

SUPREME COURT OF THE UNITED STATES

IN THE SUPREME COURT OF THE UNITED STATES

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UNITED STATES PATENT AND)
TRADEMARK OFFICE, ET AL.,)
) Petitioners,
) v.) No. 19-46
BOOKING.COM B.V.,)
) Respondent.
- - - - -

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Petitioners,)
v.) No. 19-46
BOOKING.COM B.V.,)
Respondent.)
- - - - -

Washington, D.C.
Monday, May 4, 2020

The above-entitled matter came on for
oral argument before the Supreme Court of the
United States at 10:00 a.m.

APPEARANCES:
ERICA L. ROSS, Assistant to the Solicitor General,
Department of Justice, Washington, D.C.;
on behalf of the Petitioners.
LISA S. BLATT, Esquire, Washington, D.C.;
on behalf of the Respondent.

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P R O C E E D I N G S

(10:00 a.m.)

CHIEF JUSTICE ROBERTS: We'll hear argument this morning in Case 19-46, United States Patent and Trademark Office versus Booking.com.

Ms. Ross.

ORAL ARGUMENT OF ERICA L. ROSS

ON BEHALF OF THE PETITIONERS

MS. ROSS: Mr. Chief Justice, and may it please the Court:

It is a fundamental principle of trademark law that no party can obtain a trademark for a generic term like "wine," "cotton," or "grain." As Judge Friendly explained and as the Lanham Act confirmed, a generic term is never entitled to trademark protection no matter how much money and effort the user has poured into promoting the sale of its merchandise and what success it has achieved in securing public identification.

In other words, secondary meaning or acquired distinctiveness is simply irrelevant to generic terms. That principle controls here. It is undisputed that "booking" is generic for

1 the hotel reservation services Respondent
2 provides. Respondent thus could not federally
3 register "Booking." Nor could Respondent
4 register "Booking Company" or "Booking Inc."

5 In Goodyear, this Court held that the
6 mere addition of an entity designation like
7 "Company" or "Inc." to an unprotectable term
8 does not create a protectable mark. That is
9 because those terms indicate only that parties
10 have formed an association or partnership to
11 deal in the relevant goods. By prohibiting a
12 first adopter from obtaining a trademark in a
13 phrase like "Booking Inc.," Goodyear ensured
14 that no party can monopolize a generic term.

15 The same result should apply to
16 Booking.com. The addition of ".com" is the
17 on-line equivalent of "Company" or "Inc." It
18 conveys only that Respondent provides its
19 services via a commercial website on the
20 Internet. There is no sound reason for
21 Respondent to be able to federally register
22 "Booking.com" as a trademark when it couldn't
23 register "Booking, Inc."

24 Registration would effectively give
25 Respondent a monopoly on the words "Booking.com"

1 and would interfere with competitors' ability to
2 use similar domain names. That's particularly
3 problematic because it's how the Internet works.
4 Only one entity can obtain the contractual
5 rights to a domain name at a time. So
6 Respondent already enjoys significant
7 competitive advantages that brick-and-mortar
8 equivalents like "Booking Inc." would lack.

9 That same feature of the Internet also
10 means that if Respondent's survey evidence is
11 enough to obtain federal trademark registration,
12 that nearly every generic.com business can do
13 the same. Because domain names are one of a
14 kind, a significant portion of the public will
15 always understand a generic ".com" term to refer
16 to a specific business, even if it is not
17 familiar with the particular business at issue
18 --

19 CHIEF JUSTICE ROBERTS: Counsel --

20 MS. ROSS: -- thus resulting in --

21 CHIEF JUSTICE ROBERTS: -- counsel,
22 you mentioned the Goodyear case, but you did not
23 quote the language from the trademark statute
24 that is at issue here. That language says that
25 the primary significance of the mark to the

1 public shall be the test for determining whether
2 the mark has become generic.

3 Now the Goodyear case had a different
4 test, an absolute rule. And it seems to me
5 that, in trying to decide what Congress had in
6 mind, it makes more sense to follow the language
7 that Congress chose in the statute rather than a
8 130-year-old case of ours.

9 MS. ROSS: So, Mr. Chief Justice, two
10 points on that. The first is that the Lanham
11 Act actually preserves a distinction between
12 generic and descriptive terms. And so generic
13 terms, it confirms -- and this is both in the
14 definitional provision and then again in
15 Section 1025 E and F -- or 1052, excuse me, E
16 and F, confirms that generic terms are never
17 susceptible to trademark registration even when
18 they acquire secondary meaning, and descriptive
19 terms, merely descriptive terms, may acquire
20 trademark significance when they acquire
21 secondary meaning. So I think the Lanham Act
22 preserves sort of the underlying principle of
23 Goodyear.

24 Now, moving to Section 1064(3)
25 specifically, the cancellation provision that

1 you note, that's on page 11-A of our appendix.
2 It says the primary significance of the
3 registered mark to the relevant public, rather
4 than purchaser motivation, shall be the test for
5 determining whether the measure -- the
6 registered mark has become the generic name of
7 goods or services.

8 I think it's significant here that
9 that provision was enacted in 1984. Respondent
10 has pointed to no case and no source before its
11 own brief suggesting that it overturned this
12 Court's --

13 CHIEF JUSTICE ROBERTS: It was enacted
14 --

15 MS. ROSS: -- decision in Goodyear.

16 CHIEF JUSTICE ROBERTS: -- it was
17 enacted in 1984, but that's a lot closer to
18 today than the Goodyear case, which was 130
19 years ago. So I don't know why we would focus
20 more on the statutory language than that -- that
21 old -- old case.

22 But more -- more to the point maybe,
23 that if this is a generic term, Booking.com,
24 that means that it describes a category of goods
25 or services. But, when you talk about other

1 companies in that category, whether it's
2 Travelocity, Priceline, or whatever, nobody
3 refers to those as -- as Booking.coms.
4 Booking.com is not a generic term to describe
5 that type of -- of service.

6 MS. ROSS: So, again, a few points on
7 that, Mr. Chief Justice. The first is that we
8 agree that in the ordinary case, one might use
9 the term "generic" to refer, or to understand
10 it, how the -- the consumers generally refer to
11 a class of goods, but I think it can also be
12 used, as this Court's decision in Goodyear used
13 it, for how a specific entity or how the public
14 would understand a specific term.

15 So, for example, in Goodyear, the
16 Court held that Goodyear, Inc. could not be, or
17 Wine, Inc., for example, could not be
18 trademarked, and that's true even though nobody
19 refers to a class of Wine, Incorporated.

20 CHIEF JUSTICE ROBERTS: Thank you --

21 MS. ROSS: The point here is --

22 CHIEF JUSTICE ROBERTS: -- thank you

23 --

24 MS. ROSS: -- that the decision --

25 CHIEF JUSTICE ROBERTS: -- thank you

1 -- thank you, counsel.

2 Justice Thomas?

3 JUSTICE THOMAS: Yes, Ms. Ross. The
4 -- a couple of questions.

5 The -- could Booking acquire an 800
6 number, for ex -- that's a vanity number,
7 1-800-booking, for example, that is similar to,
8 for -- 1-800-plumbing, which is a registered
9 mark?

10 MS. ROSS: So, Justice Thomas, under
11 the Federal Circuit's decisions, yes, it could.
12 Those decisions, I think, may -- are -- are sort
13 of debatable under Goodyear and the principles
14 that we think control here, but the Federal
15 Circuit -- the PTO, rather, does follow those
16 decisions because of the right of direct appeal
17 to the Federal Circuit from PTO decisions.

18 Now I think it's significant that
19 those are distinguishable in the sense that the
20 core problem with Booking.com is that it allows
21 Respondent to monopolize booking on the Internet
22 because of the fact that longer domain names of
23 Respondent's competitors, like ebooking.com and
24 hotelbooking.com, can include Booking.com. That
25 is not as obviously true of something like

1 1-800-booking.

2 JUSTICE THOMAS: Well, the -- that --
3 that -- that could be true, but the -- I'd like
4 you to compare this to Goodyear. In Goodyear,
5 you had a generic term, but you also had added a
6 term such as company or inc., which any company
7 could use.

8 Now, with booking, here, there can
9 only be one domain address ".com." So this
10 would seem to be more analogous to the 1-800
11 numbers, which are also individualized.

12 MS. ROSS: So, Your Honor, you're
13 completely correct that only one Internet entity
14 at a time can hold the domain name rights to
15 Booking.com. I think that actually works in our
16 favor rather than Respondent's for a few
17 reasons.

18 The first is that Respondent doesn't
19 actually argue that every domain name should get
20 a trademark, as I think would be the consequence
21 of Your Honor's position there. I think the
22 reason that Respondent doesn't do that, again,
23 is because, if that's good for Respondent, then
24 it's good for ebooking.com and hotelbooking.com,
25 and then I think the risk of confusion analysis

1 on the back end would also have to account for
2 the fact that each of those is unique. And so
3 Respondent would wind up with a very thin
4 trademark protection.

5 Putting that to one side, in the usual
6 case of trademark, what a register -- what a
7 registrant wants is the ability both to exclude
8 others from using the same name and to -- to
9 exclude others from using names that are
10 confusingly similar. Because of the functional
11 nature of the Internet, Respondent already has
12 that first advantage.

13 So others can't use Booking.com
14 on-line, and their competitors won't want to use
15 those -- those terms in their promotional
16 materials because that will direct customers to
17 Respondent's website rather than their own.

18 So the point here -- and this, you
19 know, is why generic .com terms garner so much
20 money on the Internet. The point, I think, of
21 this case, what really matters, is the second
22 type of usage, the ability to block out
23 competitors like ebooking.com and
24 hotelbooking.com. And I think that's exactly
25 the type of anticompetitive concern that this

1 Court expressed in Goodyear, that if you allow
2 one company to have Booking, Inc. or Booking
3 Company, it's going to preclude others from
4 calling their goods by their name and from
5 marketing themselves as what they are.

6 Now I think, you know, the -- Judge
7 Wynn explains this very well in the court of
8 appeals dissent at pages 28A to 29A of our
9 appendix. What Respondent wants here is
10 something it couldn't get in the
11 brick-and-mortar world. So usually we require
12 businesses to decide whether to adopt a generic
13 name upfront, and that allows them to get easy
14 recognition from consumers who automatically
15 understand what they sell --

16 CHIEF JUSTICE ROBERTS: Thank you,
17 counsel.

18 MS. ROSS: -- but we don't allow the
19 space for --

20 CHIEF JUSTICE ROBERTS: Thank you,
21 counsel.

22 Justice Ginsburg?

23 JUSTICE GINSBURG: Two questions. The
24 first question is, if you're right that .com
25 doesn't make a generic term non-generic, how

1 many marks, already registered marks, would be
2 subject to cancellation?

3 I take it there are dozens of ".coms"
4 that have been registered. Is that so?

5 MS. ROSS: So, Justice Ginsburg, I
6 think Respondent suggests that there are far
7 more than there actually are. If I can make
8 just a few points on this. The first is that
9 the TTAB, which is how the PTO speaks
10 precedentially, has been consistent on this
11 point, and the examiner decisions in our
12 appendix as well as the courts of appeals other
13 than the court below.

14 So, by and large, our rule is being
15 followed out in the world, so I don't think that
16 there is going to be this huge change.

17 Now Respondent does point to some
18 examples, but I think those examples show a few
19 flaws. One of those flaws is that Respondent
20 seems to think that on our rule, the combination
21 of any two nouns or any noun and an "ng"
22 designation is always going to be generic.
23 That's simply not true. You always have to look
24 at how the two terms are being used.

25 So, for example, Respondent looks at

1 the Cheesecake Factory, but, of course, that's
2 not a literal factory producing cheesecakes.
3 It's a restaurant. So I don't think Cheesecake
4 Factory --

5 JUSTICE GINSBURG: I wanted you to
6 focus on cancellation. Who could apply to
7 cancel an existing registration?

8 MS. ROSS: So I do believe --

9 JUSTICE GINSBURG: If we -- if we rule
10 in your favor, would the PTO itself endeavor to
11 cancel these marks?

12 MS. ROSS: I don't believe so, Your
13 Honor. I think that competitors could, under
14 Section 1064, file petitions to cancel
15 registrations. And, of course, the fact that it
16 was generic would allow registration -- or,
17 excuse me, cancellation at any point.

18 Now I think that those same entities
19 could have brought cases previously based on,
20 again, the binding law of the Federal Circuit
21 and the TTAB, which is and was consistent on
22 this point. So, again, I think, because
23 Respondent's appendix sort of greatly overstates
24 the number of marks that actually have been
25 incorrectly registered, we don't have a fear

1 that there will be a huge backlash if the rules
2 change.

3 And -- and to explain a little bit
4 more why I think that's so, Respondent points to
5 not just examples like Cheesecake Factory --

6 JUSTICE GINSBURG: I'm sorry, I have
7 another question I wanted to ask you, and it's a
8 follow-up to Justice Thomas.

9 Your answer to the telephone number
10 question, 1-800-Booking, was, well, that's the
11 Federal Circuit precedent. But it would be our
12 job in this case to deal with that if the
13 Federal Circuit is wrong.

14 Do you have another distinction for
15 the 1-800, say, Mattress or Booking, that would
16 distinguish it from the domain name?

17 MS. ROSS: Yes, Justice Ginsburg. So
18 I think the other distinction is that, again,
19 Booking.com can be encapsulated in longer domain
20 names in the -- in a way that 1-800 booking or
21 booking itself really couldn't be in longer
22 phone numbers.

23 So there's sort of a -- a sort of de
24 facto reason why the same competitive risks
25 aren't there. I think it's also worth --

1 CHIEF JUSTICE ROBERTS: Thank you --

2 MS. ROSS: -- taking a step back --

3 CHIEF JUSTICE ROBERTS: Thank you,

4 counsel. Thank you, counsel.

5 Justice Breyer?

6 JUSTICE BREYER: The same question as

7 Justice Thomas's question. Good morning anyway.

8 And to Justice Thomas's question, Justice

9 Ginsburg -- what do you want to say about that?

10 You can have a -- a trademark that is an

11 address, 1418 35th Street or something. You

12 have a trademark that's an address. You can

13 have a trademark that's a telephone number. So

14 why can't you have a trademark that's a ".com"?

15 MS. ROSS: So, again, Justice Breyer,

16 and good morning, I -- I think that it is clear

17 from Goodyear that Goodyear balanced these

18 competing objectives that are always true in

19 trademark law in this very similar context of

20 "Booking Company." We think "Booking Company"

21 and "Booking.com" are essentially equivalent.

22 All "Booking.com" tells you is that there is a

23 website on the Internet for booking. It tells

24 you it's a type of service that's sort of a

25 classic generic usage. And we think that that

1 follows from Goodyear.

2 Now Goodyear, as I was saying, sort of
3 balanced these two competing interests. On the
4 one hand, we want to make sure that consumers
5 understand that the good they got last time is
6 from a particular brand, and so we want strong
7 brand identification, and we protect trademarks
8 for that reason.

9 On the other hand, we want to avoid
10 monopolization of language. And I think that's
11 exactly the concern that Goodyear had with
12 "Booking dot" -- or, excuse me, with "Booking
13 "Company" and "Booking Inc." or "Wine Company"
14 and "Grain Company" and "Grain Inc." in the
15 words of Goodyear. And it's exactly the same
16 concern that we have on the Internet here
17 because, again, by using Booking.com and by
18 getting a trademark on "Booking.com," Respondent
19 necessarily must want to be able to block out
20 "ebooking.com" and "hotelbooking.com" and
21 similar names. I think, again, because
22 Respondent couldn't do that in the
23 brick-and-mortar world, there's no reason why it
24 should be allowed to do it on the Internet.

25 Now you noted that you could have sort

1 of a street address as a trademark, but I think
2 that's fundamentally different because, of
3 course, that's not telling you anything at all
4 about the services. So the -- the registrant
5 there would still have to work to build up its
6 brand recognition in the same way that a person
7 who uses a inherently distinctive mark like
8 Amazon has to do. They don't get this sort of
9 up-front benefit from using a generic term where
10 everyone now knows that they provide, in
11 Respondent's case, on-line booking services and
12 all of the concomitant benefits on the Internet
13 that go with that, such as, again, the fact that
14 other competitors can't use that name and the
15 consumers will go to Booking.com expecting that
16 to be a site for booking -- for on-line booking
17 even if there's no particular knowledge on the
18 part of the consumer about that website.

19 JUSTICE BREYER: Thank you.

20 CHIEF JUSTICE ROBERTS: Justice Alito?

21 JUSTICE ALITO: What do you think I
22 should do if I think that Goodyear is a case
23 from a different era and doesn't control here
24 but also think that the Lanham Act, similarly,
25 was enacted in a different era, namely, in the

1 pre-Internet era, and that the case law on which
2 Ms. Blatt relies belongs to that era?

3 How can a rule that makes sense in the
4 Internet age be reconciled with the language of
5 the Lanham Act?

6 MS. ROSS: So I think, Justice Alito,
7 it's pretty easily reconcilable with the Lanham
8 Act. And I want to go back to the Chief
9 Justice's first question about the primary
10 significance test.

11 Again, the primary significance test
12 is sort of cabined necessarily, in the statute
13 at least, to cancellation of a mark that was
14 already considered distinctive, so this comes up
15 in cases like Teflon and Kodak and things where
16 it's a coined term.

17 And so the -- as Respondent concedes
18 in their brief, it's a very narrow rule. In
19 1984, Congress passed this amendment to overturn
20 a specific Ninth Circuit case that had applied a
21 different test in the cancellation context.

22 Now it is true that other courts have
23 applied similar analyses in other places, but
24 that's because of the preexisting common law.
25 So, for that reason, we think Goodyear continues

1 to control for the same reason that this other
2 preexisting common law does.

3 But even taking a view sort of outside
4 of Goodyear, as I take your question to suggest,
5 even without Goodyear, you have this very basic
6 trademark policy that has always been true,
7 which is that generic terms simply are not
8 susceptible to appropriation by a particular
9 business, even when there's secondary meanings.

10 This Court recognized that in *Two*
11 *Pesos* following the Lanham Act, citing Judge
12 Friendly's quintessential sort of categories of
13 terms, and I think it remains true on the
14 Internet, just as it remains true in the
15 brick-and-mortar world. Again, I think
16 trademark is always trying to make this balance
17 between competition and brand recognition on the
18 one hand and fear of monopolization on the
19 other.

20 And I think the fear of monopolization
21 side here really speaks very strongly to our
22 position because, again, Respondent's view would
23 allow them to monopolize any term.

24 I think it's worth noting, on pages 6
25 and 8 of Respondent's brief, their test actually

1 requires them, I think, to hedge as to whether
2 the words "Oranges" or "Oranges, Inc." or, I
3 presume, "Oranges.com" would be generic. So, on
4 their view, "Oranges" remains generic if and
5 only if a survey shows that the public continues
6 to think of that as "the spherical fruit of the
7 same color." I think that would be a surprising
8 outcome under trademark law, whether in the
9 brick-and-mortar world or on the Internet.

10 Now the other point that Respondent
11 makes with respect to the -- the codification of
12 the primary significance test, you know, I don't
13 think it's actually the primary significance
14 test that's the core of Respondent's argument.
15 Respondent's argument is much more that that
16 test must always and in all circumstance require
17 looking to survey evidence and giving that
18 survey evidence dispositive weight.

19 I think that's not true under
20 Goodyear, which I think is wholly reconcilable
21 with the primary significance test, because
22 Goodyear itself, on page 602 of the opinion,
23 rejected evidence as legally irrelevant that one
24 particular defendant had sort of the best claim
25 to public association. Again, that's consistent

1 with the Lanham Act --

2 JUSTICE SOTOMAYOR: Counsel --

3 MS. ROSS: -- in Section --

4 CHIEF JUSTICE ROBERTS: Justice
5 Sotomayor? Justice Sotomayor?

6 JUSTICE SOTOMAYOR: I'm sorry, Chief.

7 Ms. Ross, picking up on where you were
8 right now, is it your position that the primary
9 significance test to the public is never to be
10 used in determining what's generic and what's
11 not, or is it -- and if we don't use that test
12 at least in whole or in part, however much you
13 want, what other things would a PTO examiner
14 look to?

15 MS. ROSS: Justice Sotomayor, it's not
16 our position that the -- the courts and the PTO
17 can never look to the primary significance test
18 outside of cancellation. Again, I think that
19 the reason why courts and the PTO do that is
20 because the Lanham Act didn't overturn
21 preexisting common law, and that, again, speaks
22 to why we think Goodyear remains good law.

23 But I think what courts should do in
24 this instance is look to other sources to figure
25 out what, again, a generic term -- whether

1 something is a generic term, which usually means
2 whether it is going to indicate the type of good
3 or service.

4 So dictionary definitions are very
5 helpful in this regard, the use by other
6 competitors, like, again, "hotelbooking.com" and
7 "ebooking.com" here, and similar sources. What
8 I think you should -- what courts and the PTO
9 shouldn't do is give dispositive weight to
10 survey evidence that, as the trademark scholars'
11 brief by Professor Tushnet explains, is going to
12 cause some issues in these particular
13 circumstances.

14 So, again, because of the functional
15 nature of the Internet, because everyone
16 understands that a certain -- that only one
17 entity at a time can hold the domain name
18 "Booking.com," surveys are going to misrepresent
19 the number of people who actually understand
20 that Booking.com is a business as opposed to
21 only infer that because of the way the Internet
22 works.

23 Now I think --

24 JUSTICE SOTOMAYOR: Ms. Ross, may I --

25 MS. ROSS: -- if we really did --

1 JUSTICE SOTOMAYOR: Ms. Ross, may I?

2 Let me stop you there for a moment.

3 MS. ROSS: Of course.

4 JUSTICE SOTOMAYOR: I looked at your
5 definitions of "booking" and, basically, one
6 definition said booking a hotel, but this
7 service is much broader than that. You can book
8 a hotel, you can book leisure, you can book
9 travel, you can book cars.

10 So that may be a problem with my
11 looking at "booking" as generic, but my point
12 being that if I look at all the evidence you
13 point to, ebooking, car booking, hotel booking,
14 that a finder of fact could well conclude that
15 Booking.com is, in fact, related to one entity
16 and not to a -- a -- has become more a
17 descriptive word than a generic phrase.

18 MS. ROSS: Justice Sotomayor, I think
19 I -- I think this was not presented here and I
20 disagree on the merits. So I think it's not
21 presented here in that Respondent has
22 acknowledged -- is no longer contesting that
23 "booking" is generic for the relevant class of
24 services here, and that's the hotel -- the
25 on-line hotel reservation services.

1 To go to your broader point, you know,
2 I think this actually speaks to the problem with
3 a lot of Respondent's examples, which is to say
4 you're always looking at the particular category
5 and the particular -- for which the goods or --
6 or services are being registered and the usage.

7 Now, on this idea that --

8 CHIEF JUSTICE ROBERTS: Thank you --

9 MS. ROSS: -- while maybe it --

10 CHIEF JUSTICE ROBERTS: -- thank you,
11 counsel.

12 Justice Kagan?

13 JUSTICE KAGAN: Good morning, Ms.

14 Ross. A couple -- one short question first.

15 I'm -- I'm right in saying that you're
16 advocating for a categorical rule here, am I
17 not? In other words, you're not saying that
18 trademarks of this kind will rarely be
19 registered -- registrable; you're saying that
20 they will never be registrable. Is that
21 correct?

22 MS. ROSS: I think it depends a little
23 bit, Justice Kagan, on what you mean by
24 "trademarks of this kind." We think that when
25 you're simply appending .com --

1 JUSTICE KAGAN: Generic .com,
2 Bookings.com, Booking.com.

3 MS. ROSS: Sure. So Booking.com and
4 other -- other phrases where the combination
5 doesn't add any additional meaning, so like I
6 mean to distinguish cases like the courts of
7 appeals have hypothesized, like tennis.net,
8 where there's sort of an interplay between the
9 two words on either side of the period. We
10 don't think that those would necessarily -- that
11 those could necessarily never provide for
12 trademark protection. We just don't think
13 that's really presented here.

14 But --

15 JUSTICE KAGAN: And am I right -- is
16 that why -- you know, the PTO takes a much less
17 categorical position. It says, well, those
18 .coms will typically not add source identifying
19 significance, but it doesn't say never. Why is
20 that? What's the -- why -- why is there a
21 difference between what the PTO examiners'
22 manual says and what you say?

23 MS. ROSS: So I don't think there
24 actually is a difference, Justice Kagan. I
25 think what the PTO is leaving open, again, is

1 this category, this very narrow category of rare
2 cases that the Federal Circuit and the Ninth
3 Circuit have recognized.

4 I think what Respondent would do is to
5 expand that category. I mean, Respondent has
6 tried to say that this is sort of the rare case,
7 but, as I was explaining earlier, I think
8 basically every generic .com case is going to
9 have this type of evidence because of people's
10 knowledge of how the Internet works.

11 So I think we're not asking --

12 JUSTICE KAGAN: Ms. Ross, in -- in
13 your brief, you say, you know, you're -- you're
14 -- you're not making the argument that people go
15 around talking about Booking.coms, but you're
16 instead saying that Booking.com is generic --
17 and this is on page 44 of your brief -- because
18 customers would understand the term to convey
19 only that the -- the company provides on-line
20 booking services and the term conveys no
21 additional meaning that would distinguish
22 Respondent's services from those of other
23 providers.

24 And I guess, when I think about that
25 test, I think, well, maybe or maybe not. If --

1 if the test is what you say, is what is a
2 consumer going to understand and does the term
3 convey additional meaning that would distinguish
4 the Respondent's services from others, I kind of
5 think, well, may -- maybe it would. Well, so
6 how does that test go along with a categorical
7 rule?

8 MS. ROSS: So I think, Justice Kagan,
9 to the extent that you think it could convey to
10 consumers some additional meaning, that
11 additional meaning -- and really the only
12 additional meaning that Respondent has ever
13 pointed to -- is this idea that it points you to
14 a particular website.

15 So that, I think, both because it's a
16 functional feature of the Internet to which we
17 don't usually give trademark protection and for
18 all of the competition-based reasons I was
19 noting earlier, I think that can't be enough to
20 get them over the line.

21 They've never made an argument --
22 again, the -- the -- sort of the key distinction
23 between generic and descriptive terms is that a
24 generic term identifies the type of good or
25 service, whereas the descriptive -- a

1 descriptive term tells you something about a
2 feature or a characteristic of the service.

3 So, for example, apple pie, generic
4 for pies, but descriptive for rooms, rooms --

5 JUSTICE KAGAN: But suppose, Ms. Ross
6 -- sorry to interrupt. Suppose, Ms. Ross, that
7 you lose on your argument on a categorical rule.
8 Is there something else that the Court would --
9 that you would like the Court to include in an
10 opinion about how to evaluate registration
11 claims for generic .com marks? In other words,
12 if categorical is a -- is a bridge too far, is
13 there -- is there something else that we should
14 be thinking about in terms of saying when it is
15 that generic marks are registrable?

16 MS. ROSS: So a few points, Your
17 Honor. I think, first, we obviously think that
18 the Court should follow Goodyear. And so I
19 think what Goodyear said was that generic
20 company terms "without further specification"
21 won't be enough to get trademark protection. I
22 think that that is essentially the rule that
23 we're asking for here.

24 JUSTICE KAGAN: Right. But you're
25 not -- they're not.

1 CHIEF JUSTICE ROBERTS: Brief --
2 briefly, Ms. Ross.

3 MS. ROSS: Sure. I think we would
4 want the -- at -- at a bare minimum, the risk of
5 confusion analysis on the back end to be
6 extremely sensitive to the fact that what's
7 driving the intuition is the uniqueness of the
8 domain name. And so that equally applies to
9 Respondent's competitors.

10 CHIEF JUSTICE ROBERTS: Thank you,
11 counsel.

12 Justice Gorsuch?

13 JUSTICE GORSUCH: Counsel, I'd like to
14 follow up on that and -- and just give you
15 another minute to -- to continue answering that
16 question.

17 Suppose we -- the Court does not
18 accept your bright-line rule. How would you
19 advise the Court to write an opinion that draws
20 on and points to the sensitivity necessary in
21 this area?

22 MS. ROSS: Sure. So a couple of
23 points, Justice Gorsuch. The first is that I
24 think, again, even if the Court did not think
25 that Goodyear firmly controlled here, as we do,

1 I think it is very indicative of the right type
2 of analysis in terms of the concern with
3 monopolizing language.

4 As I was saying earlier --

5 JUSTICE GORSUCH: Let's -- let's put
6 Goodyear aside for the moment. Okay? Again, I
7 -- I -- I know you want us to go there. But put
8 that aside for the moment. What would you have
9 the Court say?

10 MS. ROSS: Certainly. So I would want
11 the Court to recognize, as the Lanham Act, I
12 think, commands, again, in Sections 1052 E and
13 F, that generic terms generally are not
14 susceptible to trademark registration based on
15 secondary meaning.

16 And so Respondent, like all generic
17 .coms, would have to come forward with some
18 evidence other than simply this secondary idea
19 that, yes, this is a -- a term that just tells
20 me that it's an on-line booking agency, but
21 consumers have come to understand it as
22 something else.

23 I think blurring that distinction can
24 have really bad consequences outside of the .com
25 context. So, again, the oranges or Oranges,

1 Incorporated example where everything is now
2 subject to survey evidence.

3 So I would want the Court to make
4 clear --

5 JUSTICE GORSUCH: I -- I guess that --
6 that leads to my -- my next question, and that
7 is, why aren't existing doctrinal tools under
8 the Lanham Act sufficient? Because we do --
9 always, in every case, not just this area, would
10 take very seriously questions about consumer
11 confusion.

12 And it seems to me a lot of your
13 argument on -- on competition law policy issues
14 is concerned with consumer confusion. The
15 Lanham Act accounts for that. And then it seems
16 like you're also concerned about the use of a
17 generic term, but fair use doctrine is designed
18 to account for that.

19 So why aren't there sufficient
20 doctrinal tools to address the concern, the
21 competition law concerns you've raised, and why
22 isn't this just another example of where
23 intellectual property and monopolization
24 concerns intersect and we have to respect the
25 judgment Congress made in this particular area?

1 MS. ROSS: So, Justice Gorsuch,
2 there's a lot in that question. I think that,
3 you know, my first-line answer, of course, is
4 that we think that the tools are sufficient.
5 They just point in our direction.

6 Now I -- I think that the fact that
7 generic terms can't be trademarked even upon a
8 showing of secondary meaning under the Lanham
9 Act is itself enough to resolve this case.

10 Now, moving on from there, you know,
11 you mentioned the risk of confusion analysis. I
12 think it's notable that Respondent in their
13 brief says we should get a -- a trademark on
14 Booking.com, but if ebooking.com comes -- and a
15 large part of that is because we're unique --
16 but, if ebooking.com comes along, we should win
17 in a risk of confusion analysis because we were
18 here first.

19 Now I think if it's sort of good for
20 the goose, good for the gander, if ebooking --
21 or if Booking.com gets trademark protection
22 because it's unique, then it seems as though
23 ebooking.com should get equal protection because
24 it, too, is unique. So I -- I don't think that
25 sort of the -- the competition concerns are

1 necessarily resolved under existing trademark
2 law. I think you would actually have to --

3 CHIEF JUSTICE ROBERTS: Thank you,
4 counsel.

5 Justice Kavanaugh?

6 JUSTICE KAVANAUGH: Thank you, Mr.
7 Chief Justice.

8 Good morning, Ms. Ross. Respondent
9 says there's no threat of monopoly with domain
10 -- domain names because they're unique, and they
11 say they wouldn't, in fact, be concerned about
12 ebooking.com or similar names in their brief.

13 So what are the real-world practical
14 problems you foresee if .coms could obtain
15 trademarks?

16 MS. ROSS: Thank you, Justice
17 Kavanaugh. So, again, I think the real-world
18 practical problem is, one, I don't read
19 Respondent actually to say that they wouldn't
20 think that ebooking.com were infringing. They
21 say, sure, go ahead and register it, but, if it
22 turns out consumers are confused, then we think
23 we -- we get the -- the territory and you don't.

24 So I do think there is a very real
25 risk of monopolization in that sense. The other

1 risk, though, I think, is that, you know,
2 Respondent is already getting, as I mentioned
3 earlier, these huge first mover advantages from
4 the fact that it and only it can control
5 Booking.com on the Internet. And so it is
6 asking for this privilege that no business would
7 have in the real world of both getting the
8 really exacerbated first mover advantages of
9 using a generic name and then also getting the
10 back-end trademark protection.

11 And I guess I don't see why the
12 Internet context should permit that, again,
13 given that it already gives Respondent these
14 huge advantages.

15 I also think this is sort of a -- a --
16 maybe a lesser level, but, you know, if it's
17 true that Booking.com and presumably every other
18 trademark -- or, excuse me, every other domain
19 name can get a trademark, then you're going to
20 have this problem where the trademark system is
21 basically becoming a domain name registry
22 system. It's just duplicative of that. And I'm
23 not sure why, rather than following sort of
24 bedrock trademark principles like generic terms
25 can't get trademark protection, no "Booking

1 Company," therefore no "Booking.com," the Court
2 would go in that direction of essentially just
3 having a quasi DNR for -- for Internet generic
4 ".com" names.

5 JUSTICE KAVANAUGH: Respondent also
6 points out that there have been registrations of
7 "Booking.com" in other countries, the EU, the
8 United Kingdom. Can you respond to that?

9 MS. ROSS: Sure, Justice Kavanaugh.
10 You know, I think that may well be true. I
11 don't think it's particularly relevant here.
12 Obviously, those other countries aren't focusing
13 or aren't constrained by Goodyear, as we think
14 this Court is. And -- and they're not
15 constrained by the Lanham Act, as we think this
16 Court is. And, obviously, again, I think the
17 Lanham Act preserves that core understanding of
18 Goodyear, which is no company can obtain a
19 trademark on a generic term, even if it shows
20 that the public has come to associate it with
21 its goods. And that's all Respondent has argued
22 for here.

23 JUSTICE KAVANAUGH: Thank you.

24 CHIEF JUSTICE ROBERTS: Ms. Ross, why
25 don't you take a minute to wrap up.

1 MS. ROSS: Sure. Thank you, Mr. Chief
2 Justice.

3 So I think our basic points are
4 simple. We think our rule flows directly from
5 Goodyear. ".com" is simply the on-line version
6 of "company," and it tells you only that
7 Respondent operates a commercial website via the
8 Internet where bookings can be made. We think
9 it's consistent with the Lanham Act's
10 preservation of this distinction between generic
11 and descriptive terms and with long-standing
12 trademark policy.

13 Respondent's rule, by contrast, would
14 require overturning Goodyear, blurring the
15 Lanham Act's line between generic and
16 descriptive marks, and permitting the
17 monopolization of generic terms on-line. And
18 for all of those reasons, we would respectfully
19 ask that the Court reverse.

20 CHIEF JUSTICE ROBERTS: Thank you,
21 counsel.

22 Ms. Blatt.

23 ORAL ARGUMENT OF LISA S. BLATT

24 ON BEHALF OF THE RESPONDENT

25 MS. BLATT: Thank you, Mr. Chief

1 Justice, and may it please the Court:

2 This case is about how to tell the
3 difference between descriptive names the Lanham
4 Act protects and generic ones the Act does not.
5 There are three reasons this Court should hold
6 that the answer is the primary significance
7 test, that is, whether consumers primarily think
8 the name is a genus or a potential brand.
9 First, the Act mandates this test. Second, the
10 Act abrogated *Goodyear*. And, third, this test
11 furthers the statutory purpose to let consumers
12 decide which marks deserve trademark protection.

13 First, the text. The Act has always
14 required, in Sections 1052, 1091, and 1127,
15 trademark registration if a mark helps consumers
16 distinguish among brands. In other words, the
17 Act protects descriptive names, which consumers
18 find useful, but it excludes generic ones, which
19 consumers think just refer to a genus. The
20 Lanham Act thus codified the law of unfair
21 competition, which had protected descriptive but
22 not generic names.

23 And right before Congress passed the
24 Act, this Court in *Kellogg* adopted the primary
25 significance test under unfair competition law

1 to distinguish between generic and descriptive
2 names. For the past 70 years, courts have
3 embraced this primary significance test to tell
4 the difference under the Lanham Act.

5 And it was against this universal
6 backdrop that Congress later codified the
7 primary significance test in Section 1064 to
8 overrule a decision departing from this test in
9 the cancellation context; 1064 thus reflects
10 Congress's ratification of the primary
11 significance test to define a generic name in
12 all contexts. The government has no other test
13 for the dividing line other than primary
14 significance.

15 Second, Goodyear did not survive the
16 Lanham Act. The Act repudiates, root to branch,
17 any per se rule that an island of words are
18 generic as a matter of law regardless of
19 consumers' views.

20 First, Sections 1052, 1091, and 1127
21 necessarily define generic names as ones that do
22 not help consumers distinguish among brands,
23 because everything else must be registered. And
24 the factual question about what consumers think
25 is the antithesis of a per se rule.

1 CHIEF JUSTICE ROBERTS: Thank you --
2 thank you, counsel.

3 You rely heavily on the primary
4 significance test, but that is only in the
5 provision of the statute dealing with
6 cancellation of marks. And, of course, this is
7 not a cancellation case; it's a registration
8 case. So why should we assume that the primary
9 significance test carries the weight that you
10 would give it?

11 MS. BLATT: Sure. So, like I just
12 said, the -- 1064, we think, is a ratification
13 of the law as if you're looking at the dividing
14 line between what's a generic term and what's a
15 descriptive term. And the specific amendment
16 was to overrule a decision that had come up in
17 the cancellation context, so it was targeted to
18 that Ninth Circuit anti-monopoly case.

19 In terms of the primary significance
20 test, though, if you ignore Section 1064, there
21 is still no other test than other than one that
22 decides -- that looks to what consumers think of
23 the mark, because three provisions, regardless
24 of 1064, require registration of marks that help
25 consumers distinguish among brands. So, by

1 definition --

2 CHIEF JUSTICE ROBERTS: Well, maybe
3 one reason that Congress put this in the
4 cancellation section and not in the registration
5 section is because they appreciated the
6 significance of Goodyear with respect to
7 registration of marks.

8 MS. BLATT: That -- that -- I don't
9 think that can be right because, again, Goodyear
10 is a -- Goodyear is a common law rule. Let me
11 just talk about Goodyear.

12 Goodyear is a common law rule that is
13 based on the principle under common law that no
14 mark could be trademarked if competitors could,
15 with equal truth, hypothetically say that about
16 the mark. And so Goodyear, by its terms,
17 interchangeably uses the word "generic" and
18 "descriptive" marks. And that was true because
19 common law didn't care. Both were off limits.

20 And so the Court in Goodyear
21 specifically said "Wine Company" is no different
22 than "Lackawanna coal" and "Pennsylvania wheat,"
23 which are descriptive terms. And the Court said
24 both are off limits.

25 Now this Court in five -- five cases

1 at the time right after Goodyear described
2 Goodyear as not only a case about descriptive
3 terms, but two cases, Lawrence Manufacturing and
4 P.D. Beckwith, which are cited on page 28 of the
5 government's brief, for the equal truth
6 principle, and that's where the government -- I
7 think it didn't mean to -- but it basically says
8 bookyear -- "booking" does not deserve a
9 trademark because everyone with equal truth
10 could be a booking company. And we know --

11 CHIEF JUSTICE ROBERTS: Counsel, there
12 --

13 MS. BLATT: -- the Lanham Act --

14 CHIEF JUSTICE ROBERTS: -- there are a
15 lot of companies that use booking in their --
16 the second-level domain, ebooking.com,
17 hotelbooking.com, eurobookings.com,
18 travelbooking.com.

19 If you succeed in trademarking
20 Booking.com, then these competitors will be
21 impeded from using that term, which is an
22 accurate description of the services and goods
23 that they -- they provide.

24 MS. BLATT: So I -- I don't think
25 that's correct.

1 CHIEF JUSTICE ROBERTS: Isn't that
2 something that we should take into
3 consideration?

4 MS. BLATT: Sure. And like you should
5 take into consideration with all marks that are
6 descriptive. I mean, our bottom-line position
7 is that ".com" marks should be treated the same.

8 But there are three reasons why you
9 shouldn't worry about what the government's --
10 their -- their sort of, you know, concerns about
11 anti-monopolization. First, the concerns are
12 just in a brief. They don't give you a single,
13 not a single, example of harm, despite the
14 ubiquity of generic-word ".com" marks and the
15 fact that Booking.com is registered in 85 other
16 countries, including ones that --

17 CHIEF JUSTICE ROBERTS: Could you
18 quickly note what your second and third reasons
19 are?

20 MS. BLATT: Yes. So let me get to the
21 third reason, which I think is the legal reason
22 in terms of why it doesn't crowd out. The more
23 descriptive a mark is, the harder it is for that
24 mark to show a likelihood of confusion, a
25 requisite element in any infringement claim.

1 And the ease with --

2 CHIEF JUSTICE ROBERTS: Thank you,
3 counsel.

4 Justice Thomas?

5 JUSTICE THOMAS: Thank -- thank you,
6 Chief.

7 The -- just getting back to the
8 Chief's question, Ms. Blatt, you -- you seem to
9 rely almost exclusively on the primary
10 significance test. Do you need that test in
11 order to prevail here?

12 MS. BLATT: No, because, regardless of
13 what you think of our test, the government can't
14 be right because three statutory provisions that
15 don't mention primary significance test
16 overrule, repudiate, abrogate, and completely
17 eradicate any notion that you could have a
18 per se rule that would ignore what consumers
19 think, which is why the Court in *Qualitex* didn't
20 need some primary significance test; it just
21 said you look at -- you don't have the common
22 law per se bar against trademarking colors; it's
23 just a factual question about what consumers
24 think. Do they find the mark useful? And so we
25 -- we win under three provisions.

1 I think the other problem, even
2 putting aside those three provisions, Justice
3 Thomas, is that there's a whole separate problem
4 the government has, that there are two
5 provisions that require courts to look to how
6 consumers would view the mark as a whole and not
7 its component parts.

8 And so you can't just think because
9 "Wine Company" -- "wine" is generic, "company"
10 is generic, "Wine Company" is generic. And
11 that's the same, you know, with the word
12 "container" and the word "store." You put the
13 two together. "Booking" or ".com," you put the
14 two together and you have to -- you have to look
15 at the way consumers would view that as a whole.
16 That also abrogates a per se rule.

17 So you don't even need to mention
18 primary significance to know that the government
19 is wrong. It just so happens that every court
20 has always said the primary significance test
21 governs.

22 JUSTICE THOMAS: Yeah.

23 MS. BLATT: The PTO's manual says it.
24 It's the test that was applied in this case.
25 And if I could turn to something that I think is

1 pretty devastating for the government, is their
2 appendix.

3 Their appendix of rejected marks is
4 not based on Goodyear. It's based on the
5 primary significance test. Go look at the
6 records in ad.com, bedandbreakfast.com,
7 bookkeeping.com, limousine.com,
8 newspaperarchive.com. There's no Goodyear.
9 It's the primary significance that looks at
10 extensive evidentiary record about how consumers
11 would perceive the mark.

12 Now our appendix is not -- it's the
13 same. It's not based on mistakes. Weather.com,
14 tickets.com, dating.com, wrestlingfigures.com,
15 and another bed and breakfast mark, the PTO
16 looked at extensive evidence. It wasn't some
17 lazy PTO officer. It was someone looking at the
18 primary significance test and saw, wow, I'm
19 seeing that consumers really see weather.com as
20 distinctive, it deserves registration.

21 So the status quo is the primary
22 significance test. And that's what has been --
23 you know, I think this also should give the
24 Chief and Justice Thomas some comfort that most
25 marks flunk the primary significance test, but

1 some don't.

2 JUSTICE THOMAS: So do you make a --
3 the government relies on Goodyear, and you say
4 that, of course, there's been a sea change in
5 trademark law since Goodyear, particularly with
6 the Lanham Act.

7 Would you just explain briefly how you
8 think the Lanham Act has expanded the trademark
9 law and what is protected and what is not
10 protected?

11 MS. BLATT: Sure, Justice Thomas. So
12 it's a basic overhaul in the sense that -- and,
13 again, these are the five Supreme Court cases
14 that are cited on pages 37 and 38 of our brief,
15 and all the old chestnuts, Elgin and Canal
16 Company, these are famous trademark cases that
17 are all about the bar on descriptive marks.

18 You cannot, could not, may not
19 trademark Lackawanna Coal or Pennsylvania Wheat
20 or Elgin Watch or whatever the typewriter was in
21 the Howe case. You just can't do it because
22 everybody has an equal right to say they have
23 that particular characteristic or that
24 particular --

25 CHIEF JUSTICE ROBERTS: Thank you, Ms.

1 Blatt.

2 Justice Ginsburg?

3 JUSTICE GINSBURG: If you have the
4 same name, Ms. Blatt, then the consumers will
5 know that the word com, .com, will get you a
6 particular thought, not all sellers of a given
7 sort of commodity but one particular thought.
8 And yet you don't argue that generic.com is
9 always potentially trademarkable. So when must
10 a generic .com remain generic?

11 MS. BLATT: So, in terms of when it
12 flunks the primary significance test, in
13 addition, I can talk -- I'll give you some
14 examples, but the -- the cites that I gave you
15 from the government appendix are good examples
16 of how generic word .com marks flunk it. But
17 let's just -- let's look at -- well, there are
18 several examples.

19 So, in our survey, the majority,
20 overwhelming majority found that
21 washingmachines.com were generic, and yet an
22 overwhelming majority found that Booking.com
23 referred to the travel website that's used
24 around the globe.

25 Another example, just sort of a common

1 sense example I can give you, is that sometimes
2 people think of generic word .coms generically.
3 I have searched every grocerystore.com looking
4 for toilet paper. I have now started looking at
5 every hardware.com. I am using fooddelivery.com
6 for all of my takeouts these days. Those are
7 generic -- generic usages of a generic word
8 .com.

9 And I think the examples on the PTO's
10 database versus our examples just show you where
11 -- and let me just correct for the record here
12 about survey evidence. Survey evidence is never
13 dispositive. You always look at any and all
14 relevant evidence about consumer usages.

15 And if there's evidence from
16 newspapers, consumer surveys, dictionaries,
17 trade journals that give you reason to suspect a
18 survey is either unreliable or just you don't
19 have to credit it, then don't credit it. Then
20 the dot -- the generic .com mark loses as a
21 factual matter because the evidence is over --
22 otherwise overwhelming that the mark flunks the
23 primary significance test.

24 It's just that, here, the government
25 dropped -- it tried to argue the survey was

1 unreliable, but it -- it waived that in the
2 court of appeals. And so we -- and the -- the
3 district court said, I'm not just relying on the
4 survey, I'm relying on all the evidence about
5 Booking.com and the lack of PTO's evidence.

6 But other cases will turn out
7 differently.

8 JUSTICE GINSBURG: May I ask you
9 another question? And that is, if passing off
10 another service as your service is what you're
11 really concerned about, why does an unfair
12 competition law afford you adequate protection?

13 MS. BLATT: So mainly the reason is
14 because, you know, we're a business. We want
15 the same competitive rights that every other
16 travel agency has to federal registration. But,
17 specifically, .com marks need Sections 1125(d)
18 and (d)(2) in particular because it allows in
19 rem proceedings.

20 So, if you have a cyber scam, they
21 largely arise overseas, and the person is beyond
22 the jurisdiction of the U.S. courts, and what
23 the Lanham Act does, if you're -- if you're a
24 trademark, it allows you to sue the domain name
25 and basically shut it down.

1 And spoofing, typo -- typosquatting
2 and all those other cyber -- cyber scams are
3 prevalent on the Internet. But I do think, even
4 if you didn't have the Internet-specific
5 reasons, they're not second-class citizens.
6 They deserve the same trademark registration
7 rights as any other company to protect against
8 outright counterfeiting and infringement.

9 CHIEF JUSTICE ROBERTS: Thank you,
10 counsel.

11 Justice Breyer?

12 JUSTICE BREYER: Thank you. I'm going
13 to -- going to -- directing your attention to
14 Professor Tushnet's brief and McCarthy on
15 trademark, which is against your position, it's
16 a combination of -- of four things.

17 One, the trademark law is supposed to
18 give the company the advantage that grows out of
19 a commercial identification. It's not supposed
20 to create monopoly power or market power beyond
21 that.

22 MS. BLATT: Mm-hmm.

23 JUSTICE BREYER: Here, the power of
24 the trademark, your trademark, is exactly
25 growing out of the fact that everybody knows

1 there's one com with one name. And if you can
2 do it in the future, you don't have to worry
3 about searching the Internet for toilet paper
4 from grocerystores.com. There will only be one.
5 Grocerystores.com will recognize one and only
6 one. There will be pizza.com, there will be
7 cookies.com, there will be flowers.com, et
8 cetera.

9 Now, second, the problem is maybe not
10 so bad if that was the only thing that they
11 could use. But there are going to be lawsuits
12 when it's ipizza.com because that's Italian
13 pizza, or fflowers.com because that's fresh
14 flowers, or ebookings.com. So we're creating an
15 area of exclusivity that goes well beyond the
16 name.

17 The third thing they bring out is
18 that, in fact, the identification that you talk
19 about flows simply from the fact that loads of
20 people now know that each Internet company has
21 one name.

22 So the interesting thing about your
23 survey is not the 73 percent of the people who
24 think that Booking.com is a single company but
25 the 33 percent of the people who think that

1 washingmachines.com is a -- is a -- is a
2 trademark special company, which it isn't. And
3 they do that because they know about the
4 Internet. So you're taking Internet power, not
5 just advertising or commercial product power,
6 and multiplying it.

7 And the fourth thing is what Justice
8 Ginsburg said. There's another way to achieve
9 your result: unfair competition law.

10 All right. Now that's a lot. But I
11 want to hear your answer to those points.

12 MS. BLATT: Sure. It's not really a
13 lot. It's first there's the statute, that the
14 statute decided the policy decision in our
15 favor. If we meet the definition of a
16 trademark, we get registered.

17 Second, as a policy matter, the
18 Tushnet brief is just wrong. If you look at the
19 page 94 of the trial court record, read -- that
20 was the government's expert's story, their
21 narrative, the judge rejected it, and if you
22 look at pages 164 and 167 of the Joint Appendix,
23 our expert trashes that methodology and makes
24 fun of it and says, if you -- okay, take out, go
25 ahead, remove every single person who

1 erroneously thought Washington --
2 washingmachines.com was a -- was a trademark,
3 and you still get a 64 percent, which is huge
4 brand recognition for Booking.com.

5 Third, the government's appendix just
6 destroys this argument. They reject these marks
7 day in and day out. They don't get registered.

8 Fourth, reality destroys their
9 argument. Where are the lawsuits? Where are
10 the complaints? Nowhere. I don't see any. Our
11 brief at pages 27 and 28 cites rent.com,
12 tickets.com, and travel.com, and then sites like
13 -- and I lost -- we just ran out of room to put
14 them all. 123rent.com, rentusanow.com,
15 forrent.com, it's endless.

16 The notion that anyone is being
17 crowded out is just silly. It would be one
18 thing if they could explain someone complaining.
19 But the ubiquity of the travel marks and the
20 ticket marks and the rent marks is nuts.

21 And so this --

22 CHIEF JUSTICE ROBERTS: Thank you,
23 counsel.

24 MS. BLATT: Sure.

25 CHIEF JUSTICE ROBERTS: Justice Alito?

1 JUSTICE ALITO: What would your
2 client's position be if companies that had --
3 that took Booking.com but made very slight
4 variations sought trademark protection?

5 MS. BLATT: Yeah, that's -- that's
6 fine. And that's why ebooking -- we don't
7 object to ebooking. ebooking is not a problem.
8 And I think it's for the two reasons -- if I
9 could finish -- it is what -- exactly what
10 Justice Gorsuch said.

11 It is the fair use defense allows
12 under Section 1115(b)(4) that anyone can use the
13 registered name -- here, it would be Booking or
14 Booking.com -- to describe their services, no --
15 no liability.

16 And also -- and McCarthy has a huge --
17 a huge thing on this, that the more descriptive
18 the names, these lawsuits just don't -- don't
19 work. And that's true with the -- it's not just
20 .com marks. Alzheimer's has a foundation.

21 JUSTICE ALITO: You would not -- your
22 client would not object to the registration of
23 any trademark that simply made a slight
24 variation in Booking.com? That would be fine?
25 All of those companies could register their

1 trademarks?

2 MS. BLATT: They are, because there's
3 a million booking registrations already.

4 JUSTICE ALITO: Yeah. Would you just
5 answer the question?

6 MS. BLATT: Yes. They --

7 JUSTICE ALITO: Would your client
8 object to that?

9 MS. BLATT: They don't and have not
10 and would not. Now, if there was fraud and
11 somebody ripping off the goodwill based on
12 Booking.com, I'm sure they'd want to sue, but it
13 -- it would be very hard to bring that lawsuit.
14 Very hard.

15 JUSTICE ALITO: My concern with your
16 position is exactly what I think Justice Breyer
17 just suggested. You are seeking a degree of
18 monopoly power that nobody could have had prior
19 to the Internet age.

20 I take it a company could not have
21 registered "booking company," but because of the
22 Internet, you have Booking.com, which gives you
23 an advantage over other companies that are in
24 that business. And now you want to get even
25 more advantage by getting trademark protection

1 for that.

2 MS. BLATT: So if I could turn to the
3 company situation. This is just not true. The
4 Wig Company, which is registered, is celebrating
5 its 50th year anniversary. It's called The Wig
6 Company. There's also The Wig Shop and The Wig
7 Store and The Wig -- Wig Mart.

8 And so it's not like Wig Company has
9 crowded out wig companies. There are many
10 places that sell wigs just fine. It's not like
11 any generic word .com has crowded out --
12 weather.com exists with accuweather.com.
13 Law.com, there are so many law.com variations
14 that are registered and not suing each other and
15 no one's complaining that you just type in
16 law.com into the database and you'll see it.
17 There's just a lot of registered names.

18 And that's fine in terms of saying,
19 well, that's just, you know, what the PTO does,
20 but the fact that -- that they don't have any
21 anticompetitive harm seems to me telling that
22 you wouldn't want to -- you wouldn't want to
23 write an opinion destroying the -- the -- the
24 billions of dollars of goodwill that's been
25 built up in not just .com marks but in company

1 marks.

2 And if you extend Goodyear past
3 corporate designation, it just -- the government
4 cited it. It said "company" means an
5 association or a partnership. Well, .com is not
6 an association or a partnership. It's a store
7 to buy stuff. And so --

8 CHIEF JUSTICE ROBERTS: Thank you,
9 counsel.

10 Justice Sotomayor?

11 JUSTICE SOTOMAYOR: Ms. Blatt, I am
12 troubled, as Justice Breyer and Justice Alito
13 are, about the monopoly situation, but I'm also
14 troubled by what's the rule that you want the
15 PTO to follow?

16 They can't trademark under law generic
17 names. Are they required now to run their own
18 consumer perception surveys before they
19 determine that a particular name is generic?

20 How -- are you okay with the existing
21 rule that I think Justice Kagan read before,
22 which is that there is no per se rule but that
23 -- what is it -- how is it going to change PTO
24 practice, and won't it lead inevitably to the
25 registration of every single common name of

1 every business and then a expensive legal fight
2 on whether it's become generic or not?

3 MS. BLATT: So I -- I 100 percent
4 agree with Justice Kagan. It -- our view is the
5 status quo, which is the primary significance
6 test, it's what the PTO's manual says. It's
7 what the PTO has been applying, which is why our
8 -- our appendix and the government's appendix
9 are actually consistent.

10 It shows the PTO day in and day out
11 rolling up its sleeves applying the primary
12 significance test. No, you do not have to have
13 a survey. The PTO looks at tons of evidence and
14 says, look, this is just -- consumers would see
15 this as referring to any place on the Internet
16 that sells these goods. You're not getting
17 registered. And that's the end of the story.
18 And that's why a lot of those marks end up on
19 the rejected list.

20 Now, on our list, when they let in
21 weather.com, they looked at different evidence
22 and said, wow, weather.com has a big consumer
23 fan base and has -- has the primary significance
24 of being a brand. So we got to register that.
25 And that's good for consumers.

1 You want consumers to know when they
2 go to weather.com they're getting weather.com
3 and not accuweather.com, and the same way with
4 the dating.com and wrestlingfigures.com.

5 So I -- I hear you on you're worried,
6 but the PTO is up to the task. This is what
7 they've been doing. And we've had -- there are
8 .com marks that have been registered from the
9 late 1990s and 2000s without incident.

10 JUSTICE SOTOMAYOR: If this is a -- if
11 this is a factual question, and a district court
12 is not to give the PTO deference, then what
13 we're going to have is every district court
14 reweighing all of this evidence that the PTO
15 looked at.

16 And, frankly, I'm on the margin with
17 respect to your mark, because I would have
18 looked at ebooking and carbooking and
19 hotelbooking and all of those other bookings and
20 said this really booking standing alone is
21 generic, even with .com.

22 Now you point to the Teflon study, but
23 you seem to be saying that a district court who
24 ruled a different way would be wrong as a matter
25 of law. Could that be?

1 MS. BLATT: No. That --

2 JUSTICE SOTOMAYOR: Could any survey
3 ever be dispositive?

4 MS. BLATT: No. So let me be clear.
5 A district court -- and it sounds like we would
6 have lost had you been the trial court -- could
7 rule against us --

8 (Laughter.)

9 MS. BLATT: -- based on the survey.

10 JUSTICE SOTOMAYOR: Maybe, maybe not.
11 I didn't look at that entire record.

12 MS. BLATT: No, but you could. We
13 could have lost at the trial court level.
14 That's the risk you take. A lot of people go
15 the Federal Circuit route because they like
16 Federal Circuit law and you take a risk. You go
17 usually the district court route when you think
18 you have good evidence.

19 CHIEF JUSTICE ROBERTS: Thank you,
20 counsel.

21 Justice Kagan?

22 JUSTICE KAGAN: Good morning, Ms.
23 Blatt. I guess what strikes me is -- is
24 something along the same lines as what has
25 struck Justices Breyer and Alito and Sotomayor,

1 and it's that there seems a disconnect between
2 the primary significance test and these kinds of
3 names, because the primary significance test is
4 really asking, well, does a consumer understand
5 something as referring to a category of products
6 or, instead, as referring to a particular
7 product or service? And -- and these names by
8 definition are unique, and everybody knows that
9 they're unique.

10 So, if you apply the primary
11 significance test to these completely unique
12 URLs, aren't you going to get a bias in the
13 results?

14 MS. BLATT: Correct.

15 JUSTICE KAGAN: And it's true of the
16 -- the survey, the Teflon surveys, but it's true
17 of evidence generally, that it would seem as if
18 you're going to get a bias in the results and
19 more things will seem to be registrable than
20 really ought to be.

21 MS. BLATT: Yeah, so a great question,
22 and I think I can clarify this for you.

23 So, just like The Wig Company or
24 wig.com, they can be generic for wig companies
25 and wig producers. So it's not just you have to

1 say The Wig Company. No one thinks The Wig
2 Company is referring to wigs. It would be --
3 or, you know, it would be generic for a type of
4 company. So it's not just a category of goods.
5 It's the category of the sellers.

6 So, if you think of Booking.com is no
7 different than the Container Store, you could
8 say that is so unfair that Container Store --
9 the Container Store, because there can only be
10 one The Container Store. It's the same way with
11 .com.

12 Now you're right about the -- the
13 Internet address, but that would indict every
14 .com mark, even your hotel, Paris -- Paris hotel
15 booking, because you would always win under the
16 -- under the sphere of it must have -- it could
17 never be generic.

18 And so courts have just been dealing
19 with this, I'd say now for two decades, or at
20 least the PTO, that were treating the .com marks
21 like house marks, store marks, association marks
22 --

23 JUSTICE KAGAN: Okay. Let me ask you
24 another question that goes back to what Justice
25 Alito said. And you said to him and to the

1 Chief Justice, well, you wouldn't sue
2 ebookings.com or hotelbookings.com or any of a
3 number of variants on the name.

4 Who would you sue? When is a .com
5 going to win a trademark suit?

6 MS. BLATT: I haven't seen any. The
7 same reason though -- but let me just be clear,
8 the same reason the Alzheimer's associations and
9 paper stores and the paper marts aren't all
10 suing each other, because they'd lose. So these
11 suits don't happen.

12 But why people want trademark
13 registration is twofold. Outright
14 counterfeiting, because Booking.com is a -- is a
15 popular name, and we don't want people ripping
16 off or a store opening up.

17 I think if you read the car.com brief,
18 they show car dealers putting up signs calling
19 themselves car.com. That's called ripping off.
20 That's called theft. And that's what the
21 trademark laws are about. So you need that.

22 But, secondly, I think that they want
23 it for the -- 1125(d). It's a specific problem
24 with spoofing and cyber -- and cyber scams. And
25 that is definitely what the Internet amicus

1 briefs are saying, is that they need this. And
2 that's what Booking cares about. Booking does
3 not like Internet scams and cyber scams stealing
4 its business and ruining its reputation because,
5 you know, someone infects your Internet and
6 destroys your -- you know, your identity.

7 CHIEF JUSTICE ROBERTS: Thank you,
8 counsel.

9 Justice Gorsuch?

10 JUSTICE GORSUCH: Good morning. If I
11 understand your point correctly, Ms. Blatt, it's
12 that the government's concerns about the
13 competitive advantage are minimized or mitigated
14 by the fact that marks like Booking.com are
15 relatively weak because you're putting together
16 two generic terms.

17 And consumers may well have your
18 company in mind when they see that. You've got
19 evidence -- and we can argue about how good that
20 is -- but there may be no consumer confusion.
21 And that may also be true with ebooking or
22 hotelbooking. Consumers may or may not,
23 depending on the facts, have particular
24 companies in mind.

25 And the relative weakness of the mark

1 is your answer, together with the fair use
2 doctrine, to the government's monopoly concerns.
3 Is that a fair summary?

4 MS. BLATT: Much better than I said.

5 JUSTICE GORSUCH: Will you expound on
6 that, please?

7 MS. BLATT: Sure. So -- and let me
8 just help you with the reason why they're so
9 weak to begin with and why McCarthy has this
10 whole chapter of every lawsuit where, you know,
11 similarly worded marks can't sue for others.

12 Let's take weather.com and
13 accuweather.com. So it turns out that
14 consumers -- when you have very descriptive
15 marks like both of those that are registered,
16 consumers become very conditioned to focus on
17 the difference. So they know "accu" is
18 different. If you look at booking and ebooking,
19 consumers would focus on, oh, there's the "e"
20 site, there's the "e" one, I want to go to the
21 "e" one.

22 And so it is very, very hard to show
23 likelihood of confusion because the more similar
24 the mark is, it becomes extremely impossible or
25 exceedingly unlikely to be able to prove that.

1 And that is not specific to the ".com" context.
2 It's the same problem that every mart, shop,
3 source, place, exchange, emporium, collective --
4 you know, we have -- like there's a million dog
5 marks, a million coffee marks, a million paper
6 mart -- paper marks. They all have different --
7 "store," "shop," "place." Very similarly
8 worded. They never sue each other, and if they
9 do, they lose.

10 JUSTICE GORSUCH: Do you --

11 MS. BLATT: And I'm not making it up,
12 Justice Gorsuch. They had a whole brief to cite
13 examples of lawsuits.

14 JUSTICE GORSUCH: Can you address for
15 me a little bit more on the record, I know we're
16 not the trial judge here, but Justice Breyer's
17 point, I think, 74 percent of consumers
18 recognized Booking.com as your client, but
19 33 percent think that anything ".com" is a -- is
20 a real store.

21 So only about -- as -- as I understand
22 it, about 41 percent on a net basis recognize
23 your mark. What -- what do we do about that?
24 What -- what should we say in this opinion, if
25 anything --

1 MS. BLATT: Well --

2 JUSTICE GORSUCH: -- about the
3 standard --

4 MS. BLATT: Yes. So --

5 JUSTICE GORSUCH: -- if not the facts?

6 MS. BLATT: Okay. So you've read the
7 Tushnet brief and the government's brief. You
8 have not obviously read our expert --

9 JUSTICE GORSUCH: Well, now --

10 MS. BLATT: -- that explains how --

11 JUSTICE GORSUCH: -- that's not fair.

12 Now come on.

13 MS. BLATT: Okay. So why it is so
14 funny is that you would never net them out. You
15 don't take 74 and subtract 33. It's just based
16 on a -- like, a very sort of lack of
17 understanding of survey methodologies.

18 You net out the participants. And so,
19 when you net out the participants, you say Lisa
20 Blatt dumbly thought washing. -- washing --
21 washingmachine.com was a -- was a -- was a
22 brand, so we're going to take her out of the
23 survey. So, if we look at the people who
24 correctly saw washingmachine.com as generic,
25 64 percent still saw Booking.com.

1 And so I guess I can say is there's
2 just -- there's an extensive discussion of this
3 in the --

4 JUSTICE GORSUCH: Oh, I -- I
5 understand that. I'm -- I'm trying to extract
6 just a level up from the facts --

7 MS. BLATT: Okay. Okay. I'll --

8 JUSTICE GORSUCH: -- and ask for your
9 guidance as to what the Court should say with
10 respect to these kind of survey methodologies,
11 if anything.

12 MS. BLATT: So I think --

13 CHIEF JUSTICE ROBERTS: Briefly,
14 Ms. Blatt. Ms. Blatt?

15 MS. BLATT: Oh, yeah, I'm sorry. So
16 what I would say is that, you know, the
17 survey is -- the survey instructs the consumers
18 -- I'm sorry, the participants ahead of time
19 that "office supplies" is a common --
20 "officesupplies.com" is generic. And if they
21 didn't understand that, they couldn't take the
22 survey, that staples.com was a brand and
23 officesupplies.com is generic. If the --

24 CHIEF JUSTICE ROBERTS: Thank you,
25 counsel.

1 Justice Kavanaugh?

2 MS. BLATT: Sure.

3 JUSTICE KAVANAUGH: Thank you,
4 Mr. Chief Justice.

5 Good morning, Ms. Blatt. I want to
6 make sure I understand what you think about our
7 precedent in Goodyear exactly.

8 Could the principle of Goodyear still
9 have some value outside the ".com" context in
10 the classic company context in which that case
11 arose because the ".coms" are inherently unique,
12 or is your position more broadly that Goodyear
13 just has no value anymore?

14 MS. BLATT: So I'll -- I'll fall back
15 to certainly you shouldn't extend it to ".com"
16 because ".com" is closer to the words "store"
17 and "shop" -- and "shop." But, if you took
18 Goodyear at its word, you're killing non-profits
19 because of the association problem.

20 Goodyear -- the terms of the opinion
21 say it means association. And that's how
22 non-profits identify themselves. So we have --
23 or a coalition or a society. And so you have
24 the Amputee Coalition, the Christian Coalition.
25 You have -- there are so many of these

1 associational marks that I think Goodyear would
2 destroy, in addition to "foods co." or
3 "Container Store."

4 And I -- I just want to say one thing
5 about the government's making fun of the
6 Cheesecake Factory. "Crab House" is not a
7 little house where crabs live. They're actually
8 dead and you eat them. And the government
9 thought "Crab House" was generic.

10 So, if you go down this road of
11 thinking that certain words are off limits, I
12 just think you're creating a real mess that's
13 very unstable, unprincipled, and unworkable and
14 unclear.

15 JUSTICE KAVANAUGH: Picking up on
16 Justice Kagan's line of questioning, it seems
17 that your rule invariably will lead to a
18 situation where most every ".com" business that
19 sells good or -- goods or services will be able
20 to obtain a trademark. Maybe -- in other words,
21 your position leads to the opposite kind of
22 bright-line rule. Maybe that's okay, but is
23 that wrong and, if so, when -- when wouldn't it
24 be?

25 MS. BLATT: I think it's wrong, but I

1 -- I hear that -- I hear at least six of you
2 concerned about it, so I can try to help on --
3 on this.

4 What you can do is make clear in your
5 opinion that a district court, if there is
6 evidence of -- from all kinds of sources that
7 the PTO uses and all those examples I gave in
8 the beginning, they cite all kinds of examples
9 proving that generic word ".com" marks flunk the
10 primary significance test -- that the PTO can
11 look past survey evidence and so can courts if
12 you're really worried about a survey bias.

13 Now we have a whole brief of survey
14 experts saying this was a great survey. So I --
15 I hate to trash our survey. A lot of people
16 thought our survey was great. It's the -- it's
17 the classic Teflon survey.

18 But, also, let me just take you to
19 Waffle House. Waffle House, there was a fight
20 about the survey. The -- the PTO said it was
21 generic, and Waffle House came in with a survey
22 and they -- they trademarked it. So I -- I
23 don't know why ".com" is having some sort of,
24 you know -- it's scary and, therefore, it should
25 be treated differently because of this fear that

1 all ".com" marks have an unfair advantage
2 because of a website. It's -- you know, the PTO
3 has been doing this for -- for two decades now
4 without a problem.

5 CHIEF JUSTICE ROBERTS: Thank you,
6 counsel.

7 Ms. Ross, you have three minutes for
8 rebuttal. Ms. Ross, three minutes for rebuttal.

9 REBUTTAL ARGUMENT OF ERICA L. ROSS
10 ON BEHALF OF THE PETITIONERS

11 MS. ROSS: Thank you, Mr. Chief
12 Justice. Sorry about that.

13 The -- if I could just focus on three
14 main points. First, I think Respondent's rule
15 operates from the presumption that the Lanham
16 Act knocked out all prior common law unless it
17 was expressly preserved. That's the opposite of
18 the way that we usually think about statutory
19 change. I think just a couple of weeks ago in
20 Romag, this Court, nine justices, looked to the
21 common law to determine what the Lanham Act
22 preserved. And I think the same should be true
23 here. That's particularly so because, in the
24 examples that Respondent cites, like the
25 geographic terms and descriptive terms, Congress

1 was clear when it wanted to overturn pre-Lanham
2 Act precedent.

3 I think, on the second point,
4 Respondent suggests that the primary
5 significance test did it. In particular, I
6 think I heard my friend just suggest for the
7 first time today that Kellogg itself did it.
8 That's inconsistent with the position that they
9 take on page 22 of their brief, which
10 acknowledges that Kellogg actually discussed the
11 primary significance test to determine when a
12 descriptive term would get protection under
13 unfair competition law, so that's entirely
14 consistent with the view here that generic terms
15 are never susceptible to trademark, even with
16 primary -- even -- or even when a showing of
17 secondary meaning has been made.

18 Again, we think that the primary
19 significance test coexists with prior law, which
20 includes Goodyear. And I think Respondent
21 points to this idea that the PTO has been
22 applying the primary significance test. That's
23 true with the Goodyear sort of guardrail. It
24 understands that a generic term can't be made
25 into a trademark simply by showing that a bunch

1 of consumers think that it -- it's associated
2 with a particular mark or a particular brand.

3 Now Respondent's example actually --
4 or Respondent's survey actually proves this
5 point. There was a lot of back and forth about
6 washing -- "washingmachine.com" versus
7 "Booking.com," but I think what's really
8 instructive here is "washingmachine.com" versus
9 "supermarket."

10 Thirty-three percent of Respondents in
11 Respondent's survey thought that
12 "washingmachine.com" was a brand name. Zero,
13 not a single survey respondent, thought that
14 "supermarket" had that -- that characteristic.
15 So, clearly, the .com context is doing a ton of
16 work on Respondent's view.

17 The third point that Respondent really
18 hit was this idea that there wouldn't be any
19 competitive harm from Respondent's rule. I
20 think that's clearly not correct.

21 We know that because of the same
22 reason that we know that booking companies
23 shouldn't be allowed to be trademarked. We just
24 know that when you have -- that a trademark law
25 is not supposed to take terms off the table,

1 that everyone needs to describe their goods.

2 I think, you know, Respondent focused
3 on certain examples, like "tickets.com" and
4 "Container Store." I think, again, Respondent
5 is misunderstanding that you have to always look
6 at how -- what those are registered for. So
7 "tickets.com," for example, for ticket
8 management services, not for tickets generally.
9 So they're massively overstating what's going on
10 here.

11 I think, again, there might be hard
12 questions at the margins on some of these,
13 whether something like "container" or "tickets"
14 is being used in its generic sense, but that's
15 not reflective of the .com or the company.
16 That's at that first root level.

17 Finally, I think, if they're not going
18 to sue ebooking.com and hotelbooking.com, it's
19 really unclear what they want out of this.
20 Ripping off Respondent referred to is covered by
21 unfair competition. Typosquatting likewise is
22 covered by unfair competition. And
23 Section 1125(d), which Respondent pointed to,
24 presumes that you have a preexisting trademark
25 like Kodak or like Xerox or like Teflon in the

1 old days, and someone goes along and --

2 CHIEF JUSTICE ROBERTS: Thank you,
3 counsel.

4 MS. ROSS: -- gets the trademark --

5 CHIEF JUSTICE ROBERTS: Thank you,
6 counsel. The case is submitted.

7 (Whereupon, at 11:16 a.m., the case
8 was submitted.)

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