

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.**

REPLY BRIEF FOR APPELLANTS

DAVID YERUSHALMI, ESQ.
AMERICAN FREEDOM LAW CENTER
1901 PENNSYLVANIA AVENUE NW
SUITE 201
WASHINGTON, D.C. 20006
(646) 262-0500
Attorneys for Applicants-Appellants

December 19, 2013

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ARGUMENT

I. The Issue Before the Court: A Respect for the Factual Record.

While there are certainly legal issues in dispute in this appeal requiring this Court's *de novo* review (as discussed below), these legal issues all point to what can best be described as the USPTO's cavalier disdain for the factual record. Stated in broad terms as a query, the issue might appropriately be framed as follows: Will the USPTO¹ be held to a standard of care that requires it to apply the actual facts of the record in a reasonable fashion in its legal analysis as to whether there is "substantial evidence" to support its initial finding of disparagement?

In this appeal, as was the case below, we find the USPTO downplaying the reality of more than one definition for the word "Islamization" and doing so because the record supplied by Appellants demonstrates that the only use of the word in public discourse patently supports Appellants' position that its mark, Stop the Islamization of America, neither disparages nor brings into disrepute law-abiding Muslims because it quite appropriately distinguishes between Islamization as a process hostile to our political system on the one hand and the law-abiding practice of Islam as an entirely protected First Amendment exercise of religious freedom on the other. This evidentiary deficiency forces the USPTO onto the

¹ As in Appellants' Opening Brief (cited referentially herein as "Appellants' Br. at ___"), the Trademark Trial and Appeal Board is referred to as the "Board" and the United States Patent and Trademark Office is referred to as the "USPTO" herein.

rather tenuous ground of asking this Court to adopt a position—in the context of a mark using a term with more than one meaning and with the only probative evidence in the record supporting Appellants’ position—that it is neither probative nor problematic that the USPTO has failed to provide a single person or entity, whether Muslim or non-Muslim, who even suggests it is disparaging or otherwise wrong to oppose Islamization. Indeed, to the contrary, the only instance the USPTO could find of Muslims addressing anything close to the mark was a letter published by British Muslims expressly supporting the goal “to see a halt” (as in “stop”) in “the rise of extremism and political Islam in Britain, which has been used to justify or demand nondemocratic practices” (precisely the definition of Islamization used by Appellants) and thus expressly joining in common cause with an organization calling itself “Stop the Islamization of Europe” and concluding with a call to “jointly work together” to stave off this common-perceived threat. (A1122-23; *see also* Appellants’ Br. at 21-25).²

² Beyond the USPTO’s evidentiary proffer of the British Muslims’ letter, Appellants introduced as evidence the official record of public testimony at a bipartisan Congressional hearing on the “Roots of Violent **Islamist** Extremist Terrorism” wherein important Muslim leaders and spokespersons, among others, made the clarion point throughout their oral and written testimony that the Islamization agenda of the Islamists is distinct and separate from Islam and law-abiding Muslims, and that the focus of the threat should be on stopping Islamists and their civilizational jihad agenda. *See, e.g.*, A484-88 (Maajid Nawaz); A493-97 (Zeyno Baran); A497-500 (Fathali M. Moghaddam); A500-02 (Maajid Nawaz); A502-04 (Zeyno Baran); A504 (Fathali M. Moghaddam); A505-06 (Maajid Nawaz); A511-12 (Zeyno Baran); A5112-13 (Maajid Nawaz); A514-15 (Zeyno

It is enough, we are told, to satisfy the USPTO's substantial evidence burden if we accept the USPTO's invitation to draw its preferred inference that Appellants are bigots who oppose all things Islamic. And the evidence to support the USPTO's inference boils down to this: (1) Appellants opposed the construction of two specific mosques specifically due to the connection between the respective mosques' leadership and Islamists with nefarious connections to the Muslim Brotherhood and notably not because these mosques or any others are related to "all things Islamic" (USPTO Br. at 18) and (2) bigots leave bigoted comments on Appellants' blog. (USPTO Br. at 18-19). What makes the USPTO's bigot-innuendo ploy all the more egregious—beyond the fact that as a government agency the USPTO is tasked with upholding the rule of law as opposed to engaging in a hyper-politicized and patronizing advocacy to protect Islam from the terror committed in the name of Islam by self-described Islamic jihadis—is the overwhelming probative evidence supporting Appellants in the record before the Court. The factual record establishes beyond dispute that the term "Islamization" is only used in public discourse to describe a political-legal process that subverts and negates the First Amendment's free speech, free exercise, and Establishment Clause protections and further results in a legally sanctioned gender-based

Baran); A528-36 (Maajid Nawad written testimony); A547-62 (Zeyno Baran written testimony); A563-74 (Fathali M. Moghaddam written testimony); A620-25 (Zeyno Baran post-hearing answers to written questions).

discrimination that would return women to a time and place no longer tolerated by American law.³ The problem with the USPTO's patronizing political advocacy, as

³ Federal courts also seem to be clear about the meaning of Islamization and the Islamists' violent agenda. See, e.g., *Makir-Marwil v. United States AG*, 681 F.3d 1227, 1230 (11th Cir. 2012) ("The [State Department's 2007] Country Report [on Sudan] notes that the ruling party 'originally came to power with a goal of Islamization, treated Islam as the state religion,' and 'restricted Christian activities.'"); *Presbyterian Church of Sudan v. Talisman Energy, Inc.*, 453 F. Supp. 2d 633, 677 (S.D.N.Y. 2006) ("Moreover, the plaintiffs acknowledge that not all Government attacks were even connected to the oil industry. According to the plaintiffs' experts, the Government's aggression in the south was also part of a long-term plan of "islamization" and "jihad."); *Boumediene v. Bush*, 553 U.S. 723, 827 (2008) ("America is at war with radical Islamists.") (Scalia, J., dissenting). Federal courts have also expressly recognized that Muslims oppose the Islamist agenda of Islamization to overthrow secular rule only to replace it with an Islamist state. See, e.g., *Bouchikhi v. Holder*, 676 F.3d 173, 175 (5th Cir. 2012) ("Bouchikhi is a native and citizen of Algeria. He is a Muslim imam. He believes in democratic government, and he disapproves of the present Algerian regime because of its failure to permit democracy. As a moderate Muslim, Bouchikhi opposes the mistreatment of non-Muslims and the use of violence to establish an Islamist state."). Moreover, the federal courts' recognition of the violence of the Islamist agenda is not new. See *In re Ross*, 140 U.S. 453, 463 (1891) ("After the rise of Islamism, and the spread of its followers over eastern Asia and other countries bordering on the Mediterranean, the exercise of this judicial authority became a matter of great concern. The intense hostility of the people of Moslem faith to all other sects, and particularly to Christians, affected all their intercourse, and all proceedings had in their tribunals. Even the rules of evidence adopted by them placed those of different faith on unequal grounds in any controversy with them. For this cause, and by reason of the barbarous and cruel punishments inflicted in those countries, and the frequent use of torture to enforce confession from parties accused, it was a matter of deep interest to Christian governments to withdraw the trial of their subjects, when charged with the commission of a public offence, from the arbitrary and despotic action of the local officials."). Among the literally hundreds of federal court cases referencing "Islamization" or "Islamism" or "Islamist," none of those cases stand for the proposition that the meaning of any of those words used by Muslims and non-Muslims carries a meaning different from that argued by Appellants herein.

is true of most such governmental efforts, is that it is itself demeaning and disparaging of the group it seeks to protect: in this case, Muslim Americans, by imposing upon them an alignment with those adherents of Islamization who seek, by definition and by common usage, to subvert secular political systems, such as our constitutional republic, and to replace them with theocracies founded upon Islamic law (*i.e.*, sharia).

Before we return to the factual record and then to the crux of the USPTO's argument, we pause here to affirm the appropriate legal analysis, the USPTO's burden, and the legal issues before this Court for review *de novo*.

II. The Legal Analysis and this Court's *De Novo* Review.

While this Court has yet to rule on the proper analysis to apply to a USPTO rejection of a mark on the grounds that the mark disparages or brings some group into disrepute, or, for that matter, on the proper standard of review for such a rejection, the parties have no material disagreements on these specific legal issues. Thus, the parties agree on the two-part analysis to test whether a mark is disparaging (USPTO Br. at 15-16) and further agree that this Court's review is *de novo* to determine if the USPTO's rejection of the mark is supported by substantial evidence. (USPTO Br. at 14-15).

The parties also agree that this Court places the "substantial evidence" bar at a height less than the "weight of the evidence" test but more than the "scintilla of

evidence” threshold and “[w]here two different, inconsistent conclusions *may reasonably be drawn from the evidence* in [the] record, an agency’s decision to favor one conclusion over the other is the epitome of a decision that must be sustained upon review for substantial evidence.” *In re Morsa*, 713 F.3d 104, 109 (Fed. Cir. 2013) (emphasis added). (See USPTO Br. at 15).

It is here, however, where the parties diverge. Specifically, the USPTO attempts to downplay the fact that “Islamization” has a specific meaning that does not mean “all things Islamic.” Rather, the specific meaning, and the only one used in public discourse and made a part of the record herein, refers to a legal-political process to convert a secular society into a theocracy by basing its political order on Islamic law and by denying the constitutional liberties at the heart of Western political order.⁴ Further, the parties disagree about the legal consequences for the

⁴ One way the USPTO downplays the second meaning of Islamization is to assert without any evidentiary basis that a definition listed as a second sense meaning is somehow a less important or less common meaning. (USPTO Br. at 10, 17-18). This is not only pure conjecture on the USPTO’s part, it is belied by the very dictionaries upon which it relies. Thus, for example, the Merriam-Webster online dictionary states explicitly that “[t]he system of separating the various senses of a word by numerals and letters is a lexical convenience. It reflects something of their semantic relationship, but it does not evaluate senses or set up a hierarchy of importance among them.” (See Merriam-Webster online “Help” page at <http://tinyurl.com/mq9kxdq>, last visited on Dec.17, 2013). The Oxford English Dictionary, said to be the most authoritative dictionary of the English language, orders its sense meanings “grouped and structured to show the chronological development of the word” not by common usage or importance. (See Oxford English Dictionary online guide “How to use the OED: Glossary” page at <http://tinyurl.com/mfv9ap4>, last visited on Dec. 17, 2013).

USPTO's and the Board's utter disregard of the mountain of relevant and probative evidence put into the record by Appellants as opposed to what can only be described as the flimsiest of innuendo evidence relied upon by the USPTO. In a word, was the USPTO's treatment of the evidence legally "reasonable"?

And notwithstanding the USPTO's argument to the contrary, Appellants do not confuse the Examining Attorney's *prima facie* burden with the USPTO's ultimate substantial burden test at issue here. (USPT Br. at 20-21; 24). Indeed, if there is confusion, or more likely, an effort to reconstruct Appellants' argument to create confusion, it is by the USPTO.

Appellants have not contested whether the Examining Attorney met its *prima facie* burden in rendering its non-final Office action ("NFOA"). Admittedly, that threshold is low. *See, e.g., In re Pacer Tech.*, 338 F.3d 1348, 1351-52 (Fed. Cir. 2003). Rather, Appellants have challenged the Examining Attorney's Final Office Action ("FOA") and the Board's ruling upholding the FOA on the following grounds:

- Appellants rebutted the Examining Attorney's *prima facie* case with overwhelming, competent evidence regarding the use and meaning of Islamization by Muslims and non-Muslims alike (Appellants' Br. at 1-2; 11-18), including:
 - dictionary references establishing a second meaning of the term

“Islamization” that supported Appellants’ position that Islamization is a legal-political process that deprives Muslims and non-Muslims alike of their constitutional liberties (A1039 & 1041);

- reams of evidence from Muslims and non-Muslims, provided in Congressional testimony, professional journals, and publications of major American Muslim organizations, all of which makes the point that Islam and Muslims are definitionally distinct from Islamization and Islamists (*i.e.*, advocates of a politicized Islam and Islamization), and that the Muslim Brotherhood operates globally and in the U.S. to spread the Islamist message as part of the Islamization process (A93-943);
 - a thorough-going survey of all law review articles mentioning Islamization, further demonstrating that its use is limited to a distinct legal-political process that would deprive Americans, Muslim and non-Muslim alike, of their constitutional liberties (A944-94); and
 - a Department of Justice press release describing criminal sentencings of defendants who “spread a militant Islamist message” in the U.S. and raised money for terrorist organizations connected with Hamas (A995-98);
- Appellants’ rebuttal evidence shifted the evidentiary burden back to the USPTO to introduce some evidence (to meet the substantial evidence test) to form a *reasonable* basis for the conclusion that the mark has the meaning of “all things

Islamic” in the marketplace, and, failing that, that the mark’s meaning in context of a legal and political movement to undermine, if not to eviscerate, constitutional liberties is disparaging to law-abiding Muslims. (Appellants’ Br. at 19-26).

- The USPTO, however, presented no new evidence other than the evidence carefully reviewed and critiqued in Appellants’ Opening Brief: (1) three articles authored by Appellants that say nothing about opposition to Islam or Muslims but rather point to Appellants’ efforts to condemn Islamist organizations tied to the Muslim Brotherhood, and by implication to the Muslim Brotherhood’s Islamization agenda, and, in one instance, an article that points to Appellants’ efforts to support women who reject the Islamist treatment of women (Appellants’ Br. at 13-16); (2) cherry-picked crude comments left by anonymous commenters at Appellants’ blog (Appellants’ Br. at 17-18); and (3) articles describing the lament by American Muslims that some people link all things Islamic and all Muslims to terror, but without any connection whatsoever to the mark or the term “Islamization.” (A11-12).

Thus, when the USPTO suggests that Appellants’ have somehow confused the evidentiary burdens imposed upon the USPTO, it is mistaken. (USPTO Br. at 21; 23-24). Put properly, while the Examining Attorney’s initial examination in an *ex parte* review of a trademark application might not require more than a primitive

online definitional hunt for meaning and the proffer of only vague evidentiary innuendo to reach a “reasonable predicate” to meet its *prima facie* burden for rendering a NFOA, when the trademark applicant, as in this case, responds to the NFOA with hundreds of pages of relevant, material, and highly probative evidence to counter this “reasonable predicate,” the applicant’s rebuttal necessarily shifts the burden back to the USPTO to justify its holding as reasonable in light of the new evidence. *See, e.g., In re Pacer Tech.*, 338 F.3d 1348, 1350 (Fed. Cir. 2003) (rebutting *prima facie* case in lack of distinctiveness case returns the burden to USPTO); *In re Becton, Dickinson & Co.*, 675 F.3d 1368, 1374 (Fed. Cir. 2012) (rebutting § 2(e)(5) *prima facie* case with “competent evidence,” which is a preponderance of evidence); *In re Gyulay*, 820 F.2d 1216, 1217 (Fed. Cir. 1987) (failing to provide any rebuttal evidence to counter § 2(e)(1) *prima facie* case).

Thus, and as set out in Appellants’ Opening Brief, the USPTO and the Board erred as a matter of law in two fundamental ways: First, the USPTO and the Board erred by summarily dismissing as “unpersuasive” the mountain of highly relevant and probative evidence demonstrating that law-abiding Muslims and non-Muslims alike understand the term “Islamization” in context of the mark as a political-legal agenda threatening our constitutional liberties and worthy of being stopped. And second, by crediting as “substantial evidence” articles and anonymous blog comments that say nothing about how the mark is used “in the context of the

marketplace as applied to the goods described in the application for registration,”⁵ the USPTO has created an evidentiary system driven by political considerations and not the factual record. We turn now to the USPTO’s failure to establish even a reasonable factual basis for its claim that there is substantial evidence of disparagement or a bringing into disrepute.⁶

III. The Record Is Devoid of Substantial Evidence to Demonstrate Disparagement.

A. The USPTO Arbitrarily and Unreasonably Discounts Appellants’ Substantial Evidence Rebutting Grounds for Rejecting the Mark.

The USPTO arbitrarily and unreasonably dismisses Appellants’ evidence, demonstrating both that the word “Islamization” has a specific non-disparaging meaning and that Muslims are neither disparaged by opposition to Islamization or brought into disrepute by a “substantial composite” of the public by virtue of the mark’s use. *See, e.g., In re Blvd. Entm’t*, 334 F.3d at 1340 (noting the “substantial composite” requirement in the context of a scandalous mark); *In re Maverty Media*

⁵ *In re Blvd. Entm’t*, 334 F.3d 1336, 1340 (Fed. Cir. 2003).

⁶ The USPTO argues, and Appellants agree, that a Section 2(a) rejection of a mark may be based upon evidence that the mark disparages some group, belief, or institutions or that the mark will bring these groups, institutions, or beliefs into disrepute. *See* 15 U.S.C. § 1052(a). From this point, the USPTO takes the view that the disparagement focus is on Muslims and all things Islamic, and the bringing-into-disrepute focus is on the non-Muslim general public. (USPTO Br. at 23). But, as discussed in the text that follows, there must be a “substantial composite” of the affected group (*i.e.*, Muslims) that will feel disparaged or a “substantial composite” of the general public (*i.e.*, non-Muslims) that will harbor disrepute of the affected group by virtue of the use of the mark.

Group Ltd., 33 F.3d 1367, 1371 (Fed. Cir. 1994) (“[E]ven if the members of this panel personally find the mark BLACK TAIL disgustingly scandalous, the legal conclusion that a trademark comprises scandalous matter must derive from the perspective of the substantial composite.”). Thus, the USPTO characterizes Appellants’ evidence as a “hodge-podge” of materials (USPTO Br. at 5), notwithstanding the logic and foundation for the evidence provided by Appellants’ response to the Examining Attorney’s NFOA. (A-77-85). The USPTO Brief then purports to list the evidence, but omits any reference to 150 pages of relevant, material, and probative testimony provided at a Congressional hearing, much of which was from highly credible Muslims, whose testimony makes clear that law-abiding Muslims and non-Muslims alike understand the process of Islamization as an Islamist agenda to subvert the Constitution, and, as such, these witnesses’ desire to work against and to resist Islamization in all its forms—whether as violent jihad or peaceful sedition. (*See generally* A475-625 and *see specifically supra* note 2). Further, the USPTO dismisses what it describes as “a 1976 paper authored by a person identified only as Dr. Jaafar Sheikh Idris,” while claiming throughout its brief that Appellants’ evidence fails to demonstrate either the meaning of the term “Islamization” or that Muslims would not suffer disparagement by its use in the marketplace. (*See specifically* USPTO Br. at 5 -6, 8). But this paper by Dr. Idris, which lays out precisely the understanding of Islamization set out by Appellants

herein, was published for widespread dissemination among and for American Muslims by the Islamic Society of North America and the Muslim Students Association, organizations that the experts who testified in the earlier referenced congressional hearing described as two of the most important of such Muslim American organizations with large Muslim membership and reach. (A896-908; *see also supra* note 2).

B. The USPTO’s Arguments Are Based on Irrelevant Evidence and Circular Reasoning.

At essence, beyond the cavalier and arbitrary dismissal of Appellants’ probative evidence, the USPTO’s argument boils down to this: (1) three types of evidence—dictionary definitions, articles by Appellants opposing two specific mosques, and anonymous blog commenters—establish the meaning of the mark in context of the marketplace as meaning that all things Islamic must be stopped (USPTO Br. at 17-24); and (2), having established to its satisfaction this meaning that “all things Islamic” must be stopped, it was but a foregone conclusion that Muslims will be disparaged. For good measure, the USPTO cites to articles that articulate the complaint and fear that law-abiding Muslims will be tarred with the terrorist label because of the global terror campaign being waged in the name of Islam and by self-proclaimed Muslim jihadis. (USPTO Br. at 25-27). But this second argument of “disparagement” (*i.e.*, connecting terrorism with Islamization and thus with all Muslims) rests entirely on the first leg, which creates a circular

feedback loop by dismissing Appellants' evidence of the actual meaning of Islamization and the fact that Muslims themselves oppose Islamization.

In other words, according to the USPTO, the mark disparages Muslims or brings them into disrepute because it uses the word "stop" and because the purpose of the mark, as set out in the application for trademark registration, is to "[p]rovid[e] information regarding understanding and preventing terrorism." (A27; USPTO Br. at 25-26). But this lament by Muslims *qua* Muslims about being linked to terrorism simply because they are Muslim is only relevant if the meaning of the mark in the marketplace is "all things Islamic." If, as the Appellants argue, and as the evidence demonstrates conclusively, the term "Islamization" is a term that only refers to Islamists and is used purposefully, and understood by all those in the marketplace, as a term to distinguish law-abiding Muslims from those who would subvert our Constitution and liberties, then the lament by Muslims about being labeled terrorists actually points to the importance of the use of the word "Islamization" to counter this generic and overly inclusive condemnation of "all things Islamic." Indeed, if Appellants are permitted to register their mark and fully promote the educational message that it is the Islamists and Islamization that foster terrorism and not Muslims *qua* Muslims, the perfectly understandable lament about the blanket labeling of all Muslims as terrorists might very well be ameliorated.

We won't repeat here what has been demonstrated in Appellants' Opening Brief, but we would note that the multiple dictionary definitions require the USPTO to do more than just point to one possible meaning. *See, e.g., In re Blvd. Entm't*, 334 F.3d at 1340 (discussing implications of more than one meaning in scandalous mark context and citing *In re Maverty Media Group Ltd.*, 33 F.3d at 1367). The USPTO, however, simply ignores the reams of Appellants' proffered evidence on the meaning of Islamization to Muslims and non-Muslims alike in the marketplace of policy professionals, political activists, and politicians,⁷ and, instead, points to articles by Appellants that cannot possibly mean what the USPTO claims they mean if language and words are to have any serious meaning. (*See* Appellants' Br. at 11-18).

Even more telling, in contrast to Appellants' substantive and probative evidence of Islamization used in a marketplace occupied by policy professionals, political activists, and politicians, the USPTO cites to cherry-picked anonymous

⁷ It is worth noting here that the case law cited in the text clearly requires a search for the meaning of the mark in the marketplace of the goods or services set out in the trademark application. The USPTO ignores this marketplace requirement, as discussed in the text that follows, by taking a tiny fraction of anonymous, hand-picked blog commenters and calling them, *sua sponte*, "consumers." But the marketplace for a mark that seeks to stop Islamization and the purpose of which is to provide information to "understand[] and prevent[] terrorism" is hardly reaching out to some small select group of anonymous "commenters" on a blog. Rather, it is reaching out to policymakers, politicians, political activists and others who might actually have an impact on "understanding" and "preventing" terrorism. The USPTO simply glides over this "marketplace" requirement without comment or analysis.

comments left at Appellants' blog and claims that these represent "consumers" of the mark in the marketplace. (USPTO Br. at 26). Beyond the critique of this argument already presented (Appellants' Br. at 17-18), the very idea that a biased and tiny selection of bigoted comments could possibly represent a "substantial composite" of the potential tens of thousands of "consumers" who might visit Appellants' blogs⁸ or read about their work is absurd on its face and *a fortiori* so when juxtaposed against the rebuttal evidence provided by Appellants. *See, e.g., In re Blvd. Entm't*, 334 F.3d at 1340 (noting the "substantial composite" requirement in the context of a scandalous mark). Indeed, if all the USPTO must do is introduce a few comments left by anonymous "trolls" (as they are called) as "evidence" of meaning to "consumers" in the marketplace, the result is what we see here: the USPTO will claim that any contrary evidence at best necessitates a weighing of the evidence by the USPTO. (USPTO Br. at 27) (going even further and dismissing out-of-hand Appellants' overwhelming evidence of the meaning and use of the mark in the marketplace and then asserting that had "appellants wanted to contest the weight that the Examining Attorney and the Board placed on the comments, they could have offered their own evidence, . . .").

Indeed, the lack of any real probative value of anonymous blog comments

⁸ Appellant Pamela Geller's blog, www.atlsshugs.com, and Appellant Robert Spencer's blog, www.jihadwatch.org, were both highlighted and linked to the website cited by the USPTO as www.sioaonline.com, which is now defunct. (USPTO Br. at 6).

has been recognized by the federal courts in the Lanham Act context. Thus, the

Third Circuit has explained:

We also note that, even were the comments more abundant, this sort of evidence will often be of only limited value. Comments left on blog posts can be very difficult to authenticate. The use of false identities in Internet forums is now a well-known tactic for attacking corporate rivals. *See, e.g.*, Brad Stone and Matt Richtel, *The Hand That Controls the Sock Puppet Could Get Slapped*, N.Y. TIMES, July 16, 2007 (“John Mackey, the chief executive of Whole Foods Market . . . used a fictional identity on the Yahoo message boards for nearly eight years to assail competition and promote his supermarket chain’s stock.”). Even if a poster is “legitimate,” doubts will often remain as to the sincerity of the comment. *See, e.g.*, *Trolling for Your Soul*, THE ECONOMIST, Mar. 31, 2011 (“‘Trolling’—posting willfully inflammatory, off-topic or simply stupid remarks—plagues blogs and other online forums.”). And, finally, even if a poster is genuine and making a comment in good faith, whether he or she would fall in to the universe of consumers whose opinions are relevant (*i.e.*, those who are or potentially might be purchasers of the products in question) often cannot be known. *See Merisant Co. v. McNeil Nutritionals, LLC*, 242 F.R.D. 315, 319 (E.D. Pa. 2007) (citing *Pittsburgh Press Club v. United States*, 579 F.2d 751, 758 (3d Cir. 1978)).

QVC Inc. v. Your Vitamins Inc., 439 Fed. Appx. 165, 168-69 (3d Cir. 2011) (unpublished opinion cited here pursuant to Rule 32.1 of the Federal Rules of Appellate Procedure and Federal Circuit Rules). So it is that if the USPTO is permitted to credit such patently arbitrary and anonymous comments as evidence to support a reasonable conclusion about a substantial composite of the consumers in the appropriate marketplace, and to do so when juxtaposed against the mountain

of evidence put into the record by Appellants that contradicts these bigoted comments, there is little value in any appeal from a USPTO decision.

But what is most problematic about the USPTO's "evidence" is that the only actual evidence in the record of Muslims and non-Muslims speaking about Islamization and what it means to them demonstrates without any contradiction that law-abiding Muslims and non-Muslims understand the distinction between Islam and Muslims on the one hand and Islamization and Islamists on the other. Moreover, when Muslims and non-Muslims alike call for the designation of Islamic terrorists as Islamists engaged in an Islamization that contradicts their faith, it is hard to take seriously a claim that a call to stop Islamization would denigrate law-abiding Muslims or their faith.

Finally, we deal with two arguments raised by the USPTO Brief that should not actually require response, or at least much of one. First, the USPTO argues that because "Islamization" is linguistically and, at least by virtue of the Islamist claim, factually connected to Islam, any call to "stop" Islamization is insulting to Muslims and Islam. (USPTO Br. at 22). But this argument makes no sense because it ignores the meaning and logic of the word Islamization. Of course Islamists claim a relationship to Islam—that is precisely why law-abiding Muslims seek to expose and oppose Islamists and to label their agenda Islamization and worthy of Muslim's antipathy. Further, this is no different than if Appellants

sought to “stop the American Nazi Party.” Could it be said that Appellants disparage “Americans” by doing so? Hardly, because it is clear in context that the Nazis targeted are a tiny subset of Americans, and that the word “American” simply provides the geographical context of the Nazi Party at issue. Again, what is most telling about this argument by the USPTO is the fact that Muslims themselves utilize the terms Islamization and Islamist to distinguish the bad elements who would claim the mantle of Islam from the good elements.

The second argument we treat here is an argument hard to take seriously at any level. The USPTO concludes its brief by asserting that a Section 2(a) disparagement rejection applies equally to protect the law abiding as well as the seditious. (USPTO Br. at 28). The statute requires, at least according to the USPTO’s newest argument, a rigid moral equivalency. The most basic problem with this argument, and there are plenty, is that it is empirically false. Thus, there are trademarks that oppose and seek to stop those who carry out abductions, such as the Somali pirates or parents who believe they are acting justly in abducting their children in violation of court orders (“Stop Abductions”); or those who might advocate for—what some people call cruelty to animals—animal sacrifice for religious observance or just harmless sport (“Society for the Prevention of Cruelty to Animals”); as well as those parents who firmly believe they are acting responsibly and in the best interests of their children by “not withholding the rod”

(“American Society for the Prevention of Cruelty to Children”). There are even trademarks that suggest judges and others involved in the judicial system are terrorists (“Judicial Terrorism”). Would the USPTO also take this view of a mark appearing as “Stop Human Trafficking” because it insulted those who treat women and young children as chattel? Moreover, even assuming this argument has legs, the fact remains that no Islamist would be disparaged by the fact that law-abiding and patriotic Americans oppose the Islamization agenda, and there is simply no evidence in the record to suggest otherwise. Indeed, based upon the factual record as a whole and specifically as previously noted herein, Islamists fully expect Western political orders to resist any move to replace the Constitution with Islamic law. That is precisely why the Muslim Brotherhood Islamists inform us, through the Brotherhood’s motto, “Allah is our objective, the Prophet is our leader, the Qur’an is our law, jihad is our way, dying in the way of Allah is our highest hope.” (A461).

CONCLUSION

Based upon all of the foregoing and the record herein, 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

/s/David Yerushalmi

David Yerushalmi, Esq. (DC Bar No. 978179)

1901 Pennsylvania Avenue NW, Suite 201

Washington, D.C. 20006

dyerushalmi@americanfreedomlawcenter.org

david.yerushalmi@verizon.net

Tel: (646) 262-0500; Fax: (801) 760-3901

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 5,329 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.

CERTIFICATE OF SERVICE

I hereby certify that on December 19, 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.