Insights: Alerts

Vidal v. Elster: The Supreme Court Affirms the Constitutionality of Section 2(c) of the Lanham Act

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In *Vidal v. Elster*,[1] the Supreme Court addressed the constitutionality of Section 2(c) of the Lanham Act, which prohibits the registration as a trademark or service mark of any "name, portrait, or signature identifying a particular living individual except by his written consent."[2] It did so in the context of the U.S. Patent and Trademark Office's refusal to register a mark containing a satirical reference to former President Donald Trump, which a fractured Court held did not violate the applicant's right to free speech.[3] In reaching that conclusion, the Court did not invoke its usual test for evaluating the constitutionality of content-discriminatory (but not viewpoint-discriminatory) restrictions on speech, namely, that found in *Central Hudson Gas & Electric Corp. v. Public Service Commission*.[4] Instead, it applied a historical analysis potentially signaling the end of *Central Hudson* inside and outside the trademark registration context. With respect to that context, the Court took pains to limit its holding to Section 2(c) and disclaimed any intent to articulate a framework for evaluating the constitutionality of other grounds for unregistrability. Nevertheless, its methodology arguably can support challenges to grounds lacking the lengthy historical pedigree attributed to Section 2(c) by the Court. Those include grounds added to the Act in the relatively recent past, as well as extrastatutory ones—such as an applied-for mark's failure to function as a mark—recognized even more recently in the case law.

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