

2013-1412
(Serial No. 77940879)

United States Court of Appeals
for the
Federal Circuit

IN RE PAMELA GELLER and ROBERT B. SPENCER

**Appeal from the United States Patent and Trademark Office,
Trademark Trial and Appeal Board.**

BRIEF FOR APPELLANTS

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August 30, 2013

CERTIFICATE OF INTEREST

Counsel for the appellants Pamela Geller and Robert Spencer certifies the following:

1. The full name of every party or amicus represented by me is:
Pamela Geller and Robert Spencer.

2. The name of the real party in interest (if the party named in the caption is not the real party in interest) represented by me is:
Not applicable.

3. All parent corporations and any publicly held companies that own 10 percent or more of the stock of the party or amicus curiae represented by me are:
Not applicable.

4. The names of all law firms and the partners or associates that appeared for the party or amicus now represented by me in the trial court or agency or are expected to appear in this court are:
None.

Dated: August 30, 2013

Respectfully submitted,

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STATEMENT OF RELATED CASES

Counsel is unaware of any related cases within the meaning of Federal Circuit Rule 47.5.

STATEMENT OF JURISDICTION

This Court has jurisdiction over this *ex parte* appeal of the February 7, 2013 final decision of the Trademark Trial and Appeal Board (“TTAB” or the “Board”), which upheld the denial by the United States Patent & Trademark Office (“USPTO”) of the trademark application of Applicants-Appellants Pamela Geller and Robert Spencer (“Applicants” or “Appellants”). *See* 28 U.S.C. § 1295(a)(4)(B). Applicants timely filed the Notice of Appeal on April 8, 2013. *See* 15 U.S.C. § 1071(a)(2); 37 C.F.R. § 2.145(d).

STATEMENT OF THE ISSUES FOR REVIEW

I. Whether there was substantial evidence in the record before the TTAB to uphold the denial of Appellants’ application for trademark registration based upon the UPSTO’s assertion that Appellants’ mark “consists of or includes matter which may disparage or bring into contempt or disrepute persons, institutions, beliefs or national symbols” in violation of the Trademark Act Section 2(a), 15 U.S.C. § 1052(a).

II. Whether the TTAB committed legal error by relying on arbitrary and anecdotal evidence of the meaning of the mark and its use in context by Appellants.

III. Whether the TTAB committed legal error by concluding that Appellants' mark is disparaging to American Muslims by relying on arbitrary and anecdotal evidence of the understanding of the meaning of Applicants' mark to American Muslims.

STATEMENT OF THE CASE

Appellants filed the STOP THE ISLAMISATION OF AMERICA ("Mark") Mark Registration Application ("Application") with the USPTO on February 21, 2010.¹ (A26-31). Examining Attorney initially refused to register the Mark in a non-final Office action ("NFOA") on April 28, 2010. (A34-76). Appellants filed their response to Examining Attorney's NFOA on July 26, 2010 ("Response"). (A77-998). Ultimately, Examining Attorney refused to register the Mark in a final Office action ("FOA") on January 19, 2011, (A1003-24), based on her conclusion

¹ The original Applicant for the Mark was Pamela Geller. (A26). It is unclear to counsel for Appellants how Robert Spencer was named a co-Applicant except that Robert Spencer was apparently mistakenly named a co-Applicant in the "Notice of Appeal" to the TTAB. (A1127). Robert Spencer appears nowhere else in the filings or the record before the TTAB, but he is in fact a partner in the use of the Mark with Pamela Geller. The TTAB's February 7, 2013 decision ("TTAB Decision") names the Applicants as Pamela Geller and Robert Spencer. (A1). For that reason, Robert Spencer is named as a co-Applicant and co-Appellant herein and is represented by the undersigned in these proceedings.

that the Mark “consists of or includes matter which may disparage or bring into contempt or disrepute persons, institutions, beliefs or national symbols. Trademark Act Section 2(a), 15 U.S.C. § 1052(a).” (A1006). The essence of the logic of the FOA is that “Islamisation” means all things Islamic and “Stop” in the context of Applicants’ services relating to informing the public about terrorism disparages Muslims because together they suggest Islam should be “stopped” due to its connection with terrorism. Appellants timely appealed to the TTAB July 11, 2011, (A1127), arguing that the USPTO had not carried its burden to establish that the meaning of the Mark was one that would be disparaging to American Muslims. In their appeal, Appellants argued that the meaning of the word “Islamisation”² in the Mark has a *specific* meaning both in context of its public use and within the online definitions cited by Examining Attorney and that this *specific* meaning was improperly disregarded by the USPTO FOA. Thus, Appellants showed that the term “Islamisation” in the context of the Mark does not mean all things Islamic but rather a very dangerous politicization of Islam where Islamic law supplants secular constitutional law and civil liberties in political society. (A1128-47; A1186-99).

The TTAB upheld the substance and logic of the FOA. (A1-24).

² “Islamisation” is alternatively spelled “Islamization” with a ‘z’ instead of ‘s’ as used by Applicants. (A1134).

STATEMENT OF FACTS

A. The Facts Relied Upon by the USPTO in its FOA and by the TTAB.

The facts relied upon by the USPTO to deny Appellants' application to register their Mark and by the TTAB to affirm the denial, are as follows:

- Published articles from LexisNexis evidencing that Muslims do not like being labeled terrorists simply because they are Muslims (A1013-1135);
- Online dictionary definitions defining "Islamisation" as all things Islamic (A1036-1042);
- Essays posted at Appellants' blog, which presumably evidence an animus by Appellants against all things Islamic (A1043-1121);
- Anecdotally selected, anonymous blog comments posted at Appellants' blog in response to the essays referenced above, which presumably evidence that some of the people who leave anonymous comments on Appellants' blog evidence an animus to all things Islamic (A1043-1121); and
- A letter from a group of British Muslims posted at a website of a group called Stop the Islamisation of Europe ("SIOE"), which presumably evidences that the group of British Muslims are disparaged by something the SIOE group has done, which in turn evidences why American

Muslims or Muslims simply would be disparaged by the Mark. (A1122-1123).

B. The Actual Probative Facts in the Record.

The facts relied upon by Appellants to support this brief and to support their application for the registration of their Mark are as follows:

- The same online dictionary definitions cited by the USPTO which include a definition of “Islamisation” related specifically to a political agenda to impose upon a society Islamic religious law as the law of the land in lieu of man-made law (A1039; 1041);
- Congressional testimony by experts on Islamic terrorism demonstrating the direct and indirect links between Islamic terrorism and the political agenda of Islamisation (A459-A625);
- Published Muslim academic and policy papers demonstrating that the meaning and understanding by Muslims of the term “Islamisation” is consonant with Appellants’ intended meaning and use of the Mark (A95-458; A895-908);
- A thorough, representative sampling of a review of all law journal articles published and aggregated through Lexis search algorithms referencing “Islamisation” or its alternative spelling evidencing the use of

the term “Islamisation” identical to Appellants’ intended meaning and use of the Mark (A944-94); and

- Published policy papers, professional courses, and website essays by Muslims and non-Muslims evidencing that the meaning and understanding by Muslims of the term “Islamisation” is consonant with Appellants’ intended meaning and use of the Mark (A626-894; A909-43).

SUMMARY OF THE ARGUMENT

The TTAB erred in finding Appellants’ Mark (“Stop the Islamisation of America”) disparages Muslims and thus violates Trademark Act Section 2(a), 15 U.S.C. § 1052(a) because the TTAB ignored the only factual evidence of the meaning and understanding of the term “Islamisation” to Muslims and non-Muslims alike. That factual evidence establishes that of the two dictionary definitions of “Islamisation”—one meaning “all things Islamic” and the other referring to a sectarianization of a political society through violence or other means, thus eliminating man-made law and replacing it with Islamic law—only the latter more specific definition is used in public discourse by Muslims and non-Muslims alike.

Further, the TTAB erred by concluding that given the TTAB’s preference for the former broader definition of “Islamisation” as all things Islamic and given

the connection of the Mark to education about terrorism, Muslims would suffer disparagement by the use of the Mark. Thus, the TTAB improperly selected the meaning of Islamisation as all things Islamic and shifted the burden to Appellants to prove Muslims would not be disparaged even though there is no evidence in the record that Muslims have ever been disparaged by the use of the term “Islamisation,” which has been used in public discourse extensively.

ARGUMENT

I. STANDARD OF REVIEW.

The United States Court of Appeals for the Federal Circuit has determined that the burden of proving that a mark violates Section 2(a) of the Trademark Act rests with the USPTO. *In re Boulevard Entm't, Inc.*, 334 F.3d 1336, 1339 (Fed. Cir. 2003) (discussing a “scandalous” mark and citing *In re Save Venice N.Y., Inc.*, 259 F.3d 1346, 1351 (Fed. Cir. 2001), for the proposition that factual rulings are reviewed based upon the “substantial evidence” standard while legal rulings are reviewed *de novo*). When deciding whether a mark is disparaging, the TTAB itself has recognized that

the guidelines for determining whether a mark is scandalous or disparaging are ‘somewhat vague’ and the ‘determination [of whether] a mark is scandalous [or disparaging] is necessarily a highly subjective one.’ *In re Hershey*, 6 USPQ2d 1470, 1471 (TTAB 1988). Because the guidelines are somewhat vague and because the determination is so highly subjective, we are inclined to resolve doubts on the issue of whether a mark is scandalous or disparaging in favor of applicant and pass the mark for publication with the

knowledge that if a group does find the mark to be scandalous or disparaging, an opposition proceeding can be brought and a more complete record can be established. *Cf. In re Gourmet Bakers, Inc.*, Serial No. 755,278, 173 USPQ 565 (TTAB 1972) (“It has been recognized by this and other tribunals that there is no easy applicable objective test to determine whether or not a particular mark, as applied to specific goods, is merely descriptive or merely suggestive. The distinction between marks which are ‘merely descriptive’ and marks which are ‘suggestive’ is so nebulous that more often than not it is determined largely on a subjective basis with any doubt on the matter being resolved on applicant’s behalf on the theory that any person who believes that he would be damaged by the registration will have an opportunity under Section 13 to oppose the registration of the mark and to present evidence, usually not present in the ex parte application, to that effect.”).

In re In Over Our Heads, Inc., Serial No. 755,27816, USPQ2d 1653, 1990 TTAB LEXIS 52, *4-*6 (TTAB 1990) [not precedential].

II. THE LEGAL ANALYSIS.

The USPTO, the TTAB, and Appellants all agree on the statement of the relevant analysis for determining whether a mark is disparaging under Section 2(a) of the Trademark Act, 15 U.S.C. § 1052(a). Specifically, that analysis involves two steps: (1) the USPTO must determine what the mark means; and (2) the USPTO must determine if that particular understanding of the mark is disparaging to the group at issue. *In re Lebanese Arak Corp.*, 94 U.S.P.Q.2d 1215, 1217 (TTAB 2010); *see also Harjo v. Pro-Football, Inc.*, 50 U.S.P.Q.2d 1705 at 1740-41 (TTAB 1999) (“*Harjo I*”), *rev’d on other grounds*, 284 F. Supp. 2d 96 (D.D.C. 2003) (“*Harjo II*”), *remanded on other grounds*, 415 F.3d 44, (D.C. Cir. 2005), *on*

remand, 567 F. Supp. 2d 46, (D.D.C. 2008), *aff'd* 565 F.3d 880 (D.C. Cir. 2009) (“Our analysis is essentially a two-step process in which we ask, first: What is the meaning of the matter in question, as it appears in the marks and as those marks are used in connection with the services identified in the registrations? Second, we ask: Is this meaning one that may disparage Native Americans?”).

At the first step in the legal analysis, there can be no real dispute that the broad dictionary definition of the meaning of the term “Islamisation” (used within the Mark) as referring to all things Islamic (and notably conversion to Islam) is only one of at least two possible meanings. The TTAB implicitly, if not grudgingly, conceded that “Islamisation” may in fact refer to a “sectarianization of a political society through efforts to ‘make [it] subject to Islamic law.’” Thus, the TTAB wrote::

Applicants advocate that Muslims do not use the term “Islamisation” “in the broad generic way consonant with ‘Islamic.’” Rather, applicants argue there is a second definition of “Islamize” which conveys another meaning. That is, as set forth in the foregoing definitions, “Islamize” also means “[t]o cause to conform to Islamic law or precepts” (as defined at *Dictionary.com*) and “[m]ake subject to Islamic law: to cause people, institutions, or countries to follow Islamic law” (as defined at *Encarta.com*). This definition, *i.e.*, to cause to be in conformity with Islamic law, more closely corresponds to the meaning of “Islamisation” proffered by applicants, namely, a sectarianization of a political society through efforts to “make [it] subject to Islamic law.”

(A8-9) (footnote omitted).

And, as the TTAB correctly stated, when confronted with more than one

dictionary definition, the TTAB must then proceed to the next phase of the analysis:

As acknowledged by applicants, both *Harjo I* and *Harjo II* make clear that a term that has multiple meanings must be understood—for purposes of the “meaning” analysis—in the context of how it is used in the public domain relevant to the mark. If more than one meaning is established, both meanings advance to the second phase of the analysis, i.e., does the group at issue consider the term as used in the context of the services disparaging? With this in mind, we consider whether applicants’ mark is disparaging.

(A12) (footnote omitted).

The problem with the remainder of the TTAB’s Decision is that it proceeds to turn the USPTO’s burden on its head and require Appellants to disprove what was nowhere in the record: “There is no evidence showing a substantial composite of the Muslim population in the United States understands the word “Islamisation” to have the meaning asserted by applicants.” (A14). What is striking about this shifting of the legal burden (and now subject to *de novo* review by this Court) is that neither the USPTO nor the TTAB even attempt to evidence a single Muslim in American or anywhere in the world that uses the term “Islamisation” as meaning “all things Islam” as opposed to the overwhelming evidence in the record that the only public use of the term is in relation to a very harsh and Draconian political system built upon Islamic law. (A77-998).

A. The TTAB Used Legally and Factually Unfounded “Evidence” of the Meaning of “Islamisation” as All Things Islamic to Overcome the Overwhelming Evidence in the Record that the Only Public Use of the Term “Islamisation” Is as a Description of an Islamist Political Agenda to Replace Secular Democracy with Islamic Religious Law.

1. The Factual Record.

Two things stand out about the factual record in this case. The record proffered by Appellants as 12 separate and lengthy exhibits attached to Appellants’ Response to the Examining Attorney’s NFOA denying registration of Mark includes Congressional testimony by experts on Islamic terrorism (Exhibits 2-3 at A459-A625); published Muslim academic and policy papers (Exhibits 1 & 5 at A95-458 & A895-908, respectively); a thorough, representative sampling of a review of all law journal articles published and aggregated through Lexis search algorithms referencing “Islamisation” or its alternative spelling (Exhibits 10-11 at A944-94); and published policy papers and website essays by Muslims and non-Muslims (Exhibits 6-9 at A909-43). Each of these exhibits and the other exhibits provided by Appellants as part of the record before the TTAB (and now before this Court) describes Islamisation as an “Islamist” agenda to treat Islam not simply as a religion or culture, but as a political ideology to convert a political order from a secular government founded on man-made law to a theological-based political order founded upon Islamic law (*i.e.*, *sharia*). This record also demonstrates that this theological-political agenda results in the cruel and draconian denial of basic

civil liberties, especially in the treatment of women, non-Muslims, and Muslims considered by politically-minded Islamists as apostates.

In an effort to overcome this factual showing of the use and meaning of the term Islamisation in the “marketplace” of ideas that is the context of the Appellants’ use of the term, the TTAB, following the lead of the USPTO, chose to cherry-pick comments left at Appellants’ blog in response to various postings and buttressed this “evidence” of the “marketplace” by characterizing blog postings at Appellants’ website tendentiously to “prove” that Appellants oppose all things Islamic. The problem with this approach to “evidence” of the “marketplace” is that it is both empirically and legally mendacious. We examine the TTAB’s “evidence” of the marketplace below.

2. The TTAB’s “Evidence” of the Meaning of “Islamisation.”

The opinions in both *Harjo I* and *Harjo II* make clear that a term that has multiple meanings must be understood—for purposes of the “meaning” analysis—in context of how it is used in the marketplace of ideas relevant to the mark. “Redskin” could mean all things relating to the professional football team or it could refer to Native Americans in a demeaning fashion. But, both meanings remained for purposes of the second phase of the analysis—do Native Americans consider the term as used in the context of the pro football team disparaging? (A12).

The USPTO and the TTAB have chosen to ignore the overwhelming evidence in the record that the term “Islamisation” has only been used in the public domain to refer to a political and military process replacing civilian laws with Islamic religious law (*i.e.*, *sharia*) to impose Islamic political rule on society. Moreover, the TTAB also ignores the fact that the only evidence in the record—indeed the USPTO’s own evidence—demonstrates that even Muslims consider the term “Islamisation” to mean, what for Americans would be, an undesirable political process imposing Islamic law on previously non-sectarian political orders.

Instead, the TTAB chooses to refer to irrelevant essays and arbitrarily selected anonymous “comments” posted to Appellants’ blog to elevate artificially the broad meaning of Islamisation nowhere used in the public domain. (A5-8). Thus, the TTAB first cites to essays published at Appellants’ blog to suggest that Appellants oppose all things Islamic. (A5-6). The problem with the essays cited, beyond the fact that Appellants’ blog contains literally thousands of posted essays and the empirical and evidentiary value of the essays chosen is at best left unaddressed by the TTAB, is the fact that the essays neither refer to “Islamisation” nor do they remotely represent an understanding of that term that would support a meaning of all things Islamic.

The first essay cited by the TTAB (A5-6), entitled “SIOA Mosque Manifesto: All Mosques are Not Created Equal, A Handy Guide to Fighting the

Muslim Brotherhood,” makes exactly the opposite point suggested by the TTAB. (See this essay at A1043-46). The TTAB characterizes this essay as an argument and manual for use in opposing any and all mosque-construction (thus, presumably, all things Islamic) in the U.S. But no fair reading of this essay could possibly provide evidence of such a rendering. Indeed, the very title of the essay makes the point that Islamist Muslim Brotherhood groups, who themselves (as the factual record makes clear) are seeking the Islamisation of political societies (as we witness in real time in the Middle East following the “Arab Spring”), use mosque-building as a political tool to accomplish Islamisation. But beyond the title of the essay is the substance itself, which demonstrates beyond cavil that the essay provides instructions to investigate the sponsors of a proposed mosque to determine if it is tied to the Muslim Brotherhood, and if so, how to oppose it legally. Nowhere does the essay suggest even by inference that all mosques are objectionable.

The second article cited by the TTAB, entitled “Geller, Spencer in Big Government: The 9/11 Mosque’s Peace Charade and SIOA Condemns Obama’s Blessing of Ground Zero Mega-Mosque; Bolton, Wilders to Speak At 9/11 Rally” (A6), also does not support a meaning of the term “Islamisation” as all things Islamic. (See this essay at A1081-82). To be kind is to say that the TTAB must not have even read the article to characterize it as supportive of the “all things

Islamic” meaning. This short essay states clearly at the very beginning that the campaign to oppose the “Ground Zero mosque” was not about opposing mosques or religious liberty for Muslims, but rather about honoring the victims literally buried at Ground Zero:

The human rights organization Stop Islamization of America (SIOA) strongly condemns Barack Obama’s blessing of the Islamic supremacist mega-mosque to be built at the hallowed ground of the September 11, 2001 jihad terror attack.

SIOA founder and executive director Pamela Geller said in a statement that Obama “has, in effect, sided with the Islamic jihadists and told the ummah (at an Iftar dinner on the third night of Ramadan) that he believes in and supports what will be understood in the Islamic world as a triumphal mosque on a site of Islamic conquest.”

Geller noted that in coming out in favor of the mosque, Obama confused the issue by framing it as one of religious liberty, when no opponent of the mosque is calling for restrictions on anyone’s religious freedom; ignored the historical record showing that thousands of mosques have been built over the cherished sites of conquered peoples (notably the Dome of the Rock on the site of the Jewish Temple in Jerusalem); and also ignored the clear evidence of the mosque backers’ duplicity and refusal to condemn the jihad terrorist group Hamas.

“Obama must know,” said Geller, *“that this is not about religious liberty. No one has suggested abridging the First Amendment to stop the mosque, and to oppose the Ground Zero mosque is not to oppose the First Amendment. There are hundreds of mosques in New York, thousands in America. This is not a religious issue. This is an issue of national dignity and respect for those who were murdered at that site in the name of Islam. Mutual respect is a two way street.”*

(A1081) (emphasis added). In other words, whether one agrees or disagrees that a

mosque at Ground Zero honors or dishonors the victims of 9/11 buried there, the essay itself simply does not support the meaning of Islamisation proffered by the USPTO or the TTAB.

The third and final essay is in fact excerpts from a newspaper article posted at Appellants' blog and cited by the TTAB, entitled, "Detroit Transit Sued for Nixing SIOA 'Leaving Islam?' Bus ads." (A6). Rather than stand for the proposition "that the spread of Islam in America is undesirable and must be stopped" (A6), this article merely recounts the debate over an advertisement Appellants sought to display on advertisement space made available on public transit to provide Muslims who have offended Islamists with a refuge from retaliatory violence. (*See* this essay at A1075-77). In fact, the advertisement itself says nothing of Islamisation or all things Islamic nor does it even implicate such broad subjects. Rather, as the teacher quoted in the article nicely concludes, "The Dearborn educator, however, said the ads serve a positive purpose. 'This kind of campaign and Americans support of it could assure these frightened Muslims that they have the rights that every other American has, that they will be protected, not abandoned or exposed to their leaders should they act upon their desire to be free,' the teacher said." (A1077). Thus, far from attacking or "stop[ing]" all things Islamic, the advertisement by Applicants was an effort to provide Muslims threatened by violent Islamists with refuge.

Following the TTAB's odd rendering of the three essays posted at Appellants' blog, the TTAB followed the USPTO's cue and cherry-picked anonymous comments left at the blog to argue that these "consumers" and their attitudes were somehow indicative of Appellants' use of the term "Islamisation" and its meaning in the marketplace of ideas. (A6-8). Keeping in mind that the earlier cited essays say nothing about "Islamisation" and certainly do not advocate "stop[ping]" Islam or all things Islamic, the TTAB understood it was treading on thin ice by citing to such an arbitrary selection of anonymous blog comments, itself providing the following caveat: "While the probative value of the blog comments submitted by readers of applicants' website is less than that of the articles themselves due to the anonymity of the authors, they provide additional insight into the public's perception of and reaction to applicants' STOP THE ISLAMISATION OF AMERICA mark and services as used in the marketplace." (A8).

The problem with such an arbitrary selection, however, is obvious and even more egregious than the TTAB lets on. First, anonymous public blog comments are *not* indicative of how Appellants use the Mark in the marketplace. Second, anonymous blog comments themselves are not even remotely representative of "consumers" of Appellants', but rather a biased selection of people who leave comments at blogs. Indeed, Appellants would ask this Court to take judicial notice

of any public media site that allows for posting of anonymous comments (such as CNN.com) and select any news article and access the anonymous comments section (e.g., http://www.cnn.com/2013/08/29/world/europe/syria-civil-war/index.html?hpt=hp_c2#cnn-disqus-area). It is simply absurd to suggest—whether one’s perspective is empiricism, selection statistics, or the commonsense logic of the rules of probative evidence—that such anonymous comments represent anything about the meaning of Islamisation or how it is used by Appellants in the marketplace of ideas.

But withal, the TTAB understands it could not ignore the only actual evidence in the record of the use and meaning by Muslims and non-Muslims of the word “Islamisation,” so, as noted above, it concludes that both meanings of the word—its allegedly broad meaning of all things Islamic and its only meaning as expressed in the public discourse as a political process to create a sectarian society based upon Islamic law—must be carried forward into the second phase of the analysis to determine if there is substantial evidence that American Muslims would be disparaged by the use of the term “Islamisation” in the context of the Mark. (A12). So it is we turn now to the second phase of the analysis—disparagement—in the context of the factual record to understand what “substantial evidence” exists for the TTAB’s conclusion.

B. There Is No Substantial Evidence to Demonstrate Disparagement.

Given the available meanings of the term “Islamisation,” notably the meaning and actual use of the term by academics, professionals, and Muslims themselves as a political movement to replace man-made laws by the religious law of Islam, the USPTO and the TTAB reference zero evidence in the record that Muslim Americans, or indeed any Muslims, would object to the Mark. The TTAB sets up its disparagement analysis as follows:

Applicants argue that if the word “Islamisation” refers to only those groups and movements which seek to compel a political order to adopt Islamic law as the law of the land, law abiding and patriotic Muslims, who are not members of such groups, would not be disparaged by the mark. The difficulty with applicants’ argument is twofold: it assumes a substantial composite of Muslims understands the meaning of “Islamisation” asserted by applicants and that they would not be offended by the mark STOP THE ISLAMISATION OF AMERICA.

(A13) (footnote omitted).

But this set-up and the actual treatment of this disparagement analysis converts the USPTO’s burden into not only one improperly placed upon Appellants, but also one requiring Appellants to prove that the only public use of the term among Muslims and non-Muslims is not in fact the understanding Muslims have (“There is no evidence showing a substantial composite of the Muslim population in the United States understands the word “Islamisation” to have the meaning asserted by applicants.” [A14]). But, neither the USPTO nor the

TTAB could cite to any evidence, in the record or free-floating in the universe, that any Muslim anywhere in the world would view the Mark as disparaging, other than perhaps those lawless persons who advocate replacing the law of the People (*i.e.*, the Constitution) with the law of Allah. (*See* the TTAB's disparagement analysis at A14-16). This is important because if *Harjo II* stands for anything, it stands for the absolutely certain proposition that the USPTO bears the burden of disparagement, and that it cannot base its conclusion of disparagement on subjective, arbitrary, or non-empirical evidence. *Harjo II*, 284 F. Supp. at 125-36.

In *Harjo II*, the court rejected *Harjo I*'s approach to the analysis of disparagement precisely for failing to identify an evidentiary basis for the proposition that Native Americans as a group felt disparaged by the term "Redskins." *Id.* Because the TTAB had not found any substantial evidence of this disparagement by the group at issue, beyond unrepresentative samples, the court in *Harjo II* overruled the TTAB's ruling on disparagement. In this case, the USPTO and the TTAB have not reached even the deficient threshold of *Harjo I*. That is, the TTAB cannot cite to a single law abiding Muslim who opposes or would feel disparaged by the Mark and Applicant's use of the Mark.

Just as importantly, the USPTO and the TTAB may not simply assume Muslims would choose one meaning of "Islamisation" over another and thus be disparaged and then place the burden to disprove this non-evidentiary conclusion

on Appellants. The TTAB's disparagement analysis, which simply selects a meaning of the word "Islamisation" as all things Islamic without any evidence that this is how American Muslims understand the word, and does so in striking contraction to all of the public evidence placed in the record by Appellants, and only then concludes that American Muslims would understand that the Mark associates Muslims *qua* Muslims as terrorists who must be stopped. (A16). From here, it is but a short hop-skip-and-jump to the TTAB's listing of quotations from articles evidencing that Muslims do not like being called terrorists. (A16-18; A21-23). The problem with this "evidence" is that it has nothing to do with Appellants' Mark literally or in context of the meaning of the terms used in the marketplace of ideas.

The next piece of the TTAB's disparagement puzzle is the letter published by the British Muslims for Secular Democracy. (A18-19). Aside from the dubious use of a single letter written by a British Muslim group to establish disparagement by American Muslims, or indeed Muslims simply, the real problem with this letter as evidence of disparagement is that it actually makes the point that British Muslims oppose the "Islamicizing" of Britain and want to work with the group Stop the Islamisation of Europe ("SIOE"), to whom the letter was addressed.

Indeed, what the entire letter illustrates quite patently is that this group of law abiding and patriotic British Muslims wanted to be certain that the SIOE group

make clear that they do not oppose all things Islamic, rather just “Islamisation.” It is no coincidence that the USPTO’s brief to the TTAB only quoted from the letter selectively, leaving out the portion where the British Muslims join hands, as it were, with the SIOE group in opposing Islamisation. (A1165). In fact, the purpose of the letter was to point out *an activity* the British Muslims were concerned about—*i.e.*, SIOE’s demonstration outside a specific mosque whose attendees and leadership apparently do not advocate Islamisation. In other words, the British Muslim group, called British Muslims for Secular Democracy (“BMSD”), was not “disparaged” by the name STOP THE ISLAMISATION OF EUROPE—indeed they applauded the effort to stop the Islamisation of Europe—rather, the British Muslims were concerned that the SIOE group had targeted the wrong mosque! The letter, which is attached to the FOA at Attachments Nos. 87-88, is worth quoting in full:

Dear Mr. Gash,

We are a group of Muslim democrats who are committed to the values that define the British state, including legal and constitutional equality for all, equal rights for women and minorities, and religious freedom, including the right to be free of faith.

We take such pride in these virtues that we actively seek to defend them against any individual, political group or organised religious outfit which seeks to impose their religious beliefs upon others (thereby infringing the right of all people to practice any religion or to be free of any religion).

As an attendee at our counter-demonstration against Al-Muhajiroun on 31st October 2009, you would have seen for yourself how we thwarted their attempts to portray themselves as representatives of the British Muslim community. Not only did they abandon their “March for Sharia” at the last minute, but we were joined by pro-democracy activists of all faiths and none, and from a wide range of backgrounds (including the English Democrats). This was hailed by both Muslims and non-Muslims as a victory for freedom and democracy.

We have come to know about your proposed demonstration outside Harrow Mosque on 13th December 2009, opposing the building of the mosque extension. According to your letter to the Harrow Times on your website – which appears not to have been published in the paper as yet – you believe that, “Muslims are attempting to make Islam the dominant theocratic-political system across the world and are actively eradicating democracy, non-Islamic cultures and all other religions.”

To counter this assertion, we would like to point out that just like the majority of law-abiding British Muslims and non-Muslims, we too are extremely concerned about the rise of extremism and political Islam in Britain, which has been used to justify or demand non-democratic practices. On this issue, I am sure your organisation and ours share a common concern and would like to see a halt to the spread of these.

We acknowledge that in the past several mosques and madrassahs have been involved in anti-democratic activities and extremism, through the political and religious leanings of their management and patrons.

This undermines the confidence of the peace-loving British public and results in fragmented communities.

It is clear that mosques and madrassahs should not be used as a vehicle for hate-preaching and spreading discord within society. In this vein, we would like to point out that just because Muslims attend certain mosques out of pure necessity, this does not mean that they subscribe to the views of the mosque committees and management. More likely, it signifies that they have no other choice and are not organised enough to be able to challenge such community leadership.

We also maintain that the vast majority of British Muslims are law-abiding citizens who are happy with secular democracy and do not wish to Islamicise Britain or Europe. We would like to fight for the rights of ordinary British Muslims to practice their religion, free of any coercion by organised hard-line groups who follow a particular brand of Islam based on rigid interpretations of Islamic teachings. By demonstrating outside a mosque under the banner, “Stop the Islamisation of Europe,” ordinary peace-loving British Muslims end up feeling threatened and have begun to believe that their fundamental right to practice their religion is being curtailed. In any case, Harrow is an exemplar of good community relations, facilitated by strong communication and co-operation between different faith communities and various agencies such as the police and the local council. Our Director Tehmina Kazi can testify to this, as she has lived in Harrow for over 20 years. Individuals affiliated with Harrow Central Mosque joined our counter-protest against Al Muhajiroun and their leading members wholeheartedly support the merits of secular democracy alongside BMSD

Your campaign is also fuelling the notion that somehow organisations such as SIOE are against all Muslims and the religion Islam in itself. This is being used by the extremist elements within Muslim communities to enhance their recruitment.

We therefore urge you to call off your protest and start open dialogue with British Muslims for Secular Democracy and other pro-democracy groups, so that we could jointly work together in reducing the spread of fascism and extremism from our communities.

We look forward to your response.

Yours sincerely,

Dr Shaaz Mahboob

Vice Chair
British Muslims for Secular Democracy

(A1122-23) (emphasis added).

Thus, the very letter the TTAB presents for the proposition that the mere words, STOP THE ISLAMISATION OF AMERICA, would disparage law abiding and patriotic British (and by implication, American) Muslims actually demonstrates the point that these Muslims in fact embrace those words and that calling. The British Muslims were just concerned about a specific activity of the SIOE group and indeed sought to work cooperatively with SIOE. It would be odd indeed that British Muslims would seek to dialogue and work with a group whose very name, according to the USPTO and the TTAB, caused them disparagement.

The TTAB's final twist in its analysis of disparagement is the assertion that even if Appellants are correct about the meaning of "Islamisation," the meaning includes not only a violent/jihad-engendered revolution toward the imposition of Islamic law as the law of the land, but also a possible peaceful persuasive approach to convince enough Americans to presumably amend the Constitution to do away with the First Amendment, and indeed, most, if not all, of the Bill of Rights. (A19-21). Quite simply Appellants are dumbfounded by this part of the TTAB's Decision. Does this mean that loyal, patriotic American Muslims would be disparaged by someone arguing in favor of the Constitution and the Bill of Rights—which protect Muslims and non-Muslims alike—simply because the Constitution and the Bill of Rights might be eviscerated peacefully leading to the imposition of a religious law that treated women like chattel and non-Muslims like

second-class citizens? Moreover, how does this piece of the TTAB's argument in support of the USPTO's denial illustrate via substantial evidence how American Muslims or any Muslims would be disparaged by a group that sought to "stop" even peaceful "Islamisation"? Quite evidently, it does not.

III. CONCLUSION & RELIEF SOUGHT.

Appellants are sympathetic to the USPTO's politically correct sensitivities enticing it to protect Muslims and indeed Islam itself from even the slightest hint of disparagement in the form of public criticism, especially in the post-9/11 age with global terrorism conducted daily in the name of Islam and the Arab Spring featuring the Muslim Brotherhood's Islamisation program for Egypt and elsewhere melting into murder and mayhem. The problem with these sensitivities as applied to the denial of Appellants' Mark is that the USPTO's beef is not with Appellants or their Mark, but rather with terrorists who claim to speak in the name of all of Islam and all Muslims. Appellants' Mark does not. "Stop the Islamisation of America" has a specific meaning that Muslims and non-Muslims in America and indeed throughout the West embrace if they treasure liberty and religious freedom for all. In a zeal to take on the role of *parens patriae* and to protect Muslims from every insult, the USPTO and the TTAB have both ignored the factual record and have simply assumed meanings and understandings of the terms of the Mark that have no factual or evidentiary basis. There is no substantial evidence to support

the TTAB's Decision or the USPTO's denial of the Mark.

As such, Appellants ask this Court to find that the USPTO's denial of Appellants' Mark lacks the requisite evidentiary basis and order the USPTO to register the Mark forthwith.

Respectfully submitted,

AMERICAN FREEDOM LAW CENTER

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CERTIFICATE OF SERVICE

I hereby certify that on August 30, 2013, I caused to be filed electronically the foregoing with the Clerk of the Court for the United States Court of Appeals for the Federal Circuit by using the appellate CM/ECF system. Participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system. I further certify that all of the participants in this case are registered CM/ECF users.

AMERICAN FREEDOM LAW CENTER

/s/ David Yerushalmi
David Yerushalmi, Esq.

CERTIFICATE OF COMPLIANCE

I certify that pursuant to Fed. R. App. P. 32(a)(7) and Federal Circuit Rule 28(a)(14), the foregoing Brief was prepared in MS Word 2007, is proportionally spaced, has a typeface of 14 points Times New Roman, and contains 6400 words, excluding those sections identified in Fed. R. App. P. 32(a)(7)(B)(iii) and Federal Circuit Rule 32(b).

AMERICAN FREEDOM LAW CENTER

/s/ David Yerushalmi
David Yerushalmi, Esq.

ADDENDUM

THIS OPINION IS NOT A
PRECEDENT OF THE TTAB

Hearing: June 19, 2012

Mailed: February 7, 2013

UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

In re Pamela Geller and Robert B. Spencer

Serial No. 77940879

David Yerushalmi, Esq. for Pamela Geller and Robert B. Spencer.

Maria-Victoria Suarez, Trademark Examining Attorney, Law Office 102 (Karen M. Strzyz, Managing Attorney).

Before Cataldo, Taylor and Kuczma, Administrative Trademark Judges.

Opinion by Kuczma, Administrative Trademark Judge:

Pamela Geller and Robert B. Spencer, (“applicants”), filed an application under § 1(b) of the Trademark Act, 15 U.S.C. § 1051(b), seeking registration of the mark:

**Stop the Islamisation of
America**

in standard character form for “providing information regarding understanding and preventing terrorism,” in International Class 45.¹

¹ Application Serial No. 77940879, filed on February 21, 2010.

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Registration of the mark was refused under § 2(a) of the Trademark Act, 15 U.S.C. § 1052(a), on the ground that the applied-for mark consists of or includes matter which may disparage or bring into contempt or disrepute persons, institutions, beliefs or national symbols. Applicants timely filed a notice of appeal. Applicants and the examining attorney submitted briefs, and appeared at the oral hearing.²

A. Disparagement

Section 2(a) of the Trademark Act prohibits registration of a mark that “consists of or comprises . . . matter which may disparage . . . persons, living or dead, institutions, beliefs, or national symbols, or bring them into contempt, or disrepute.” As noted in *University of Notre Dame du Lac v. J.C. Food Imports Co.*, 703 F.2d 1372, 1376, 217 USPQ 505, 509 (Fed. Cir. 1983), § 2(a) embodies concepts of the right to privacy and publicity, that is, the right to protect and to control the use of one’s identity. In effect, this provision of § 2(a) protects against appropriation of one’s identity by another and subjecting it to contempt or ridicule. See *Greyhound Corp. v. Both Worlds Inc.*, 6 USPQ2d 1635, 1639 (TTAB 1988).

In *In re Lebanese Arak Corp.*, the Board restated the test for disparagement where the party alleging disparagement is a member of a non-commercial group, such as a religious or racial group, as follows:

- 1) what is the likely meaning of the matter in question, taking into account not only dictionary definitions, but also the relationship of the matter to the other elements

² The application was examined by Examining Attorney Maria-Victoria Suarez. Senior Attorney Brian Brown represented the USPTO at the oral hearing.

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in the mark, the nature of the goods or services, and the manner in which the mark is used in the marketplace in connection with the goods or services; and

2) if that meaning is found to refer to identifiable persons, institutions, beliefs or national symbols, whether that meaning may be disparaging to a substantial composite of the referenced group.

In re Lebanese Arak Corp., 94 USPQ2d 1215, 1217 (TTAB 2010) (citing *In re Heeb Media LLC*, 89 USPQ2d 1071, 1074 (TTAB 2008); *In re Squaw Valley Development Co.*, 80 USPQ2d 1264, 1267 (TTAB 2006); *Harjo v. Pro-Football, Inc.*, (“*Harjo I*”) 50 USPQ2d 1705, 1740-41 (TTAB 1999), *rev’d* on other grounds, (“*Harjo II*”) 284 F.Supp.2d 96, 68 USPQ2d 1225 (D.D.C. 2003), *remanded*, 415 F.3d 44, 75 USPQ2d 1525 (D.C. Cir. 2005), *on remand*, 567 F.Supp.2d 46, 87 USPQ2d 1891 (D.D.C. 2008), *aff’d* 565 F.3d 880, 90 USPQ2d 1593 (D.C. Cir. 2009)).

1. Meaning of the Mark

Applicants and the examining attorney agree, as do we, that the test set forth in *Lebanese Arak* is the applicable test, so we turn to the first prong of the test to determine the meaning of the applied-for mark as used in connection with the services identified in the application.

The examining attorney introduced several dictionary definitions for the term “Islamize”³ which were consistent in indicating the term “Islamization” (alternatively spelled “Islamisation” according to applicants) would be generally understood to mean “converting or conforming to Islam”:⁴

³ The definitions indicate that “Islamization” is the noun form of the transitive verb “Islamize.”

⁴ See attachments to April 28, 2010 and January 19, 2011 Office Actions.

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Dictionary.com Unabridged based on the Random House Dictionary:

1. To conform to Islam. 2. To bring into a state of harmony or conformity with the principles and teachings of Islam; give an Islamic character or identity to.
<http://dictionary.reference.com>

Merriam-Webster:

to make Islamic; especially: to convert to Islam
<http://merriam-webster.com/dictionary/islamization>

EncartaWorldEnglish Dictionary:

1. Convert to Islam: to convert people or countries to Islam. 2. Make subject to Islamic law: to cause people, institutions, or countries to follow Islamic law.
<http://encarta.msn.com/encnet/features/dictionary>

Webster's New World College Dictionary:

to convert or conform to, or bring within, Islam
<http://yourdictionary.com/Islamize>

American Heritage Dictionary of the English Language Fourth Ed.:

1. To convert to Islam. 2. To cause to conform to Islamic law or precepts.
<http://yourdictionary.com/Islamize>

The examining attorney also submitted the following definition for the word

“stop”:⁵

1. to cease from, leave off or discontinue: *to stop running*
2. to cause to cease; put an end to: *to stop noise in the street*
<http://dictionary.reference.com>

and a definition for the word “terrorism”:

Dictionary.com Unabridged based on the Random House Dictionary:

1. the use of violence and threats to intimidate or coerce,

⁵ See attachments to April 28, 2010 Office Action.

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esp. for political purposes

<http://dictionary.reference.com/browse/islamize>

Applying these definitions in the context of applicants' STOP THE ISLAMISATION OF AMERICA mark, the mark in its entirety would be understood to mean that action must be taken to cease, or put an end to, converting or making people in America conform to Islam. Considering the mark in connection with the nature of applicants' services namely, "providing information regarding understanding and preventing terrorism," conveys the further message that the conversion or conformance to Islam must be stopped in order to prevent the intimidating threats and violence associated with terrorism.

In addition to analyzing the definitions relative to applicants' services, it is appropriate for us to consider the manner in which applicants' mark is or will be used in the marketplace in connection with the services. *Heeb Media*, 89 USPQ2d at 1075 citing *Harjo I*, 50 USPQ2d at 1739, 1742. To do this, we have reviewed the portions of applicants' website and blog (located at sioaonline.com) that are in the record. The subject matter of the articles published on applicants' website and comments posted on applicants' blog are consistent with the theme that the spread of Islam in America, i.e., converting new members to the Islam religion, must be stopped. For example, an article on applicants' website entitled: *SIOA Mosque Manifesto: All Mosques are Not Created Equal, A Handy Guide to Fighting the Muslim Brotherhood* reports on communities in the United States that have taken action against the building of mosques and provides a step-by-step guide for people who find themselves "faced with a huge monster mosque proposal in their small

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towns.” The article begins: “As we have been reminded time after time after grisly Islamic terror plots have been exposed, there is always a mosque, and the imprimatur of a cleric, behind every operation.” The articles entitled *Geller, Spencer in Big Government: The 9/11 Mosque’s Peace Charade* and *SIOA Condemns Obama’s Blessing of Ground Zero Mega-Mosque; Bolton, Wilders to Speak At 9/11 Rally* raise strong objections to the proposed building of a mosque and Islamic Center near the site of the former World Trade Center in New York City that was destroyed as a result of a terrorist attack in September 2001. The article entitled *Detroit Transit Sued for Nixing SIOA ‘Leaving Islam?’ Bus ads* reports on a lawsuit filed by applicant Geller against the Detroit-area bus authority for refusing to run ads that offer assistance to those considering leaving Islam.⁶ There is no doubt that the underlying theme in the articles which are featured immediately underneath the website’s STOP THE ISLAMIZATION OF AMERICA⁷ banner is that the spread of Islam in America is undesirable and must be stopped.

Comments submitted to applicants’ blog by readers of applicants’ website also reflect the website’s message of stopping the spread of Islam in the United States:⁸

- [The trademark] implies that Islam is associated with violence and threats.” IMPLIES??? Hell no! IT IS

⁶ See copies of webpages from www.sioaonline.com attached to January 19, 2011 Office Action.

⁷ Although the word “Islamisation” as identified on the trademark drawing and in the application is spelled “Islamisation” (with the letter “s”), the banner at the top of applicants’ website spells the word with the letter “z.” According to applicants, the word “Islamisation” is an alternative spelling for “Islamization,” Applicants’ Appeal Brief p. 5.

⁸ See unnumbered attachments at pp. 54, 57-58 and 83 of January 19, 2011 Office Action. The spelling and punctuation in the readers’ comments are presented as contained in the postings.

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ASSOCIATED WITH VIOLENCE AND THREATS— examples of that TRUTH ABOUND-ISLAM is a terror group defined by their own Korana [a]nd imams what PC and Muzzies have infiltrated the patent office? [Comment by Whata buncha bull on April 29, 2010 at 10:36 AM in response to article entitled “Sharia Trademark Enforcement.”]

- Very few Americans are willing to educate themselves on what Islam teaches – it is not love and peace. They only know the propaganda the media and Islamic organization indoctrinate them with each day. This is why we are doomed to experience what every country that has allowed it to exists, has experienced – evil in its purest form.

If people only knew the truth, Islam would not be allowed to exist in the USA or any other country. Franklin Graham was right in saying, “Islam is evil.” [Comment by Rick Holloway on May 12, 2010 at 10:59 AM in response to article entitled “Sharia Trademark Enforcement.”]

- This closeted Muslim President MUST be impeached, removed, and defeated before he continues to take the USA down the worst path it has ever encountered. Stop Islam Now, look at its history, lets not let The USA face the same Islamic issues our brothers in Europe are facing. [Comment by Erik on August 22, 2010 at 1:38 PM in response to article entitled: “SIOA Condemns Obama’s Blessing of Ground Zero Mega-Mosque.”]

Other comments reflect the public’s association of “Islamization” with “Islam.”⁹

- . . . here’s only one thing you can do and that’s say no to Islam and the islamization of America. [Comment by ‘nuff already on June 6, 2010 at 8:14 am]

- . . . Islamisation of America spells far more danger than what once Nazism did. Islam is like a giant python that can coil around you slowly and steadily before you even know that you have been annihilated. [Comment by Vedam on August 17, 2010 at 12:33 AM]

⁹ See unnumbered attachments at pp. 59 and 81 of January 19, 2011 Office Action.

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One reader specifically commented that applicants' mark implies that applicants wish to stop Islam:¹⁰

- I agree that radical islam is the number one threat to this country's, and most country's, security. That said, the name you chose does imply that you wish to stop islam in this country. . . . [Comment by Alexandra on May 17, 2010 at 3:48 PM]

It is noted that the foregoing is not a complete list of the comments; the evidence in the record contains several additional inflammatory and/or negative readers' comments relating to the Islamic faith and its followers that were posted to applicants' blog, and we have no indication whether all comments to the blog have been submitted as evidence. While the probative value of the blog comments submitted by readers of applicants' website is less than that of the articles themselves due to the anonymity of the authors, they provide additional insight into the public's perception of and reaction to applicants' STOP THE ISLAMISATION OF AMERICA mark and services as used in the marketplace.

The evidence comprising dictionary definitions and the manner in which the mark is used and reacted to in the marketplace, taken together with the nature of applicants' services, provide probative evidence supporting the meaning of the mark proposed by the examining attorney, i.e., to stop the conversion or conformance to Islam in America in order to avoid terrorism.

Applicants advocate that Muslims do not use the term "Islamisation" "in the broad generic way consonant with 'Islamic'." Rather, applicants argue there is a

¹⁰ See unnumbered attachment at p. 59 of January 19, 2011 Office Action.

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second definition of “Islamize” which conveys another meaning. That is, as set forth in the foregoing definitions, “Islamize” also means “[t]o cause to conform to Islamic law or precepts” (as defined at *Dictionary.com*) and “[m]ake subject to Islamic law: to cause people, institutions, or countries to follow Islamic law” (as defined at *Encarta.com*). This definition, i.e., to cause to be in conformity with Islamic law, more closely corresponds to the meaning of “Islamisation” proffered by applicants, namely, a sectarianization of a political society through efforts to “make [it] subject to Islamic law.”¹¹

According to applicants, Muslims understand “Islamisation” to mean the “term of art to incorporate the political-legal movement to convert a society or politic into a political society predicated upon and governed by Islamic law (i.e., Shariah).”¹² In support of this meaning, applicants cite to uses of the term “Islamisation” by professionals, academics and religious and legal experts. We refer to the following excerpts from applicants’ evidence which provide some insight into the use of the term “Islamization” and its propagation by Islamists, i.e., those that promote Islamization as political ideology (emphasis added below):

Islamism is ultimately a long-term social engineering project. The eventual **“Islamization”** of the world is to be enacted via a bottom-up process. Initially, the individual is Islamized into becoming a true Muslim. The process requires the person to reject Western norms of pluralism, individual rights, and the secular rule of law. The process continues as the individual’s family is transformed, followed by society, and then the state. Finally, the entire world is expected to live and be

¹¹ See Applicants’ Appeal Brief p. 8 and Applicants’ Reply Brief p. 4.

¹² See Applicants’ Appeal Brief pp. 8-9.

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governed by *Islamic* principles. So it is this ideological machinery that works to promote separation, sedition, and hatred, and that is at the core of *Islamic* violent extremism. [Testimony of Zeyno Baran, Senior Fellow and Director of Center for Eurasian Policy, Hudson Institute, to U.S. Senate Committee on Homeland Security and Governmental Affairs on July 10, 2008]¹³

Now what I would like to address very quickly is what I believe i[s] the way to differentiate between *Islamists* and normal ordinary Muslims . . . the four core elements that I think are common to all *Islamists* regardless of the methodology they employ—and the first one I identify is that *Islamists* believe that Islam is a political ideology rather than a religion . . . the second core element that *Islamists* will all share is the notion that the Shariah religious code, which is a personal code of conduct, must become state law. . . [Testimony of Maajid Nawaz, Director, The Quilliam Foundation, London, to U.S. Senate Committee on Homeland Security and Governmental Affairs on July 10, 2008]¹⁴

What needs to be countered is *Islamism*, the political ideology, not Islam, the religion . . . The political ideology, however, is diametrically opposed to liberal democracy because it dictates that Islamic law, Shariah, to be the only basis for the legal and political system that governs the world's economic, social, and judicial mechanisms and that Islam must shape all aspects of life . . . Of course, not all *Islamists* will one day become terrorists, but all *Islamist* terrorists start with non-violent *Islamism*. [Testimony of Zeyno Baran, Senior Fellow and Director, Center for Eurasian Policy, Hudson Institute, to U.S. Senate Committee on Homeland Security and Governmental Affairs on July 10, 2008]¹⁵

Thus, today we can say that the broad ideological current of *Islamism* manifests itself in activist agendas that span the complete spectrum from democratic politics to violent efforts aimed at imposing Shariah law worldwide.

¹³ See Exhibit 3(a) p. 15 attached to applicants' July 26, 2010 Response to Office Action.

¹⁴ See Exhibit 3(a) p. 6 attached to applicants' July 26, 2010 Response to Office Action.

¹⁵ See Exhibit 3(a) p. 14 attached to applicants' July 26, 2010 Response to Office Action.

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[Testimony of Peter P. Mandaville, PhD., Associate Professor of Government and Politics, George Mason University, to U.S. Senate Committee on Homeland Security and Governmental Affairs on July 10, 2008]¹⁶

In understanding what the ideology of *Islamism* is, it would help to begin with the name. The suffix “ism” has been added to Islam so as to draw attention to the political nature of the subject matter. Islam is a faith; *Islamism* is an ideology that uses Islam the faith as a justification. Some of you may be reluctant in calling this ideology Islamism. There exists an understandable concern of not wanting to alienate Muslims. . . . [Written Testimony of Maajid Nawaz, Director of the Quilliam Foundation, London, to U.S. Senate Committee on Homeland Security and Governmental Affairs on July 10, 2008]¹⁷

The foregoing evidence originated from written testimony and transcripts of record before the U.S. Senate Committee investigating “The Roots of Violent Islamist Extremism and Efforts to Counter It.” Applicants submitted additional evidence including course materials authored by applicants’ counsel and others for continuing legal education, a doctoral dissertation entitled “Islamization in Pakistan: A Political and Constitutional Study from 1947-1988” submitted to the University of Karachi (Karachi, Pakistan) in October 2004, and a list of law review articles with limited excerpts from a selection of the articles. Given the nature and intended audiences of this evidence it is less widely available and therefore, is not necessarily reflective of the general public’s understanding of the meaning of

¹⁶ See Exhibit 3(a) p. 10 attached to applicants’ July 26, 2010 Response to Office Action.

¹⁷ See Exhibit 3(a) p. 52 attached to applicants’ July 26, 2010 Response to Office Action.

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applicants' mark. Indeed, applicants concede their evidence supports how Muslims themselves actually use the term "Islamization."¹⁸

We agree with the examining attorney that the several online dictionary definitions are more reflective of the public's current understanding of the term "Islamisation" than applicants' evidence, particularly because the public's access and exposure to applicants' evidence is not readily apparent. Based on the evidence, we conclude that one meaning of the mark is that the spread of Islam in America is undesirable and should be stopped in order to avoid or reduce terrorism. Although applicants' evidence is less probative of the meaning of the mark to the general public or to the American Muslim population at large, it evidences a second meaning of the mark at least to academic, professional, legal and religious experts based on the more narrow definition of the term "Islamisation" espoused by applicants.

As acknowledged by applicants, both *Harjo I* and *Harjo II* make clear that a term that has multiple meanings must be understood—for purposes of the "meaning" analysis—in the context of how it is used in the public domain relevant to the mark. If more than one meaning is established, both meanings advance to the second phase of the analysis, i.e., does the group at issue consider the term as used in the context of the services disparaging?¹⁹ With this in mind, we consider whether applicants' mark is disparaging.

¹⁸ See Applicants' Appeal Brief pp. 8-9.

¹⁹ See Applicants' Reply Brief p. 3.

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2. Whether Mark Disparages Substantial Composite of Referenced Group

Addressing the second prong of the test, the definitions of Islamization submitted by the examining attorney clearly identify the referenced group as those who have converted or conformed to Islam, i.e., followers of the Islamic religion, who are also known as Muslims. Applicants also acknowledge that the referenced group is American Muslims.²⁰ Accordingly, we find both meanings of the mark refer to Muslims in the United States.

Trademarks may disparage if they “dishonor by comparison with what is inferior, slight, deprecate, degrade, or affect or injure by unjust comparison.” *Harjo II*, 68 USPQ2d at 1247; *Harjo I*, 50 USPQ2d at 1738. The question now, is whether either meaning of the mark is disparaging to a substantial composite of the referenced group, i.e., Muslims in America.

Applicants argue that if the word “Islamisation” refers to only those groups and movements which seek to compel a political order to adopt Islamic law as the law of the land, law abiding and patriotic Muslims, who are not members of such groups, would not be disparaged by the mark.²¹ The difficulty with applicants’ argument is twofold: it assumes a substantial composite of Muslims understands the meaning of “Islamisation” asserted by applicants and that they would not be offended by the mark STOP THE ISLAMISATION OF AMERICA.

²⁰ See Applicants’ Appeal Brief pp. 14-15; Reply Brief p. 7.

²¹ See Applicants’ Appeal Brief p. 12.

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There is no evidence showing a substantial composite of the Muslim population in the United States understands the word “Islamisation” to have the meaning asserted by applicants. Applicants concede “[T]he only Muslims who actually use the term ‘Islamisation’ in any public or published fashion are those adherents to Islamisation known in the literature as Islamists, Muslim professionals dealing with counterterrorism, and Muslim academics who study the phenomenon of Islamisation within varied disciplines such as law, political science, and the study of terrorism.”²² The evidence submitted by applicants to support their specific definition of the term includes a doctoral dissertation submitted to a university in Pakistan, written and oral testimony presented to the U.S. Senate Committee on Homeland Security and Governmental Affairs during a hearing on the “Roots of Violent Islamist Extremism and Efforts to Counter It,” course materials for a legal seminar entitled “Shariah-Compliant Finance: Benign or Benevolent,” U.S. Department of Justice Sentencing Press Release, a “theoretical” paper by a Shariah scholar entitled “The Process of Islamization” published in 1976 and later published online, and printouts from various websites for Muslim-based organizations that do not show use of the term Islamization.²³ While such evidence

²² See applicants’ July 26, 2010 Response to Office Action p. 5.

²³ See applicants’ Exhibits 1-12 submitted with applicants’ July 26, 2010 Response to Office Action. Included as Exhibit 10 is a list of 246 articles that were represented to be the results of a search of the Lexis-Nexis database. Inasmuch as the list of articles contained snippets from the articles showing use of the term “Islamization” in some identifiable U.S. publications, the list evidences use of the term in U.S. publications. However, the vast majority of articles were published in law reviews and appear to relate to the history and extent of Islamization activities in countries outside of the United States, with several articles addressing the same countries or geographic regions. Of the twenty-four excerpts from these articles provided in applicants’ Exhibit 11, twenty-one of the excerpts appear to

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provides some insight into the use of the term “Islamization,” and the process of “Islamization,” they do not establish whether or how the term is perceived by the general Muslim population in the United States.

Even if a substantial composite of the U.S. Muslim population understands “Islamisation” to have the more specific meaning asserted by applicants, the mark is disparaging because the term “Islamisation” has another more general meaning relating to conversion to Islam. Moreover, a substantial composite of Muslims regardless of their personal understanding of the term “Islamization” would be disparaged by the mark if the general non-Muslim population understands the term “Islamization” to relate to converting or confirming to Islam, endowing the mark with the more likely meaning of stopping the spread of Islam in America.

The confusing overlap in terminology is likely to exacerbate the public’s understanding of applicants’ mark and its disparaging connotation. Muslim followers of “Islam,” “Islamism” and its “Islamist” proponents, and “Islamization,” are all centered on the Islamic religion. The foregoing terms share the root word “Islam” and are encompassed by the term “Islamic.” “[F]or most Americans, dealing with Islamism is extremely difficult because it is associated with Islam . . . What needs to be countered is Islamism the political ideology, not Islam, the religion.”²⁴ That this confusion exists is supported by the statement of one of the experts

discuss Islamization outside of the United States; it is not possible to tell whether the remaining articles specifically address Islamization in the United States.

²⁴ See Testimony of Zeyno Baran, Senior Fellow and Director, Center for Eurasian Policy, Hudson Institute, to Committee on Homeland Security and Governmental Affairs United States Senate on July 10, 2008 attached as Exhibit 3(a) p.14 to applicants’ July 26, 2010 Response to Office Action.

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testifying before the Senate Committee on Homeland Security and Governmental Affairs that “I firmly believe that by claiming the word Islamism, and helping shape how it is used, one can direct the debate in the right way with the intention of distinguishing the ideology from the faith.”²⁵

The admonition in the mark to STOP sets a negative tone and signals that Islamization is undesirable and is something that must be brought to an end in America. In light of the meaning of “Islamization” as referring to conversion to Islam, i.e., spreading of Islam, use of the mark in connection with preventing terrorism creates a direct association of Islam and its followers with terrorism.

There is sufficient evidence that the majority of Muslims are not terrorists and are offended by being associated as such. The following articles provide some pertinent examples:

Offended Muslims Speak Up

At a time of growing tensions involving Muslims in the United States, a record number of Muslim workers are complaining of employment discrimination, from co-workers calling them “terrorist” or “Osama” to employers barring them from wearing head scarves or taking prayer breaks. . . . [T]he rising number of complaints by Muslims, which exceeds even the amount filed in the year after the 9/11 terrorist attacks, comes as tensions rise between Muslim Americans and those of other faiths. 9/24/2010 *The New York Times, Late Edition-Final*.²⁶

²⁵ See Appendix to July 10, 2008 Hearing before US Senate Committee on Homeland Security and Governmental Affairs written testimony of Maajid Nawaz, Director of the Quilliam Foundation, London, attached as Exhibit 3(a) p.52 to applicants’ July 26, 2010 Response to Office Action.

²⁶ See unnumbered attachment at p.12 of January 19, 2011 Office Action.

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Show of support for Muslims; Religious leaders call for tolerance amid tensions

Ammal Khateeb, a Tinley Park resident at Friday's prayer service, said she has grown tired of what she sees as anti-Muslim sentiment that automatically associates Islam with terrorism. "That is why I don't wear the (hijab) scarf. It's never been good after 9/11. I'm scared," she said. "I don't want my kids to go through this racism." 9/12/2010 *Chicago Tribune Sunday Early Edition*.²⁷

Arab culture and Muslim stereotypes

The press . . . regularly uses the terms "Islamic" or "Muslim" as adjectives for terrorists. . . . [I]t is time . . . that the Western press, politicians, and public stop thinking of Islamic as another word for terrorism. 6/21-6/27/2008 *The Arab American News*.²⁸

Muslims say terrorists have hijacked their faith

. . . People make assumptions that all Muslims are terrorists, (county spokeswoman Afsheen Shamsi said). . . We believe [Islamic terrorist] is not the right terminology to use, because it links something very positive, like Islam, with the word "terrorist." 6/2/2008 *Courier News* (Bridgewater, New Jersey).²⁹

Muslim victims of 9/11 deserve a mosque

By conflating the 9/11 terrorists and Islam, the opponents of the mosque are telling Muslim Americans: Do not bother; through your shared religion, you and the terrorists are the same. 9/10/2010 *The Star-Ledger* (Newark, New Jersey) State/ROP Edition³⁰

. . . one must remain cognisant [sic] of the fact that the majority of Muslims are not Islamists . . .

[Written Testimony of Maajid Nawaz, Director of the Quilliam Foundation, London, to U.S. Senate Committee

²⁷ See unnumbered attachments at pp. 17-18 of January 19, 2011 Office Action.

²⁸ See unnumbered attachments at pp. 13-15 of April 28, 2010 Office Action.

²⁹ See unnumbered attachments at pp. 19-20 of April 28, 2010 Office Action.

³⁰ See unnumbered attachment at p. 23 of January 19, 2011 Office Action.

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on Homeland Security and Governmental Affairs United States Senate on July 10, 2008]³¹

The only true allies in countering an ideology that is fundamentally opposed to America and its ideas are those Muslims who share American ideas, or at the very least do not work to undermine them. This group includes the pious and practicing, the liberal, the secular, and the cultural ones; **the quiet but still the overwhelming majority of American Muslims**. . . . [S]o in closing, I would like to underline that to effectively counter the further spread of violent manifestations of Islamism, the United States needs to seriously engage in countering the Islamist ideology. . . . [Testimony of Zeyno Baran Senior Fellow and Director of Center for Eurasian Policy, Hudson Institute, to U.S. Senate Committee on Homeland Security and Governmental Affairs on July 10, 2008]³²

In view of the foregoing, applicants' mark used in connection with their services would be disparaging to a substantial composite of Muslims in America. Notably, the use of a similar name in England, "Stop the Islamisation of Europe," has been objected to as being disparaging and threatening to non-Islamist Muslims. In that instance, in response to a demonstration outside of a mosque under the banner "Stop the Islamisation of Europe," British Muslims for Secular Democracy (BMSD), a group which "do[es] not wish to Islamicise Britain or Europe," published a letter dated November 20, 2009, directed to the group utilizing the name "Stop the Islamisation of Europe" in England.³³ The letter by BMSD states that Muslims "end up feeling threatened" by such a demonstration and also explains that the Stop the Islamisation of Europe campaign "is fueling the notion that somehow

³¹ See Exhibit 3(a) p. 52 attached to applicants' July 26, 2010 Response to Office Action.

³² See Exhibit 3(a) p. 18 attached to applicants' July 26, 2010 Response to Office Action.

³³ See unnumbered attachments at pp. 120-121 of January 19, 2011 Office Action.

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organizations such as [Stop the Islamisation of Europe] are against Muslims and the religion Islam in itself.” While the foregoing took place in Britain and therefore would not usually be considered probative evidence of the reactions by Muslim Americans to applicants’ mark, it nonetheless is illuminative of the impact that the use of applicants’ strikingly similar STOP THE ISLAMISATION OF AMERICA mark would have in the United States, which like Britain, is an English-speaking Western-based democratic society.³⁴

The mark is also disparaging in the context of applicants’ definition of “Islamisation.” According to the definition urged by applicants and supported by their evidence, “Islamization” refers to a political movement to replace man-made laws with the religious laws of Islam.³⁵ Notably, the process of “Islamization” is not defined nor described by applicants’ evidence to mandate the use of violence or terrorism (emphasis added below):

³⁴ As shown by the evidence, applicants’ website contains links to Stop the Islamization of Europe and Stop the Islamization of England, as well as similarly named groups in numerous other countries. Although the copy of the letter from BMSD submitted by the examining attorney as an attachment to the January 19, 2011 Office Action does not contain the URL information or the date it was printed, the Office Action issued January 19, 2011 indicates that the letter may be found at <http://www.bmsd.org.uk/pdfs/islamification.pdf>. Inasmuch as applicants have not objected to the admissibility of this letter and have in fact used it to support their position (see Applicants’ Appeal Brief pp. 12-15), we have considered the letter for whatever probative value it may have. See *In re Bayer Aktiengesellschaft*, 488 F.3d 960, 82 USPQ2d 1828, 1835 (Fed. Cir. 2007) (depending on the record, information originating on foreign websites or in foreign news publications that are accessible to the U.S. public may be relevant to discern U.S. consumer impression of a proposed mark) and *In re Remacle*, 66 USPQ2d 1222 (TTAB 2002) (Board found professionals in certain fields such as medicine, engineering, computers and telecommunications would be likely to monitor developments in their fields without regard to national boundaries, and that the internet facilitates such distribution of knowledge, so evidence from an English language web site in Great Britain held admissible).

³⁵ See Applicants’ Reply Brief p. 7.

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Islamists believe that Islam is a political ideology rather than a religion.... Now, these shared elements, though common between all Islamists, ***this doesn't imply that Islamists are all of one shade. Islamists do differ in their tactics and methodologies.*** I have identified three types of Islamists. They are first either political Islamists, who are those who use entry-level politics and tactics by working within the system through the ballot box to try and bring about this ideology. ***These are, by and large, people who are non-violent, yet they have an ideological agenda.*** . . . The second type of Islamist, again, from these four shared elements, are the revolutionary Islamists . . . and their methodology is to infiltrate the militaries, to overthrow the regimes of the Middle East thorough military coups, and those in this category do not believe in using the ballot box or working through the system. And the final category of Islamists are the militant Islamists, or the jihadists, who believe in an armed struggle against the status quo. [Testimony of Maajid Nawaz, Director, The Quilliam Foundation, London, to U.S. Senate Committee on Homeland Security and Governmental Affairs United States Senate on July 10, 2008]³⁶

Not all Islamists employ terrorism as a tactic . . . [Written Testimony of Maajid Nawaz, Director of the Quilliam Foundation, London, to U.S. Senate Committee on Homeland Security and Governmental Affairs United States Senate on July 10, 2008]³⁷

Thus, today we can say that ***the broad ideological current of Islamism manifests itself in activist agendas that span the complete spectrum from democratic politics to violent efforts aimed at imposing Shariah law worldwide.*** . . . [W]e were asked to address the question of how a more in-depth understanding of the ideology of violent Islamism can improve America's national security. We need to recognize that ***violent Islamism is part of a wider ecology of Muslim and Islamist thought and***

³⁶ See Exhibit 3(a) pp. 6-8 attached to applicants' July 26, 2010 Response to Office Action.

³⁷ See Exhibit 3(a) pp. 52, 54 attached to applicants' July 26, 2010 Response to Office Action.

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practice. [Testimony of Peter P. Mandaville, Ph.D., Associate Professor of Government and Politics, George Mason University to U.S. Senate Committee on Homeland Security and Governmental Affairs on July 10, 2008]³⁸

The starting point has to be distinguishing between Muslims and Islamists, and between Islam (the religion) and Islamism (the political ideology). Islam, the religion, deals with piety, ethics, and beliefs, and can be compatible with secular liberal democracy and basic civil liberties. Islamists, however, believe Islam is the *only* (emphasis original) basis for the legal and political system that governs the world's economic, social, and judicial mechanisms. Islamic law, or *sharia*, must shape all aspects of human society, from politics and education to history, science, the arts, and more. It is diametrically opposed to liberal democracy. . . . ***This is not to say that all Islamists will one day become terrorists; the vast majority will never engage in violence and in fact are likely to abhor terrorist acts.*** [Comments of Zeyno Baran Senior Fellow and Director of Center for Eurasian Policy, Hudson Institute, to U.S. Senate Committee on Homeland Security and Governmental Affairs on July 10, 2008]³⁹

A further flaw in applicants' argument that their mark is not disparaging is that it fails to take into account the nature of the services identified in their application. Applicants' use of the STOP THE ISLAMISATION OF AMERICA mark in connection with services to provide information regarding understanding and preventing terrorism creates an association with terrorism that would be disparaging to a substantial composite of Muslims whether or not they embrace

³⁸ See Exhibit 3(a) pp. 10, 12 attached to applicants' July 26, 2010 Response to Office Action.

³⁹ See Exhibit 2 pp. 1-2 and Exhibit 3 p. 68 to applicants' July 26, 2010 Response to Office Action.

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Islamization. It is certainly clear that an association with terrorism is disparaging to Muslims who are not adherents of violent or terrorist activities.

The anti-Muslim social climate in the U.S. reflected in the articles excerpted below amplifies the disparaging impact of applicants' mark:

Americans remain conflicted about the Muslim faith . . .

[an] ABC/Washington Post poll found 49 percent with an unfavorable view of Islam . . .⁴⁰

A Time magazine poll . . . found that 43 percent of Americans hold unfavorable views of Muslims . . . Although the overall level of anti-Muslim sentiment hasn't shifted much . . . the change in tone has been striking . . . The reasons are myriad: rising fears of homegrown terrorism after the Fort Hood shootings and the attempted Times Square bombing. . . . Residents worry that 'the Muslims coming in here will keep growing in numbers and override our system of law and impose sharia law . . .⁴¹

Still other Muslims, citing what they say is increasing anti-Muslim sentiment in America, have come to view such efforts as useless.⁴²

. . . what many observers see as a growing anti-Islam fervor . . .⁴³

. . . a recent uptick in anti-Muslim acts nationally . . .⁴⁴

⁴⁰ See article entitled: "Anti-Muslim tensions roil the melting pot" published in *The Dallas Morning News* on September 11, 2010, attached to January 19, 2011 Office Action.

⁴¹ See article entitled: "Nowhere near Ground Zero, but no more welcome" published in *The Washington Post Suburban Edition* on August 23, 2010, attached to January 19, 2011 Office Action.

⁴² See article entitled: "Muslims work to retake 'jihad' from extremists" published in the *Times-Picayune* (New Orleans) on May 24, 2008, attached to April 28, 2010 Office Action.

⁴³ See article entitled: "Mosque furor, Quran burning: Anti-Islamic fervor mobilizes US Muslims" published in *The Christian Science Monitor* on September 10, 2010 attached to January 19, 2011 Office Action.

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The Bay Area, known for its multicultural diversity and acceptance, is not immune to the anti-Muslim sentiment that has infected the country. . . . Life is mostly normal for Burrell, who feels both devoutly Muslim and quintessentially Californian. But anti-Muslim sentiment, whether it's in the news or on the sidewalk, can take a toll on her and her Muslim friends, she said.⁴⁵

In view of the foregoing, we find that under either meaning of applicants' mark, when the mark is used in connection with the services identified in the application, namely providing information for understanding and preventing terrorism, the mark is disparaging to Muslims in the United States and is therefore not registrable.

3. First Amendment

Applicants' argument that the USPTO's refusal to register their mark violates their free speech rights under the First Amendment to the U.S. Constitution is unavailing. Regardless of whether applicants' mark is protected free speech, our decision does not impact their rights under the First Amendment. The refusal to register applicants' mark does not impede their right to use the mark. As such, it imposes no restraint or limit on their ability to communicate ideas or express points of view, and does not suppress any tangible form of expression. *See In re Boulevard Entertainment Inc.*, 334 F.3d 1336, 1343, 67 USPQ2d 1475, 1480 (Fed. Cir. 2003); *In re Mavety Media Group Ltd.*, 33 F. 3d 1367, 1374, 31 USPQ2d

⁴⁴ See article entitled: "Center an anti-Islamic target" published in the *Los Angeles Times Home Edition* on January 3, 2010, attached to January 19, 2011 Office Action.

⁴⁵ See article entitled: "For an American Muslim, stares, misunderstandings come with the territory" published in the *San Jose Mercury News* on September 14, 2010, attached to January 19, 2011 Office Action.

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1923, 1928-29 (Fed. Cir. 1994); and *In re McGinley*, 660 F.2d 481, 484, 211 USPQ 668, 672 (CCPA 1981). Therefore, applicants' rights are not abridged by the refusal to register their mark.

Decision: The refusal to register applicants' mark under Section 2(a) of the Trademark Act is affirmed.