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Considering the 'Trump Too Small' Trademark, Supreme Court Holds that Lanham Act's Names Clause Does Not Violate the First Amendment

Vidal v. Elster, 144 S. Ct. 1507 (June 13, 2024)

In *Vidal v. Elster*, the U.S. Supreme Court unanimously held that the "names clause" of the Lanham Act, 15 U.S.C. § 1052(c), does not violate the First Amendment of the Constitution. Although united in this overarching conclusion, the concurring justices splintered on what test to use in the future when resolving conduct-based name associations.

The case involved Elster's attempt to federally register the trademark "Trump too small" after a U.S. Patent and Trademark Office examiner refused registration. The names clause of the Lanham Act prohibits registration of a mark consisting of or comprising a name "identifying a particular living individual except by his written consent," and former President Trump did not provide consent to the registration effort. The Trademark Trial and Appeal Board affirmed, rejecting Elster's argument that the names clause violated his First Amendment right to free speech. The U.S. Court of Appeals for the Federal Circuit subsequently reversed, with the U.S. Supreme Court granting certiorari to address the First Amendment challenge to the names clause.

Writing the unanimous parts of the opinion where the challenge was rejected, Justice Thomas reversed the Federal Circuit and concluded on the Supreme Court's behalf that the names clause was constitutionally valid, and that registration could not occur without the living individual's consent.

Analyzing the history and tradition of trademark law and its underlying principles, the majority concluded that the historical restrictions on trademarking of names have existed with the First

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Amendment for many years. Whether flattering or not, trademark registration was restricted absent the consent of the living individual whose name was at issue. The majority decided that there was no *per se* rule requiring a constitutional heightened scrutiny analysis to the names clause because its application was distinguishable from viewpoint-based restrictions, which were struck down in two prior Supreme Court opinions. *See Matal v. Tam*, 582 U.S. 218, 222 (2017) (disparaging trademarks based on one viewpoint "giving offense"); *Iancu v. Brunetti*, 588 U.S. 388, 390, 393-394 (2019) (no trademark registration for trademarks based on only one viewpoint, immoral, or scandalous matter).

Though agreeing with the majority in part, in her concurrence Justice Barrett could not agree to the history and tradition analysis of the majority opinion. In her view, the preferable approach is one rooted in analogous "limited public forum" cases so long as the content-based criteria for trademark registrations reasonably relate to the preservation of the mark owner's goodwill and the prevention of consumer confusion. And, in her concurrence, Justice Sotomayor also relying less on history and tradition would have utilized conventional First Amendment precedent to resolve the issue.

Key Takeaways

- The Supreme Court's narrow ruling did not provide a bright-line test for resolving names clause cases in the future that involve content-based speech.
- Celebrities and public figures are still free to challenge attempts to use their names as brands, because that use might diminish their reputational goodwill as far as association with their names.
- The Supreme Court was splintered on using history and tradition for constitutional analysis for purposes of resolving a case where there was an intersection between trademark and First Amendment issues.
- The *Vidal v. Elster* opinion was clear that the names clause categorically prevents use of another person's name, flattering or not, without that person's consent.

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