

Supreme Court Will Review TRUMP TOO SMALL Trademark Registration Dispute

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The Supreme Court granted certiorari and will review the Federal Circuit's opinion that Section 2(c) of the Lanham Act is unconstitutional as applied to a trademark for the term TRUMP TOO SMALL. The TRUMP TOO SMALL trademark is a callback to an exchange between Senator Marco Rubio and then presidential candidate Donald Trump during the 2016 presidential primaries.

As we previously reported, the Trademark Trial and Appeal Board initially rejected the trademark application under Section 2(c) of the Lanham Act because it comprises the name of a living individual—President Trump—without that individual's consent. The Court of Appeals for the Federal Circuit reversed the TTAB's decision. The applicant for the trademark plans to sell t-shirts with the phrase TRUMP TOO SMALL to criticize President Trump; specifically, to convey "that some features of President Trump and his policies are diminutive." The Federal Circuit viewed this criticism as speech protected by the First Amendment and found that Section 2(c) is unconstitutional as applied to the TRUMP TOO SMALL trademark because the government does not have an interest "in restricting speech critical of government officials or public figures."

The Federal Circuit did not address whether Section 2(c) is unconstitutional in all cases, but did suggest that it may be "impermissibly overbroad" because it does not leave the trademark office any discretion to permit registration for trademarks that advance First

Amendment interests.

The Supreme Court previously found that portions of Section 2(a) of the Lanham Act, which prohibits registration of “immoral, deceptive, or scandalous” trademarks and trademarks that “may disparage . . . any persons, living or dead,” are unconstitutional in all cases. It remains to be seen whether Section 2(c) is destined for the same outcome.

The Supreme Court will likely hear oral arguments in the fall. Stay tuned to the TMCA Blog for an update when the Supreme Court issues its opinion.