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New Upcoming Supreme Court Trademark Case

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On June 5th, the Supreme Court granted certiorari in *Vidal v. Elster*, No. 22-704, to address the constitutionality of a refusal to register a trademark under 15 U.S.C. § 1052(c). Although the case arises from a narrow as-applied constitutional challenge, it could potentially resolve more far-reaching issues under the Lanham Act.

Section 1052(c) provides in relevant part that no trademark shall be refused on account of its nature unless it "[c]onsists of or comprises a name … identifying a particular living individual except by his written consent." 15 U.S.C. § 1052(c). In *Vidal v. Elster*, Steve Elster sought to register the mark "TRUMP TOO SMALL" with the intent to use that mark on shirts. The US Patent & Trademark Office refused registration under Section 1052(c), explaining that the use of "TRUMP" in the proposed mark would be construed as a reference to Donald Trump. Without then-President Trump's written consent, the Patent & Trademark Office concluded registration had to be refused under Section 1052(c). On appeal, the U.S. Court of Appeals for the Federal Circuit reversed. The court of appeals held that applying Section 1052(c) to bar registration of the proposed trademark would unconstitutionally restrict free speech. In the court's view, Section 1052(c) is a content-based restriction on free speech that is subject to strict or intermediate scrutiny. And the court concluded that applying Section 1052(c) to the proposed mark did not survive strict scrutiny because the government does not have a private or public interest in restricting speech that is critical of government officials or public figures in the trademark context.

The Solicitor General, on behalf of the Patent & Trademark Office, petitioned for a writ of certiorari to review the Federal Circuit's decision. Even though the constitutional challenge before the Federal Circuit was only an as-applied, not a facial, one, the Solicitor General argued that the question presented nonetheless raises an issue of substantial legal and practical importance. Among other things, the case could help clarify the constitutional status of other Lanham Act registration bars in addition to Section 1052(c).

The Solicitor General further argued that the case presents an opportunity for the Supreme Court to resolve a question left open by other recent decisions of the Court—namely, whether a view-point neutral bar on the registration of a trademark under the Lanham Act is a condition on a government benefit or a simple restriction on speech. Resolving this open question would be significant because it would determine the appropriate level of scrutiny under the First Amendment.