No. _____

In the Supreme Court of the United States

THOMAS D. FOSTER, APC, *Petitioner*,

v.

COKE MORGAN STEWART, Acting Under Secretary of Commerce for Intellectual Property and Acting Director, U.S. Patent and Trademark Office, *Respondent*.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Federal Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the Federal Circuit improperly considered government developments that postdate a trademark applicant's filing to support a refusal under Section 2(a) of the Lanham Act, despite the applicant's statutory right to constructive use based on the application's filing date.

2. Whether the Federal Circuit improperly deferred to the USPTO's statutory interpretation of Section 2(a) after this Court's ruling in *Loper Bright Enterprises v. Raimondo*, which reaffirmed the judiciary's duty to independently interpret the law under the Administrative Procedure Act.

3. Whether Section 2(a)'s prohibition against marks that "falsely suggest a connection" is unconstitutionally vague as applied to an intent-to-use trademark application which the USPTO claims references a fictionalized entity that did not exist at the time of filing.

PARTIES TO PROCEEDING

Petitioner, THOMAS D. FOSTER, APC, is a California professional corporation and was the applicant of a trademark application to the United States Patent and Trademark Office, US SPACE FORCE (Serial No. 87981611). Petitioner was the Appellant before the United States Patent and Trademark Office, Trademark Trial and Appeal Board, and was the Appellant before the United States Court of Appeals for the Federal Circuit. Petitioner is not a publicly owned corporation or subsidiary or affiliate of a publicly owned corporation.

Respondent is Coke Morgan Stewart, Acting Director of the United States Patent and Trademark Office. Respondent is not a publicly owned corporation or subsidiary or affiliate of a publicly owned corporation.

CORPORATE DISCLOSURE STATEMENT

There is no parent or publicly held company owning 10% or more of the stock of Petitioner, Thomas D. Foster, APC.

RELATED PROCEEDINGS

United States Court of Appeals (Fed. Cir.):
In re Thomas D. Foster, No. 23-1527 (May 7, 2025)

TABLE OF CONTENTS

TABLE OF AUTHORITIES

No. _____

In the Supreme Court of the United States

In re THOMAS D. FOSTER, APC, Petitioner

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PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully petitions this Court for a Writ of Certiorari to review the judgment in this case by the United States Court of Appeals for the Federal Circuit.

OPINIONS BELOW

The precedential opinion of the United States Court of Appeals for the Federal Circuit in *In re Thomas D. Foster, APC,* Case No. 23-1527 (App. 1a) was entered on May 7, 2025.

The Board's denial of Petitioner's request for reconsideration (App. 12a) was entered on December 12, 2022.

The decision of the Trademark Trial and Appeal Board sustaining the Section 2(a) refusal (App. 25a) was entered on September 19, 2022.

BASIS FOR JURISDICTION

This Court has jurisdiction of this petition to review the judgment of United States Court of Appeals for the Federal Circuit pursuant to 28 U.S.C. § 1254(1). The Federal Circuit entered judgment on May 7, 2025.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. Const. amend. I (App. 141a)

U.S. Const. amend. V (App. 142a)

15 U.S.C. § 1052(a) (App. 143a)

15 U.S.C. § 1057(c) (App. 144a)

5 U.S.C. § 706 (App. 145a)

STATEMENT OF THE CASE

Petitioner, Thomas D. Foster, APC, is the applicant for federal registration of the trademark US SPACE FORCE, filed on March 19, 2018, under Section 1(b) of the Lanham Act. The application, Serial No. 87981611, seeks protection for a variety of goods including collectible coins, jewelry and beach bags in International Classes 006, 012, 014, 016, 018, 020, 021, 024, 028 and 034.

The United States Patent and Trademark Office ("USPTO") issued multiple Office Actions refusing registration under 15 U.S.C. § 1052(a), asserting that the applied-for mark falsely suggested a connection with various entities and individuals. The grounds for refusal evolved over time. In early Office Actions, the USPTO claimed the mark falsely suggested a connection with former President Donald J. Trump and the U.S. Government. In subsequent actions, the USPTO expanded the refusal to include an alleged false suggestion of a connection with the newly created United States Space Force, a military branch established after the application's filing date.

Petitioner responded to each refusal, asserting that there was no false suggestion of a connection and that the application predated the establishment of the new military branch. In addition, Petitioner raised constitutional objections to the statutory basis for refusal under 15 U.S.C. § 1052(a), contending that the provision, as applied, violated the First and Fifth Amendments of the United States Constitution. These arguments were first raised before the Trademark

Trial and Appeal Board ("TTAB") and later expanded in a corrected opening brief submitted to the U.S. Court of Appeals for the Federal Circuit.

The TTAB issued a final decision on September 19, 2022, sustaining the Section 2(a) refusal. Petitioner filed a timely request for reconsideration, which the TTAB denied on December 12, 2022.

Petitioner then sought judicial review in the Court of Appeals for the Federal Circuit. The Department of Justice, representing the USPTO, filed a responsive brief and presented oral argument. While the appeal was pending, and after both parties' briefs were filed, Petitioner submitted a Rule 28(j) letter to the Federal Circuit on July 3, 2024, notifying the court of this Court's recent decision in *Loper Bright Enterprises v. Raimondo*, 603 U.S. 369 (2024), which reaffirmed the judiciary's duty to independently interpret statutes without deference to administrative agencies.

On May 7, 2025, the Federal Circuit issued a decision affirming the refusal to register the mark under Section 2(a), without addressing any of the constitutional issues raised by Petitioner.

This petition follows.

SUMMARY OF ARGUMENT

The decision below permits the government to deny trademark registration based on post hoc determinations of association with political figures and institutions, despite Petitioner's earlier filing date and no actual connection. This undermines the constitutional limits on viewpoint discrimination and grants impermissible deference to administrative interpretations in violation of *Loper Bright*. The refusal also creates tension within the Lanham Act itself, specifically between § 1052(a) and § 1057(c). Review is necessary to protect constitutional rights and clarify the bounds of trademark law.

PETITIONER'S GOOD FAITH AND EXPRESSIVE ORIGINS OF THE MARK

Petitioner's application for US SPACE FORCE was not the product of commercial opportunism or an attempt to misappropriate military prestige. Rather, it was inspired by a speech in which President Trump speculated, perhaps jokingly, about creating a new military branch. That fleeting comment rekindled Petitioner's childhood interest in space exploration and science fiction and catalyzed the creative development of an entertainment concept built around a fictional law enforcement agency in space—similar in spirit to Sean Connery's 1981 classic sci-fi film Outland, among other pop culture references.

Before filing, Petitioner conducted a search of the USPTO registry, determined that similar marks had been registered and were no longer active, and carefully selected the mark US SPACE FORCE to evoke patriotic and futuristic themes within a fictional context. The idea was—and remains—to tell stories, not to impersonate the government. The intended use, supported by publicly available evidence, includes merchandising tied to creative works and artistic expression. The application thus fits comfortably within the category of expressive marks that the Court has repeatedly protected from unconstitutional viewpoint-based exclusions under the Lanham Act.

REASONS WHY CERTIORARI SHOULD BE GRANTED

I. The Decision Below Reflects a Broader Pattern of Constitutional Avoidance by the Federal Circuit

The Federal Circuit has developed a troubling pattern of sidestepping constitutional challenges to Section 2(a) of the Lanham Act—particularly its "false suggestion of a connection" provision. Rather than confronting First or Fifth Amendment claims directly, the court routinely resolves such cases on narrower statutory or evidentiary grounds. Recently in *In re Elster*, 26 F.4th 1328 (Fed. Cir. 2022), where a First Amendment challenge to the "false suggestion of a connection" provision was clearly raised, the panel declined to address it, perpetuating a growing jurisprudential void in an area that implicates core expressive freedoms.

This case exemplifies that pattern. Petitioner raised a constitutional challenge to Section 2(a) early in the proceedings before the Trademark Trial and Appeal Board and expanded on those arguments in detail before the Federal Circuit. Yet the appellate court issued an opinion that wholly ignored the constitutional question, without explanation. Such disregard for a properly preserved constitutional issue is not merely an oversight—it is a failure of judicial duty.

Federal courts may not simply sidestep constitutional questions that are squarely presented and necessary to the resolution of a case. The Federal Circuit's silence in the face of Petitioner's constitutional claims undermines the integrity of its decision and invites this Court's review. If left uncorrected, this ongoing pattern of constitutional avoidance will continue to deny meaningful review to litigants whose speech and property rights are directly at stake under the Lanham Act.

II. The Decision Undermines the Statutory Right to a Constructive Use Date.

Petitioner filed for the mark US SPACE FORCE on March 19, 2018—six days after President Trump's casual public remark referencing a new military branch, but long before any formal governmental action or legislation occurred. The USPTO rejected the application not based on facts in existence at the time of filing, but rather on subsequent political developments, including the establishment of the U.S. Space Force in December 2019.

This backward-looking rationale contravenes the statutory right to a constructive use date under 15 U.S.C. § 1057(c), which fixes priority as of the date of application filing. By allowing facts that arose months or years later to retroactively defeat registrability, the USPTO and the Federal Circuit destabilized the integrity of the intent-to-use system and undermined predictability in trademark prosecution.

The Federal Circuit Ignored This Court's Binding Precedent in *Loper Bright*.

The Federal Circuit's decision also conflicts with this Court's directive in *Loper Bright*, which reaffirmed that courts—not agencies—must independently interpret federal statutes. Rather than conducting a de novo analysis of Section 2(a), the Federal Circuit deferred to the TTAB's interpretation of ambiguous statutory language, effectively abdicating its judicial responsibility under the Administrative Procedure Act, 5 U.S.C. § 706.

This is precisely the kind of judicial deference that Loper Bright rejected. The Federal Circuit's reliance on the TTAB's construction of "falsely suggests a connection" undermines judicial independence and illustrates the need for this Court to reaffirm that statutory interpretation is a judicial function.

III. Section 2(a)'s "False Suggestion" Clause Is Unconstitutionally Vague as Applied.

The phrase "falsely suggests a connection" is unconstitutionally vague in this context. The USPTO's refusal was based on evolving interpretations of public perception, political rhetoric, and the formation of government entities—factors that are inherently speculative and lack clear standards.

Moreover, there has been an unstated but consistent understanding in decisions applying Section 2(a) that fictional characters and entities do not fall within the scope of a "false suggestion of a connection" refusal—presumably because fictional entities lack a cognizable right in their fictional reputations.

Such vagueness allows the government to deny registration based on imprecise or post hoc judgments, in violation of the First and Fifth Amendments. Section 2(a) must be construed narrowly to avoid infringing on protected expression. Properly applied, it should prohibit registration only when a mark falsely implies an authorized connection with one specific institution or individual at the time of the filing of the application.

Here, President Trump's remarks did not transform "US SPACE FORCE" into a badge of origin, nor did they signal to the public that the phrase identified goods or services connected to the government. To equate a passing political remark with a source-identifier is to rewrite "used" as "mentioned"—a distortion of trademark law that warrants this Court's correction.

This case presents issues of national importance for brand owners, startups, and creative professionals who depend on trademark protection to attract investment, build public recognition, and bring new ideas to market. The constitutional and statutory questions raised here—particularly the government's unbounded discretion to deny trademark registration based on evolving political narratives—threaten to chill innovation and suppress lawful expression. Without this Court's intervention, the Federal Circuit's decision will embolden viewpoint-based discrimination and post hoc censorship of commercial identity.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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July 2025
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