717 F.3d 141, 160 (3d Cir. 2013); *Davis v. Elec. Arts, Inc.*, 775 F.3d 1172, 1177–78 (9th Cir. 2015).

The right of publicity is frequently criticized by scholars for evolving far beyond its original moorings as a modest outgrowth of the right of privacy. *See, e.g.,* Stacey L. Dogan & Mark A. Lemley, *What the Right of Publicity Can Learn from Trademark Law*, 58 STAN. L. REV. 1161, 1167 (2006) ("[C]ourts and legislatures began to recognize a much broader right of celebrities to prevent commercial use of their identities, without regard to whether the use suggested false endorsement...."). Specifically, scholars have criticized these First Amendment defenses to the right of publicity as providing *insufficient* protection for free speech. *See, e.g.,* David Franklyn & Adam Kuhn, *Owning Oneself in a World of Others: Towards a Paid-for First Amendment*, 49 WAKE FOREST L. REV. 977, 1011 (2014) ("The right [of publicity] is growing unchecked, and attempts to balance it against the First Amendment have resulted in a patchwork of misleading potential defenses."); Eugene Volokh, *Freedom of Speech and the Right of Publicity*, 40 HOUS. L. REV. 903, 930 (2003) ("[T]here is good reason to think . . . that the right of publicity is unconstitutional as to all noncommercial speech, and perhaps even as to commercial advertising as well.").

But section 2(c) is even worse. It takes *no* countervailing interests into account before denying registration to a mark, First Amendment or otherwise. Accordingly, to the extent the government interest animating section 2(c) is to protect the right of publicity, the statute is unconstitutionally overbroad because it burdens speech that the right of publicity would not burden. The provision is therefore far more extensive than necessary to serve the government's purported interest and is facially unconstitutional.⁶

Again, the distinction may be raised that section 2(c) does not prohibit speech, unlike the right of publicity, which can be used to obtain injunctions against commercial speech in particular circumstances. Unlike a party enjoined from speech under the right of publicity, a disappointed trademark registrant can nonetheless use the trademark in commerce. And again, the answer is that this Court's precedent applies scrutiny to regulations that merely burden free speech; not just to regulations that ban free speech. *See* Section I.C, *supra*. And because,

⁶ This Court recently decided that when an accused infringer uses a mark as a source identifier that parodies the plaintiff's mark, the district court should engage in a likelihood-of-confusion analysis, rather than apply a First Amendment defense at the threshold. *Jack Daniel's Properties, Inc. v. VIP Prods. LLC*, 599 U.S. 140, 153 (2023). The Court's decision depended in part on the reasoning that in these circumstances "the likelihood-of-confusion inquiry does enough work to account for the interest of free expression." *Id.* at 159. But again, section 2(c) burdens political speech without doing any work to protect free expression; neither through a likelihood-of-confusion analysis (which is already covered by section 1052(d)), nor through a First Amendment defense such as those used in the right of publicity context.

unlike the right of publicity, the provision requires denial of registration without any inquiry into whether the mark in question constitutes political or social commentary protected by the First Amendment, it is fatally overbroad. *See* Ernst, 88 BROOKLYN L. REV. at 860-866.

D. Section 2(c) is not justified by the government's additional arguments.

The government asserts several additional justifications for section 2(c), none of which are persuasive.

1. Section 2(c) does not function to protect free speech.

The government suggests that section 2(c) operates to *protect* free speech, because granting federal registration in a political or social commentary mark grants a limited right of exclusion to the registrant to prevent others from using the mark in commerce. Pet. Br. at 25-26 (“[T]he purpose and effect of federal trademark registration is to enhance the registrant’s ability to restrict the speech of others.”). *Amicus* Public Citizen makes a similar argument, stating that the Court of Appeals’ decision “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.” Br. of *Amicus Curiae* Public Citizen in Support of Petitioner (“Public Citizen Br.”) at 5.

It is true as a general matter that the grant of trademark registration to social and political commentary marks grants a right to exclude others from using confusingly similar marks in commerce.

But section 2(c) does nothing to address this free speech concern for several reasons.

First, section 2(c) does not prevent politicians and celebrities *themselves* from registering political and social commentary containing their own names and thereby burdening others from using the same political message in commerce. This poses a much greater harm than any such fear addressed by section 2(c). A politician could register a mark praising himself or his policies, and use it to prevent other citizens from saying confusingly similar political speech in commerce. A politician could even register a mark critical of himself and thereby use it to suppress negative political commentary, so long as he was willing to use it in commerce to some limited degree. Section 2(c) does nothing to address these harms lurking in the Lanham Act. Rather, it exacerbates them by giving famous people an unqualified right to veto marks containing their identity or portrait, resulting in *de facto* viewpoint discrimination.

Second, section 2(c) allows for the registration of a wide array of marks containing political and social commentary by *anyone*, so long as said marks do not identify a famous person without her consent. Professor Ramsey points to many examples of such registered marks: “‘#METOO’ for lipstick, perfume, wristbands, and legal services, and MAKE AMERICA GREAT AGAIN and BLACK LIVES MATTER for clothing, printed publications, and various other goods and services.” Ramsey, *Free Speech Challenges to Trademark Law After Matal v. Tam*, 56 HOUS. L. REV. at 462. Nothing in section 2(c) prevents the registration of these marks, which could be used to

exclude others from saying similar things in commerce.

Third, the federal registration of disparaging, immoral, or scandalous marks could also have the effect of preventing or chilling the free speech rights of others to say such disparaging, immoral, or scandalous things in commerce; even disparaging, immoral, and scandalous social and political commentary (for example, the disparaging mark THE SLANTS). This concern did not justify the bars on registration that the Court struck down in *Tam* and *Brunetti*.

Hence, it is true that federal trademark registration can allow private entities to restrict the free speech rights of others.⁷ But this concern is far too big of a whale for section 2(c) to swallow due to the many other contexts that the Lanham Act allows for the registration of marks containing social and political commentary. Hence, protecting free speech is not and cannot be the animating purpose behind section 2(c). Rather, these concerns can be addressed without offending free speech, through application of the “failure-to-function” doctrine, as set forth below. See Ernst, 88 Brooklyn L. Rev. at 870-74.

⁷ To the extent the Court’s jurisprudence does not adequately take this into account when it declares a First Amendment right to an IP power of exclusion, the Court may decide to revisit whether it should engage in a more nuanced approach to the First Amendment that considers, not only the rights of the plaintiff, but the effect of its rulings on the quantum of free speech in society as a whole. See Ernst 88 BROOKLYN L. REV. at 874-878; see also Genevieve Lakier, *The First Amendment’s Real Lochner Problem*, 87 U. CHI. L. REV. 1241 (2020).

2. Section 2(c) does not serve the purpose of barring marks that “fail to function.”

The government further defends section 2(c) on the basis that, “[i]f what the applicant seeks to register ‘fails to function as a mark,’ it cannot be registered, regardless of any message it would otherwise convey.” *Id.* at 26 (quoting THE TRADEMARK MANUAL OF EXAMINING PROCEDURE (“TMEP”) § 1202.04).

If the government is arguing that section 2(c) is justified by the “failure-to-function” doctrine, it has again erred. This cannot be the purpose of section 2(c) for several reasons. Section 2(c) does not require a finding by the PTO that a mark fail to function as a source identifier. Nor was this the basis for the PTO denying registration to TRUMP TOO SMALL. There is no evidence in the record to show that TRUMP TOO SMALL fails to function as a trademark. A mark *could* serve as a source identifier even if it did contain the name of a politician or celebrity. For example, LINCOLN CONTINENTAL functioned as a trademark for over sixty years, indicating the Ford Motor Company as the source of certain automobiles, even though it contained the name of former President Abraham Lincoln. LINCOLN CONTINENTAL, Reg. No. 0591602 (reg. June 22, 1954; cancelled Apr. 1, 2016). And section 2(c) would not be necessary to bar the registration of marks that fail to function, because the PTO already has the power to issue such denials under other provisions of the Lanham Act. Therefore, if this were section 2(c)’s purpose, the provision would be wholly nugatory.

However, the federal registration of marks that consist *solely* of political and social commentary does implicate First Amendment concerns, as explained above. And, as also explained above, section 2(c) is neither necessary nor sufficient to solve this problem. Fortunately, the failure-to-function doctrine can be used to bar the registration of marks whose function is solely to exclude others from speaking in commerce – and which do not also serve as source indicators. And because a failure-to-function denial is based in legitimate trademark policy, it does not offend the First Amendment.

Professor Alexandra J. Roberts has written that “[t]o be protectible, a trademark must be . . . used in a trademark way.” Alexandra J. Roberts, *Trademark Failure to Function*, 104 IOWA L. REV. 1977, 1981 (2019). It is insufficient for a mark to be distinctive and used in commerce. Rather, “it must be used as a mark—featured in a way that will draw consumers’ attention to it and lead them to view it as a source indicator.” *Id.* at 1977. This requirement is found in the Lanham Act’s definition of a “trademark,” which provides, in pertinent part, that a trademark must be “used by a person to identify and distinguish that person’s goods from those of others and to indicate the source of the goods, even if that source is generally unknown.” 15 U.S.C. § 1127. The relevant question is whether the public would perceive the mark as a source indicator, even if consumers “cannot . . . identify the precise company that manufactures particular goods.” Roberts, 104 IOWA L. REV. at 1977.

One category of marks that fail to function as trademarks, according to the TRADEMARK MANUAL OF EXAMINING PROCEDURE, comprises “Informational Matter.” TMEP § 1202.04. The “Informational Matter” provision bars the registration of marks that merely contain “general information about the goods or services.” *Id.* § 1202.04. For example, the Federal Circuit held that the proposed mark THE BEST BEER IN AMERICA was “so highly laudatory and descriptive of the qualities of [registrant’s] product that the slogan does not and could not function as a trademark to distinguish Boston Beer’s goods and serve as an indication of origin.” *In re Bos. Beer Co.*, 198 F.3d 1370, 1373–74 (Fed. Cir. 1999).

But the “Informational Matter” provision also precludes the registration of “Widely Used Messages” and “Slogans or Words Used on the Goods.” TMEP §§ 1202.04(b); 1202.03(f)(i). For example, the TTAB denied registration to the mark EVERYBODY VS RACISM as applied to tote bags, T-shirts, hoodies, and other clothing. *In re Go & Assocs., LLC*, No. 88944728, 2022 WL 1421542 (T.T.A.B. 2022). The Board reasoned as follows:

[W]e find that consumers would perceive EVERYBODY VS RACISM as merely an informational anti-racist message that everyone—every person, institution or organization should support the fight against racism. The commonplace meaning imparted by the phrase EVERYBODY VS RACISM would be the meaning impressed upon the purchasing public, and it would not be perceived as a service mark or trademark.

Clothing and tote bags imprinted with EVERYBODY VS RACISM will be purchased by consumers for the informational message it conveys. Therefore, consumers accustomed to seeing this phrase displayed on clothing, tote bags and other retail items from many different sources would not view the slogan as a trademark indicating source of the clothing or tote bags.

Id. at *7.

In another case, the Board denied registration to ONCE A MARINE, ALWAYS A MARINE because the primary function of the mark was “to express support, admiration or affiliation with the Marines,” not to indicate the source of goods or services. *Eagle Crest*, 96 U.S.P.Q.2d at 1232.

These decisions rely, in part, on evidence before the PTO that the slogans at issue were widely used by others in a non-trademark context. If there were evidence in the record to assess failure-to-function in this case, TRUMP TOO SMALL would likely escape this doctrine because it is novel and not widely used. Nor is there evidence in the record to show that Mr. Elster’s mark is solely political commentary; and does not also operate as a source indicator for Mr. Elster’s products.

However, failure-to-function denials can be used by the PTO to deny registration of marks that are solely intended to exclude others from making confusingly similar social and political commentary in commerce. Such denials are undoubtedly content-based under the Supreme Court’s jurisprudence, because they deny protection to marks whose content

is primarily political or social commentary. But the failure-to-function regulations pass constitutional muster under *Central Hudson* because the government has a substantial interest in ensuring trademark protection is reserved for legitimate consumer protection and fair competition purposes, and not to monopolize free expression.

Amicus Public Citizen appears to agree that the failure-to-function doctrine can be used by the PTO to protect free speech by barring registration of marks that solely attempt to monopolize political and social commentary, and do not also function as trademarks. Public Citizen Br. at 14-16. But the PTO already has the power to do this without section 2(c), and section 2(c) does not base the denial of registration on a failure-to-function analysis. Hence, this argument is a red herring. The failure-to-function doctrine cannot save section 2(c). Because the denial of registration below was not based on failure-to-function, and because there is no evidence in the record that TRUMP TOO SMALL fails to function, this case does not present that issue. *See* Ernst, 88 BROOKLYN L. REV. at 878-885.

3. Section 2(c) is not necessary to serve the legitimate bases for the denial of trademark registration that are provided for in the other subsections of Section 2.

Finally, the government contends that section 2(c) is permissible content discrimination because “the use of content-based criteria to determine which marks may be registered is an ‘inherent and inescapable’ part of any trademark-registration program. Gov. Br. at 27

(quoting *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 49 (1983)). Then the government cites to the other provisions of section 1052 that provide legitimate trademark-related bases for denying registration. *Id.* These legitimate bases for denial of registration include § 1052(a), barring the registration of “deceptive marks”; § 1052(d), barring the registration of marks that would likely cause confusion, mistake, or deception with respect to a similar mark; § 1052(e), barring the registration of certain merely descriptive, deceptively misdescriptive, geographically descriptive, geographically deceptively misdescriptive, and functional marks, as well as marks that are primarily merely a surname. 15 U.S.C. §§ 1052(a), (d), (e).

These are, indeed, legitimate bases for denying trademark registration sounding in the government’s legitimate interests in regulating commerce under the Lanham Act. But section 2(c) pointedly allows the PTO to deny registration of a mark without any finding that registration would cause deception, confusion, mistake or any other harm to intellectual property rights that the Lanham Act can legitimately protect. Nor could section 2(c) be interpreted to require such a finding, because rejection of registration on these other grounds is provided for by these other sections of the Lanham Act, such that injecting such a requirement into section 2(c) would render it duplicative of the other sections. Rather, the PTO denies registration after answering two simple questions: (1) would “the public . . . recognize and understand the mark as identifying a particular living individual[?]”; and (2) does the record contain the famous person’s consent to register the mark? *In re Nieves & Nieves LLC*, 113 U.S.P.Q.2d 1629, 2015 WL

496132, at *12, *14 (T.T.A.B. 2015) (“We find that the mark ROYAL KATE is the name of a particular living individual, namely, Kate Middleton, and because Kate Middleton has not consented to the use and registration of that name, the Section 2(c) refusal is affirmed.”). This is impermissible content discrimination in violation of the First Amendment.

III. The Court should declare section 2(c) facially unconstitutional

The Court of Appeals declined to hold that section 2(c) is facially unconstitutional, “[a]s Elster raised only an as-applied challenge.” *Elster*, 26 F.4th at 1339. There are several reasons why it would be beneficial for this Court to resolve the facial invalidity of section 2(c) now, rather than limiting itself to the question of whether it is unconstitutional as applied to marks containing critiques of a government officials or public figure.⁸

⁸ The Court may depart from the general principle and elect, in particular cases, to rule on issues of law that were not raised or argued below. See *Hormel v. Helvering*, 312 U.S. 552, 557 (1941) (“There may always be exceptional cases or particular circumstances which will prompt a reviewing or appellate court, where injustice might otherwise result, to consider questions of law which were neither pressed nor passed upon by the court or administrative agency below.”). In particular, the Court can declare a statute facially unconstitutional even if that issue was not argued below. See *Citizens United*, 558 U.S. at 331 (“[T]he distinction between facial and as-applied challenges is not so well defined that it has some automatic effect or that it must always control the pleadings and disposition in every case involving a constitutional challenge.”) (quoting Richard H. Fallon, *As-Applied and Facial Challenges and Third-Party Standing*, 113 HARV. L.REV. 1321, 1339 (2000) (“[O]nce a case is brought, no

First, the PTO has been given no guidance as to how to apply the statute to future registrations. Should it apply one of the rights of publicity defenses discussed above? Which one? Is the PTO even equipped to apply First Amendment balancing tests in the context of registration decisions? Is the statute unconstitutional only as applied to marks containing political commentary? What about social commentary or political praise? Is the PTO equipped to draw these distinctions?

Second, many otherwise valid marks will be denied registration in the interim before the facial unconstitutionality issue is properly presented again. And indeed, the mere presence of the provision could have a chilling effect on parties' choosing marks containing political commentary, parody, or other speech at the heart of the First Amendment.

The Federal Circuit suggested the likely basis for striking section 2(c): the First Amendment overbreadth doctrine. That principle provides that "a law may be overturned as impermissibly overbroad when a 'substantial number' of its applications are unconstitutional, 'judged in relation to the statute's plainly legitimate sweep.'" *Elster*, 26 F.4th at 1339 (internal quotation marks omitted) (quoting *Wash. State Grange v. Wash. State Republican Party*, 552 U.S. 442, 449 n.6 (2008)). Section 2(c)'s sweepingly broad scope "leaves the PTO no discretion to exempt trademarks that advance parody, criticism, commentary on matters of public importance, artistic

general categorical line bars a court from making broader pronouncements of invalidity in properly 'as-applied' cases").

transformation, or any other First Amendment interests.” *Id.* Nor is it possible to conceive of a plausible interpretation of the clear wording of the statute that would allow the PTO to exempt from its coverage core First Amendment speech. Nor would it be practical or desirable to have the PTO separate the wheat of protected speech from the chafe in thousands of routine registration decisions.

CONCLUSION

For the foregoing reasons, the Court should affirm the judgment of the Court of Appeals on the basis that 15 U.S.C. § 1052(c) is facially unconstitutional in violation of the First Amendment.

Respectfully submitted,

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