

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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1 P R O C E E D I N G S

2 (10:00 a.m.)

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

7 Ms. Ross.

8 ORAL ARGUMENT OF ERICA L. ROSS

9 ON BEHALF OF THE PETITIONERS

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

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

22 In other words, secondary meaning or
23 acquired distinctiveness is simply irrelevant to
24 generic terms. That principle controls here.
25 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 decision in Goodyear.

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

19 But more -- more to the point maybe,
20 that if this is a generic term, Booking.com,
21 that means that it describes a category of goods
22 or services. But, when you talk about other
23 companies in that category, whether it's
24 Travelocity, Priceline, or whatever, nobody
25 refers to those as -- as Booking.coms. So

1 Booking.com is not a generic term to describe
2 that type of -- of service.

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

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

17 CHIEF JUSTICE ROBERTS: Thank you --

18 MS. ROSS: The point here is --

19 CHIEF JUSTICE ROBERTS: -- thank you

20 --

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

22 CHIEF JUSTICE ROBERTS: -- thank you

23 -- thank you, counsel.

24 Justice Thomas?

25 JUSTICE THOMAS: Yes, Ms. Ross. The

1 -- a couple of questions.

2 The -- could Booking acquire an 800
3 number, for ex -- that's a vanity number,
4 1-800-booking, for example, that is similar to,
5 for -- 1-800-plumbing, which is a registered
6 mark?

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

15 Now I think it's significant that
16 those are distinguishable in the sense that the
17 core problem with Booking.com is that it allows
18 Respondent to monopolize booking on the Internet
19 because of the fact that longer domain names of
20 Respondent's competitors, like ebooking.com and
21 hotelbooking.com, can include Booking.com. That
22 is not as obviously true of something like
23 1-800-booking.

24 JUSTICE THOMAS: Well, the -- that --
25 that -- that could be true, but the -- I'd like

1 you to compare this to Goodyear. In Goodyear,
2 you had a generic term, but you also had added a
3 term such as company or inc., which any company
4 could use.

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

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

15 The first is that Respondent doesn't
16 actually argue that every domain name should get
17 a trademark, as I think would be the consequence
18 of Your Honor's position there. I think the
19 reason that Respondent doesn't do that, again,
20 is because, if that's good for Respondent, then
21 it's good for ebooking.com and hotelbooking.com,
22 and then I think the risk of confusion analysis
23 on the back end would also have to account for
24 the fact that each of those is unique. And so
25 Respondent would wind up with a very thin

1 trademark protection.

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

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

15 So the point here -- and this, you
16 know, is why generic .com terms garner so much
17 money on the Internet. The point, I think, of
18 this case, what really matters, is the second
19 type of usage, the ability to block out
20 competitors like ebooking.com and
21 hotelbooking.com. And I think that's exactly
22 the type of anticompetitive concern that this
23 Court expressed in Goodyear, that if you allow
24 one company to have Booking, Inc. or Booking
25 Company, it's going to preclude others from

1 calling their goods by their name and from
2 marketing themselves as what they are.

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

13 CHIEF JUSTICE ROBERTS: Thank you,
14 counsel.

15 MS. ROSS: -- but we don't allow the
16 space for --

17 CHIEF JUSTICE ROBERTS: Thank you,
18 counsel.

19 Justice Ginsburg?

20 JUSTICE GINSBURG: Two questions. The
21 first question is, if you're right that .com
22 doesn't make a generic term non-generic, how
23 many marks, already registered marks, would be
24 subject to cancellation?

25 I take it there are dozens of ".coms"

1 that have been registered. Is that so?

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

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

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

22 So, for example, Respondent looks at
23 the Cheesecake Factory, but, of course, that's
24 not a literal factory producing cheesecakes.
25 It's a restaurant. So I don't think Cheesecake

1 Factory --

2 JUSTICE GINSBURG: I wanted you to
3 focus on cancellation. Who could apply to
4 cancel an existing registration?

5 MS. ROSS: So I do believe --

6 JUSTICE GINSBURG: If we -- if we rule
7 in your favor, would the PTO itself endeavor to
8 cancel these marks?

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

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

25 And -- and to explain a little bit

1 more why I think that's so, Respondent points to
2 not just examples like Cheesecake Factory --

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

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

11 Do you have another distinction, the
12 1-800, say, Mattress, or Booking, that would
13 distinguish it from the domain name?

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

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

23 CHIEF JUSTICE ROBERTS: Thank you --

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

25 CHIEF JUSTICE ROBERTS: Thank you,

1 counsel. Thank you, counsel.

2 Justice Breyer?

3 JUSTICE BREYER: The same question as
4 Justice Thomas's question. Good morning anyway.
5 And to Justice Thomas's question, Justice
6 Ginsburg -- what do you want to say about that?
7 You can have a -- a trademark that is an
8 address, 1418 45th Street or something. You
9 have a trademark that's an address. You can
10 have a trademark that's a telephone number. So
11 why can't you have a trademark that's a ".com"?

12 MS. ROSS: So, again, Justice Breyer,
13 and good morning, I -- I think that it is clear
14 from Goodyear that Goodyear balanced these
15 competing objectives that are always true in
16 trademark law in this very similar context of
17 "Booking Company." We think "Booking Company"
18 and "Booking.com" are essentially equivalent.
19 All "Booking.com" tells you is that there is a
20 website on the Internet for booking. It tells
21 you it's a type of service that's sort of a
22 classic generic usage. And we think that that
23 follows from Goodyear.

24 Now Goodyear, as I was saying, sort of
25 balanced these two competing interests. On the

1 one hand, we want to make sure that consumers
2 understand that the good they got last time is
3 from a particular brand, and so we want strong
4 brand identification, and we protect trademarks
5 for that reason.

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

22 Now you noted that you could have sort
23 of a street address as a trademark, but I think
24 that's fundamentally different because, of
25 course, that's not telling you anything at all

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

16 JUSTICE BREYER: Thank you.

17 CHIEF JUSTICE ROBERTS: Justice Alito?

18 JUSTICE ALITO: What do you think I
19 should do if I think that Goodyear is a case
20 from a different era and doesn't control here
21 but also think that the Lanham Act, similarly,
22 was enacted in a different era, namely, in the
23 pre-Internet era, and that the case law on which
24 Ms. Blatt relies belongs to that era?

25 How can a rule that makes sense in the

1 Internet age be reconciled with the language of
2 the Lanham Act?

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

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

14 And so the -- as Respondent concedes
15 in their brief, it's a very narrow rule. In
16 1984, Congress passed this amendment to overturn
17 a specific Ninth Circuit case that had applied a
18 different test in the cancellation context.

19 Now it is true that other courts have
20 applied similar analyses in other places, but
21 that's because of the preexisting common law.
22 So, for that reason, we think Goodyear continues
23 to control for the same reason that this other
24 preexisting common law does.

25 But even taking a view sort of outside

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

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

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

21 I think it's worth noting on pages 6
22 and 8 of Respondent's brief, their test actually
23 requires them, I think, to hedge as to whether
24 the words "Oranges" or "Oranges, Inc." or, I
25 presume, "Oranges.com" would be generic. So, on

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

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

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

24 JUSTICE SOTOMAYOR: Counsel --

25 MS. ROSS: -- in Section --

1 CHIEF JUSTICE ROBERTS: Justice
2 Sotomayor? Justice Sotomayor?

3 JUSTICE SOTOMAYOR: I'm sorry, Chief.

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

12 MS. ROSS: Justice Sotomayor, it's not
13 our position that the -- the courts and the PTO
14 can never look to the primary significance test
15 outside of cancellation. Again, I think that
16 the reason why courts and the PTO do that is
17 because the Lanham Act didn't overturn
18 preexisting common law, and that, again, speaks
19 to why we think Goodyear remains good law. But
20 I think what courts should do in this instance
21 is look to other sources to figure out what,
22 again, a generic term -- whether something is a
23 generic term, which usually means whether it is
24 going to indicate the type of good or service.

25 So dictionary definitions are very

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

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

19 Now I think --

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

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

22 JUSTICE SOTOMAYOR: Ms. Ross, may I?

23 Let me stop you there for a moment.

24 MS. ROSS: Of course.

25 JUSTICE SOTOMAYOR: I looked at your

1 definitions of "booking" and, basically, one
2 definition said booking a hotel, but this
3 service is much broader than that. You can book
4 a hotel, you can book leisure, you can book
5 travel, you can book cars.

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

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

22 To go to your broader point, you know,
23 I think this actually speaks to the problem with
24 a lot of Respondent's examples, which is to say
25 you're always looking at the particular category

1 and the particular -- for which the goods or --
2 or services are being registered and the usage.

3 Now, on this idea that --

4 CHIEF JUSTICE ROBERTS: Thank you --

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

6 CHIEF JUSTICE ROBERTS: Thank you,
7 counsel.

8 Justice Kagan?

9 JUSTICE KAGAN: Good morning, Ms.
10 Ross. A couple -- one short question first.

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

18 MS. ROSS: I think it depends a little
19 bit, Justice Kagan, on what you mean by
20 trademarks of this kind. We think that when
21 you're simply appending .com --

22 JUSTICE KAGAN: Generic .com,
23 Bookings.com, Booking.com.

24 MS. ROSS: Sure. So Booking.com and
25 other -- other phrases where the combination

1 doesn't add any additional meaning, so like I
2 mean to distinguish cases like the courts of
3 appeals have hypothesized, like tennis.net,
4 where there's sort of an interplay between the
5 two words on either side of the period. We
6 don't think that those would necessarily -- that
7 those could necessarily never provide for
8 trademark protection. We just don't think
9 that's really presented here.

10 But --

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

19 MS. ROSS: So I don't think there
20 actually is a difference, Justice Kagan. I
21 think what the PTO is leaving open, again, is
22 this category, this very narrow category of rare
23 cases that the Federal Circuit and the Ninth
24 Circuit have recognized.

25 I think what Respondent would do is to

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

7 So I think we're not asking --

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

20 And I guess, when I think about that
21 test, I think, well, maybe or maybe not. If --
22 if the test is what you say, is what is a
23 consumer going to understand and does the term
24 convey additional meaning that would distinguish
25 the Respondent's services from others, I kind of

1 think, well, may -- maybe it would. Well, so
2 how does that test go along with a categorical
3 rule?

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

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

17 They've never made an argument --
18 again, the -- the -- sort of the key distinction
19 between generic and descriptive terms is that a
20 generic term identifies the type of good or
21 service, whereas the descriptive -- a
22 descriptive term tells you something about a
23 feature or a characteristic of the service.

24 So, for example, apple pie, generic
25 for pies, but descriptive for rooms, rooms --

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

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

20 JUSTICE KAGAN: Right. But you're
21 not -- they're not.

22 CHIEF JUSTICE ROBERTS: Brief --
23 briefly, Ms. Ross.

24 MS. ROSS: Sure. I think we would
25 want the -- at -- at a bare minimum, the risk of

1 confusion analysis on the back end to be
2 extremely sensitive to the fact that what's
3 driving the intuition is the uniqueness of the
4 domain name. And so that equally applies to
5 Respondent's competitors.

6 CHIEF JUSTICE ROBERTS: Thank you,
7 counsel.

8 Justice Gorsuch?

9 JUSTICE GORSUCH: Counsel, I'd like to
10 follow up on that and -- and just give you
11 another minute to -- to continue answering that
12 question.

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

18 MS. ROSS: Sure. So a couple of
19 points, Justice Gorsuch. The first is that I
20 think, again, even if the Court did not think
21 that Goodyear firmly controlled here, as we do,
22 I think it is very indicative of the right type
23 of analysis in terms of the concern with
24 monopolizing language.

25 As I was saying earlier --

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

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

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

19 I think blurring that distinction can
20 have really bad consequences outside of the .com
21 context. So, again, the oranges or Oranges,
22 Incorporated example where everything is now
23 subject to survey evidence.

24 So I would want the Court to make
25 clear --

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

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

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

22 MS. ROSS: So, Justice Gorsuch,
23 there's a lot in that question. I think that,
24 you know, my first-line answer, of course, is
25 that we think that the tools are sufficient.

1 They just point in our direction.

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

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

15 Now I think if it's sort of good for
16 the goose is good for the gander, if ebooking --
17 or if Booking.com gets trademark protection
18 because it's unique, then it seems as though
19 ebooking.com should get equal protection because
20 it, too, is unique. So I -- I don't think that
21 sort of the -- the competition concerns are
22 necessarily resolved under existing trademark
23 law. I think you would actually have to --

24 CHIEF JUSTICE ROBERTS: Thank you,
25 counsel.

1 Justice Kavanaugh?

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

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

9 So what are the real-world practical
10 problems you foresee if .coms could obtain
11 trademarks?

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

20 So I do think there is a very real
21 risk of monopolization in that sense. The other
22 risk, though, I think, is that, you know,
23 Respondent is already getting, as I mentioned
24 earlier, these huge first mover advantages from
25 the fact that it and only it can control

1 Booking.com on the Internet. And so it is
2 asking for this privilege that no business would
3 have in the real world of both getting the
4 really exacerbated first mover advantages of
5 using a generic name and then also getting the
6 back-end trademark protection.

7 And I guess I don't see why the
8 Internet context should permit that, again,
9 given that it already gives Respondent these
10 huge advantages.

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

1 JUSTICE KAVANAUGH: Respondent also
2 points out that there have been registrations of
3 "Booking.com" in other countries, the EU, the
4 United Kingdom. Can you respond to that?

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

19 JUSTICE KAVANAUGH: Thank you.

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

22 MS. ROSS: Sure. Thank you, Mr. Chief
23 Justice.

24 So I think our basic points are
25 simple. We think our rule flows directly from

1 Goodyear. ".com" is simply the on-line version
2 of "company," and it tells you only that
3 Respondent operates a commercial website via the
4 Internet where bookings can be made. We think
5 it's consistent with the Lanham Act's
6 preservation of this distinction between generic
7 and descriptive terms and with long-standing
8 trademark policy.

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

16 CHIEF JUSTICE ROBERTS: Thank you,
17 counsel.

18 Ms. Blatt.

19 ORAL ARGUMENT OF LISA S. BLATT

20 ON BEHALF OF THE RESPONDENT

21 MS. BLATT: Thank you, Mr. Chief
22 Justice, and may it please the Court:

23 This case is about how to tell the
24 difference between descriptive names the Lanham
25 Act protects and generic ones the Act does not.

1 There are three reasons this Court should hold
2 that the answer is the primary significance
3 test, that is, whether consumers primarily think
4 the name is a genus or a potential brand:

5 First, the Act mandates this test. Second, the
6 Act abrogated *Goodyear*. And, third, this test
7 furthers the statutory purpose to let consumers
8 decide which marks deserve trademark protection.

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

19 And right before Congress passed the
20 Act, this Court in *Kellogg* adopted the primary
21 significance test under unfair competition law
22 to distinguish between generic and descriptive
23 names. For the past 70 years, courts have
24 embraced this primary significance test to tell
25 the difference under the Lanham Act.

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

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

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

22 CHIEF JUSTICE ROBERTS: Thank you --
23 thank you, counsel.

24 You rely heavily on the primary
25 significance test, but that is only in the

1 provision of the statute dealing with
2 cancellation of marks. And, of course, this is
3 not a cancellation case; it's a registration
4 case.

5 So why should we assume that the
6 primary significance test carries the weight
7 that you would give it?

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

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

24 CHIEF JUSTICE ROBERTS: Well, maybe
25 one reason that Congress put this in the

1 cancellation section and not in the registration
2 section is because they appreciated the
3 significance of Goodyear with respect to
4 registration of marks.

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

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

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

22 Now this Court in five -- five cases
23 at the time right after Goodyear described
24 Goodyear as not only a case about descriptive
25 terms, but two cases, Lawrence Manufacturing and

1 P.D. Beckwith, which are cited on page 28 of the
2 government's brief, for the equal truth
3 principle, and that's where the government -- I
4 think it didn't mean to -- but it basically says
5 bookyear -- "booking" does not deserve a
6 trademark because everyone with equal truth
7 could be a booking company. And we know --

8 CHIEF JUSTICE ROBERTS: Counsel, there
9 --

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

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

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

21 MS. BLATT: So I -- I don't think
22 that's correct.

23 CHIEF JUSTICE ROBERTS: Is that
24 something that we should take into
25 consideration?

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

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

14 CHIEF JUSTICE ROBERTS: Could you
15 quickly note what your second and third reasons
16 are?

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

24 CHIEF JUSTICE ROBERTS: Thank you,
25 counsel.

1 Justice Thomas?

2 JUSTICE THOMAS: Thank -- thank you,
3 Chief.

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

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

23 I think the other problem, even
24 putting aside those three provisions, Justice
25 Thomas, is that there's a whole separate problem

1 the government has, that there are two
2 provisions that require courts to look to how
3 consumers would view the mark as a whole and not
4 its component parts.

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

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

19 JUSTICE THOMAS: Yeah.

20 MS. BLATT: The PTO's manual says it.
21 It's the test that was applied in this case.
22 And if I could turn to something that I think is
23 pretty devastating for the government, is their
24 appendix.

25 Their appendix of rejected marks is

1 not based on Goodyear. It's based on the
2 primary significance test. Go look at the
3 records in ad.com, bedandbreakfast.com,
4 bookkeeping.com, limousine.com,
5 newspaperarchive.com. There's no Goodyear.
6 It's the primary significance that looks at
7 extensive evidentiary record about how consumers
8 would perceive the mark.

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

18 So the status quo is the primary
19 significance test. And that's what has been --
20 you know, I think this also should give the
21 Chief and Justice Thomas some comfort that most
22 marks flunk the primary significance test, but
23 some don't.

24 JUSTICE THOMAS: So do you make a --
25 the government relies on Goodyear, and you say

1 that, of course, there's been a sea change in
2 trademark law since Goodyear, particularly with
3 the Lanham Act.

4 Would you just explain briefly how you
5 think the Lanham Act has expanded the trademark
6 law and what is protected and what is not
7 protected?

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

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

22 CHIEF JUSTICE ROBERTS: Thank you, Ms.
23 Blatt.

24 Justice Ginsburg?

25 JUSTICE GINSBURG: If you have the

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

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

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

22 Another example, just sort of a common
23 sense example I can give you, is that sometimes
24 people think of generic word .coms generically.
25 I have searched every grocerystore.com looking

1 for toilet paper. I have now started looking at
2 every hardware.com. I am using fooddelivery.com
3 for all of my takeouts these days. Those are
4 generic -- generic usages of a generic word
5 .com.

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

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

21 It's just that, here, the government
22 dropped -- it tried to argue the survey was
23 unreliable, but it -- it waived that in the
24 court of appeals. And so we -- and the -- the
25 district court said, I'm not just relying on the

1 survey, I'm relying on all the evidence about
2 Booking.com and the lack of PTO's evidence.

3 But other cases will turn out
4 differently.

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

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

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

23 And spoofing, typo -- typosquatting
24 and all those other cyber -- cyber scams are
25 prevalent on the Internet. But I do think even

1 if you didn't have the Internet-specific
2 reasons, they're not second-class citizens.
3 They deserve the same trademark registration
4 rights as any other company to protect against
5 outright counterfeiting and infringement.

6 CHIEF JUSTICE ROBERTS: Thank you,
7 counsel.

8 Justice Breyer?

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

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

19 MS. BLATT: Mm-hmm.

20 JUSTICE BREYER: Here, the power of
21 the trademark, your trademark, is exactly
22 growing out of the fact that everybody knows
23 there's one com with one name. And if you can
24 do it in the future, you don't have to worry
25 about searching the Internet for toilet paper

1 from grocerystores.com. There will only be one.
2 Grocerystores.com will recognize one and only
3 one. There will be pizza.com, there will be
4 cookies.com, there will be flowers.com, et
5 cetera.

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

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

19 So the interesting thing about your
20 survey is not the 73 percent of the people who
21 think that Booking.com is a single company but
22 the 33 percent of the people who think that
23 washingmachines.com is a -- is a -- is a
24 trademark special company, which it isn't. And
25 they do that because they know about the

1 Internet.

2 So you're taking Internet power, not
3 just advertising or commercial product power,
4 and multiplying it. And the fourth thing is
5 what Justice Ginsburg said. There's another way
6 to achieve your result: Unfair competition law.

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

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

14 Second, as a policy matter, the
15 Tushnet brief is just wrong. If you look at the
16 page 94 of the trial court record, read -- that
17 was the government's expert's story, their
18 narrative, the judge rejected it, and if you
19 look at pages 164 and 167 of the Joint Appendix,
20 our expert trashes that methodology and makes
21 fun of it and says if you -- okay, take out, go
22 ahead, remove every single person who
23 erroneously thought Washington --
24 washingmachines.com was a -- was a trademark,
25 and you still get a 64 percent, which is huge

1 brand recognition for Booking.com.

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

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

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

18 And so this --

19 CHIEF JUSTICE ROBERTS: Thank you,
20 counsel.

21 MS. BLATT: Sure.

22 CHIEF JUSTICE ROBERTS: Justice Alito?

23 JUSTICE ALITO: What would your
24 client's position be if companies that had --
25 that took Booking.com but made very slight

1 variations sought trademark protection?

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

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

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

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

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

1 JUSTICE ALITO: Yeah. Would you just
2 answer the question?

3 MS. BLATT: Yes. They --

4 JUSTICE ALITO: Would your client
5 object to that?

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

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

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

24 MS. BLATT: So if I could turn to the
25 company situation. This is just not true. The

1 Wig Company, which is registered, is celebrating
2 its 50th year anniversary. It's called The Wig
3 Company. There's also The Wig Shop and The Wig
4 Store and The Wig Mart.

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

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

24 And if you extend Goodyear past
25 corporate designation, it just -- the government

1 cited it. It said "company" means an
2 association or a partnership. Well, .com is not
3 an association or a partnership. It's a store
4 to buy stuff. And so --

5 CHIEF JUSTICE ROBERTS: Thank you,
6 counsel.

7 Justice Sotomayor?

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

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

17 How -- are you okay with the existing
18 rule that I think Justice Kagan read before,
19 which is that there is no per se rule but that
20 -- what is it -- how is it going to change PTO
21 practice, and won't it lead inevitably to the
22 registration of every single common name of
23 every business and then a expensive legal fight
24 on whether it's become generic or not?

25 MS. BLATT: So I -- I 100 percent

1 agree with Justice Kagan. It -- our view is the
2 status quo, which is the primary significance
3 test, it's what the PTO's manual says. It's
4 what the PTO has been applying, which is why our
5 -- our appendix and the government's appendix
6 are actually consistent.

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

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

23 You want consumers to know when they
24 go to weather.com they're getting weather.com
25 and not accuweather.com and the same way with

1 the dating.com and wrestlingfigures.com.

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

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

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

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

23 MS. BLATT: No. That --

24 JUSTICE SOTOMAYOR: Could any survey
25 ever be dispositive?

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

5 (Laughter.)

6 MS. BLATT: -- Based on the survey.

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

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

16 CHIEF JUSTICE ROBERTS: Thank you,
17 counsel.

18 Justice Kagan?

19 JUSTICE KAGAN: Good morning, Ms.
20 Blatt. I guess what strikes me is -- is
21 something along the same lines as what has
22 struck Justices Breyer and Alito and Sotomayor,
23 and it's that there seems a disconnect between
24 the primary significance test and these kinds of
25 names, because the primary significance test is

1 really asking, well, does a consumer understand
2 something as referring to a category of products
3 or instead as referring to a particular product
4 or service? And -- and these names by
5 definition are unique, and everybody knows that
6 they're unique.

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

11 MS. BLATT: Yes.

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

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

20 So just like The Wig Company or
21 wig.com, they can be generic for wig companies
22 and wig producers. So it's not just you have to
23 say The Wig Company. No one thinks The Wig
24 Company is referring to wigs. It would be --
25 or, you know, it would be generic for a type of

1 company. So it's not just a category of goods.
2 It's the category of the sellers.

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

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

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

20 JUSTICE KAGAN: Okay. Let me ask you
21 another question that goes back to what Justice
22 Alito said. And you said to him and to the
23 Chief Justice, well, you wouldn't sue
24 ebookings.com or hotelbookings.com or any of a
25 number of variants on the name.

1 Who would you sue? When is a .com
2 going to win a trademark suit?

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

9 But why people want trademark
10 registration is twofold. Outright
11 counterfeiting, because Booking.com is a -- is a
12 popular name, and we don't want people ripping
13 off our store opening up.

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

19 But, secondly, I think that they want
20 it for the -- 1125(d). It's a specific problem
21 with spoofing and cyber -- and cyber scams. And
22 that is definitely what the Internet amicus
23 briefs are saying, is that they need this. And
24 that's what Booking cares about. Booking does
25 not like Internet scams and cyber scams stealing

1 its business and ruining its reputation because,
2 you know, someone infects your Internet and
3 destroys your -- you know, your identity.

4 CHIEF JUSTICE ROBERTS: Thank you,
5 counsel.

6 Justice Gorsuch?

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

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

22 And the relative weakness of the mark
23 is your answer, together with the fair use
24 doctrine, to the government's monopoly concerns.
25 Is that a fair summary?

1 MS. BLATT: Much better than I said.

2 JUSTICE GORSUCH: Will you expound on
3 that, please?

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

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

18 And so it is very, very hard to show
19 likelihood of confusion because the more similar
20 the mark is, it becomes extremely impossible or
21 exceedingly unlikely to be able to prove that.
22 And that is not specific to the ".com" context.
23 It's the same problem that every mart, shop,
24 source, place, exchange, emporium, collective --
25 you know, we have -- like there's a million dog

1 marks, a million coffee marks, a million paper
2 -- paper marks. They all have different --
3 "store," "shop," "place." Very similarly
4 worded. They never sue each other.

5 If they do, they'd lose.

6 JUSTICE GORSUCH: Do you --

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

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

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

22 MS. BLATT: Well --

23 JUSTICE GORSUCH: -- about the
24 standard --

25 MS. BLATT: Yes. So --

1 JUSTICE GORSUCH: -- if not the facts?

2 MS. BLATT: Okay. So you've read the
3 Tushnet brief and the government's brief. You
4 have not obviously read our expert --

5 JUSTICE GORSUCH: Well, now --

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

7 JUSTICE GORSUCH: -- that's not fair.
8 Now, come on.

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

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

22 And so I guess I can say is there's
23 just -- there's an extensive discussion of this
24 in the --

25 JUSTICE GORSUCH: Oh, I -- I

1 understand that. I'm -- I'm trying to extract
2 just a level up from the facts --

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

4 JUSTICE GORSUCH: -- and ask for your
5 guidance as to what the Court should say with
6 respect to these kind of survey methodologies,
7 if anything.

8 MS. BLATT: So I think --

9 CHIEF JUSTICE ROBERTS: Briefly,
10 Ms. Blatt.

11 Ms. Blatt?

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

21 CHIEF JUSTICE ROBERTS: Thank you,
22 counsel.

23 Justice Kavanaugh?

24 MS. BLATT: Sure.

25 JUSTICE KAVANAUGH: Thank you,

1 Mr. Chief Justice. Good morning, Ms. Blatt.

2 I want to make sure I understand what
3 you think about our precedent in Goodyear,
4 exactly.

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

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

17 Goodyear -- the terms of the opinion
18 say it means association. And that's how
19 non-profits identify themselves. So we have --
20 or a coalition or a society. And so you had the
21 Amputee Coalition, the Christian Coalition. You
22 had -- there are so many of these associational
23 marks that I think Goodyear would destroy, in
24 addition to "foods co." or "Container Store."

25 And I -- I just want to say one thing

1 about the government's making fun of the
2 Cheesecake Factory. "Crab House" is not a
3 little house where crabs live. They're actually
4 dead and you eat them. And the government
5 thought "Crab House" was generic.

6 So if you go down this road of
7 thinking that certain words are off-limits, I
8 just think you're creating a real mess that's
9 very unstable, unprincipled, and unworkable and
10 unclear.

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

21 MS. BLATT: I think it's wrong, but I
22 -- I hear that -- I hear at least six of you
23 concerned about it. So I can try to help on --
24 on this.

25 What you can do is make clear in your

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

9 Now, we have a whole brief of survey
10 experts saying this was a great survey. So I --
11 I hate to trash our survey. A lot of people
12 thought our survey was great. It's the -- it's
13 the classic Teflon survey.

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

24 It's -- you know, the PTO has been
25 doing this for -- for two decades now without a

1 problem.

2 CHIEF JUSTICE ROBERTS: Thank you,
3 counsel.

4 Ms. Ross, you have three minutes for
5 rebuttal. Ms. Ross, three minutes for rebuttal.

6 REBUTTAL ARGUMENT OF ERICA L. ROSS
7 ON BEHALF OF THE PETITIONERS

8 MS. ROSS: Thank you, Mr. Chief
9 Justice. Sorry about that.

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

25 I think on the second point,

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

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

25 Now, Respondent's example actually --

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

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

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

18 We know that because of the same
19 reason that we know that booking companies
20 shouldn't be allowed to be trademarked. We just
21 know that when you have -- that a trademark law
22 is not supposed to take terms off the table,
23 that everyone needs to describe their goods.

24 I think, you know, Respondent focused
25 on certain examples, like "tickets.com" and

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

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

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

25 CHIEF JUSTICE ROBERTS: Thank you,

1 counsel. The case is submitted.

2 (Whereupon, at 11:16 a.m., the case
3 was submitted.)

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