No. 2023-1527

IN THE UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

In re: THOMAS D. FOSTER, APC,

Appellant.

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

BRIEF FOR APPELLEE

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STATEMENT OF RELATED CASES

Appellee, the Director of the U.S. Patent and Trademark Office, is not aware of any other appeal from the Trademark Trial and Appeal Board in connection with this trademark application that has previously been before this or any other court. The Director is also unaware of any related cases within the meaning of Federal Circuit Rule 47.5(b) pending in this or any other court that will directly affect or be directly affected by this Court's decision in the pending appeal.

STATEMENT OF JURISDICTION

The U.S. Patent and Trademark Office (USPTO) refused to register applicant Thomas D. Foster APC's proposed trademark pursuant to 15 U.S.C. § 1052(a). The Trademark Trial and Appeal Board affirmed that decision on September 19, 2022, Appx3-22, and denied applicant's request for reconsideration on December 12, 2022, Appx23-33. Applicant filed a timely notice of appeal on February 13, 2023. Appx35-37; *see* 15 U.S.C. § 1071(a); 37 C.F.R. § 2.145(d) (providing 63-day time limit). This Court has appellate jurisdiction under 28 U.S.C. § 1295(a)(4)(B).

STATEMENT OF THE ISSUES

After hearing President Trump's announcement of the idea to form a new branch of the military called the U.S. Space Force, applicant sought to register the trademark US SPACE FORCE for intended use on various goods. The examining attorney refused registration on the ground that the proposed mark "may . . . falsely suggest a connection with" the U.S. government's military forces. 15 U.S.C. § 1052(a). The Trademark Trial and Appeal Board upheld that determination, particularly given "the evidence of [the President's] public announcement, which received prompt national attention, as well previous U.S. Government efforts to create a branch within the U.S. Armed Forces to handle space operations." Appx32. The questions presented are:

1. Whether substantial evidence supports the Board's decision that US SPACE FORCE may falsely suggest a connection with the U.S. government's military forces.

2. Whether the Board correctly rejected applicant's various constitutional challenges to the false suggestion provision.

STATEMENT OF THE CASE

A. Statutory Background

An applicant acting in "good faith" with "a bona fide intention . . . to use a trademark in commerce" may file a trademark application. 15 U.S.C. § 1051(b)(1). Although registration may not issue until the applicant uses the mark in commerce, *see id.* § 1051(b)(3), the trademark examining attorney makes an initial determination whether the intent-to-use application meets the requirements of § 1051(b) and whether the mark is registrable under § 1052. *See* USPTO, *Trademark Manual of Examining Procedure* § 1102.01 (July 2022) (TMEP); *see also* 3 J. Thomas McCarthy, *McCarthy on Trademarks and Unfair Competition* § 19:13 (5th ed. 2023). Under § 1052, certain types of marks may not be federally registered, including those that are deceptive and those that are likely to cause confusion with existing marks. *See* 15 U.S.C. § 1052(a), (d).

This case concerns the prohibition on the registration of marks consisting of or comprising "matter which may . . . falsely suggest a connection with persons, living or dead, institutions, beliefs, or national symbols." 15 U.S.C. § 1052(a). The false suggestion provision "protect[s] persons and institutions from exploitation of their persona." *Piano Factory Grp., Inc. v. Schiedmayer Celesta GmbH*, 11 F.4th 1363, 1369 n.3 (Fed. Cir. 2021) (quotation marks omitted). There is no dispute in this case that the

U.S. government and branches of the military qualify as "persons" or "institutions" within the meaning of this provision. *See* 15 U.S.C. § 1127 (defining "person" to include "the United States" and "any agency or instrumentality thereof").

B. Factual Background

The U.S. military has long been involved in operations involving space. *See* Appx804-806. Space has served as "a domain of some of [the military's] most important assets," with a particular focus on "[g]lobal reconnaissance, global weather, global positioning, missile warning, and communications." Appx696. The concept of establishing a force dedicated to space has been considered since as early as 2001, when a commission led by Donald Rumsfeld recommended the creation of a space corps within the Department of the Air Force in the short term and a separate military branch in the long term. Appx806 (citing *Report of the Commission to Assess United States National Security Space Management and Organization* (2001), https://perma.cc/K3PH-LSA3).

Similar proposals were floated in the mid- to late 2010s. In 2017, the version of the National Defense Authorization Act for Fiscal Year 2018 that passed in the House of Representatives directed the Secretary of Defense to set up a space corps as part of the Department of the Air Force, *see* H.R. 2810, 115th Cong. § 1601 (1st Sess. 2017), but the enacted version omitted these provisions. *See* Appx29-30 (citing Appx806). In January 2018, a retired U.S. Air Force lieutenant colonel published "A treatise on the formation of a US Space Force" recommending a new military force to

handle space operations. Appx696-703. These proposals to create a space-focused military organization did not gain traction until they were backed by the then-Commander in Chief of the Armed Forces starting in March 2018.

On March 13, 2018, President Trump announced the idea of forming the U.S. Space Force while speaking to an audience of Marines at a Marines Corp air station in California. *See* Appx234. In his remarks, he described a new national military strategy "recogniz[ing] that space is a war-fighting domain, just like the land, air, and sea." Appx283. Emphasizing that "we're doing a tremendous amount of work in space," the President conceived of creating another military service and "call[ing] it the Space Force." Appx283. He explained that "[w]e have the army, the navy," "[w]e have the Air Force[,] [w]e'll have the Space Force." Appx283. Throughout his speech, the President repeatedly used the phrase "Space Force" to refer to this new branch of the military. *See* Appx262-263.

Immediately afterward, major news outlets reported on President Trump's proposal to launch the Space Force. *The Atlantic* published an online article titled "What Does Trump Mean By 'Space Force'?" on March 13 discussing the President's comments on "a potential new military branch." Appx234-235. On March 14, *Newsweek* printed his statements advocating for "a U.S. Space Force." Appx284. On *CNBC*, a March 14 article titled "What Trump's 'Space Force' might look like – and when it would be ready" similarly documented the President's "idea for a theoretical new branch dubbed the 'Space Force.'" Appx288-289. Other news sites and blog

posts also publicized the President's proposed formation of the U.S. Space Force. *See* Appx262 (explaining that President Trump "spoke to military personnel" and "start[ed] talking about a new 'Space Force'"); Appx564 (explaining that President Trump "endorsed the idea of a Space Force" as a "new branch of the US armed forces").

In June 2018, President Trump issued an Executive Order directing "the Pentagon to immediately establish a national 'space force' that would become the sixth branch of the armed forces." Appx77. The government released further details in August 2018. Appx200. In February 2019, the Department of Defense submitted a formal legislative proposal to Congress to create the U.S. Space Force. Appx192. The proposal outlined the organizational structure, estimated timeline and cost, and operational goals of the new branch. Appx189-191. The U.S. Space Force was established as part of the 2020 National Defense Authorization Act, which President Trump signed into law in December 2019. *See* National Defense Authorization Act for Fiscal Year 2020, Pub. L. No. 116-92, § 952, 133 Stat. 1198, 1561-63 (2019) (codified at 10 U.S.C. § 9081).

Today the U.S. Space Force is part of the U.S. Armed Forces. This newest military branch is headed by the Chief of Space Operations, and its headquarters are located in the Pentagon, along with the headquarters of the U.S. Army, Navy, Marine Corps, and Air Force. Appx1090. It had a budget of more than $15 billion in 2021. Appx930. And it is charged with the mission of "conduct[ing] space operations" and

"protect[ing] the interests of the United States in space," 10 U.S.C. § 9081(c)(2)-(3), including by "developing new technology" and ensuring that satellites remain "safe and operational," Appx916.

C. Administrative Proceedings

Applicant is an intellectual property law firm that sought to register the trademark US SPACE FORCE for various goods, ranging from "[l]icense plate frames" to "[l]apel pins" to "[p]icture frames." Appx39-43. Applicant claims (Br. 1) that it decided to pursue this registration after "hear[ing] the speech given by President Donald Trump at the Miramar Marine Corps Air Station on March 13, 2018." Applicant submitted its intent-to-use application six days later, on March 19, 2018. Appx47.

Throughout the examination process, the examining attorney maintained that § 1052(a) barred registration of applicant's proposed mark because it may falsely suggest a connection with the U.S. government's military forces. Appx56-57; Appx176-177; Appx409-412; Appx691-693; Appx909-910; Appx1071-1073; Appx1304-1305. The examining attorney noted that "President Trump proposed the formation of a Space Force on March 13, 2018," before the applicant's intent-to-use application was filed. Appx412. Based on the evidence showing "the frequency of media attention to [President] Trump's Space Force or the U.S. Space Force," the examining attorney concluded that "the proposed mark would most likely be associated with the President and the U.S. Government." Appx411.

On appeal, the Trademark Trial and Appeal Board affirmed the examining attorney's refusal to register. Appx5. As the Board explained, a false suggestion of a connection under § 1052(a) exists when (1) the proposed mark is the same as, or a close approximation of, a name or identity previously used by another person; (2) the mark would be recognized as pointing uniquely and unmistakably to the other person; (3) the other person is not connected with the activities performed by the party seeking to register the mark; and (4) the fame or reputation of the other person is such that, when the mark is used with the applicant's goods or services, consumers will presume a connection with the other person. Appx6-7 (citing *University of Notre Dame Du Lac v. J.C. Gourmet Food Imps. Co.*, 703 F.2d 1372 (Fed. Cir. 1983)). The Board found that each of these elements was met here.

First, the Board described that the proposed mark, US SPACE FORCE, is concededly "identical" to the name of "the U.S. Space Force branch of the U.S. Armed Forces." Appx8. And the Board rejected applicant's argument that he was entitled to registration because the U.S. Space Force was not "officially created or in existence at the time of [a]pplicant's filing date." Appx8-10. The Board explained that, unlike in circumstances where parties dispute which of them was the first to use a term commercially, in this context "prior use may be found when one's right to control the use of its identity is violated, even if the name claimed to be appropriated was never commercially exploited as a trademark or in a manner analogous to trademark use." Appx9 (quotation marks omitted). The Board thus concluded that

the "intended mark is the same as the name as that already being used by the U.S. Space Force, a branch of the U.S. Armed Forces." Appx10.

Second, the Board found that "the record establishes that [a]pplicant's proposed mark, US SPACE FORCE, will be understood as pointing uniquely and unmistakably to the branch of America's military 'U.S. Space Force.'" Appx19. The Board highlighted evidence in the record demonstrating that the new military branch had "received considerable attention" and "been prominently featured in major news publications" since "it was first announced in 2018." Appx10. The Board also discussed the significance of "the prefix 'US' (or U.S.) and the fact that the proposed mark is US SPACE FORCE, not simply 'Space Force.'" Appx17. When a term like army, navy, air force, or space force "is prefaced with U.S., it helps point uniquely and unmistakably to a specific military branch within the U.S. Armed Forces." Appx18.

In reaching this conclusion, the Board also addressed the evidence that applicant had submitted during examination. For example, the Board explained that a 2019 Netflix series called "Space Force," which was a parody directed at the U.S. military, underscored "the U.S. Space Force's renown and further reinforce[d] a direct association of the term U.S. SPACE FORCE with the actual branch of the military." Appx14. By contrast, a line of toys based on the "Starcom: the U.S. Space Force" animated television show that aired for one season in 1987 "would be overshadowed by the prominence of the U.S. Government military branch." Appx15 (quotation marks omitted). Further, the Board determined that it lacked sufficient information

to assess the methodology of a 2021 Google survey that applicant purports to have conducted. *See* Appx16. The Board found that "the results fail to support" applicant in any event because they suggest that "nearly two-thirds of the responses" associated the term US SPACE FORCE with the U.S. government. Appx17.

Third, the Board noted the lack of evidence or argument that applicant "has any connection or affiliation with the U.S. Space Force." Appx20.

Fourth, the Board pointed to widespread publicity surrounding the U.S. Space Force. The "U.S. Space Force's fame and reputation" were exemplified by the "widespread media attention" to President Trump's March 13, 2018 announcement, the continued coverage by "various major national news sites," and the multi-season run of "the Netflix show that parodies the military branch." Appx20. On this record, the Board thus concluded that "the public would mistakenly believe that [a]pplicant has a connection with the U.S. Space Force should US SPACE FORCE be used by [a]pplicant on the goods identified in the application." Appx20.

The Board also rejected applicant's "cursory argument" that the false suggestion provision is unconstitutional, noting that "Congress'[s] authority to pass laws regarding trademarks emanates from the Commerce Clause" and that the false suggestion provision "directly furthers the goal of prevention of consumer deception in source-identifiers." Appx20-22 & n.46 (quotation marks omitted).

The Board denied applicant's request for reconsideration. Appx33. The Board clarified that applicant was "not the prior user" even if the analysis were limited to the

facts predating "[a]pplicant's filing date of March 19, 2018." Appx29. Citing multiple online news articles, Appx29 nn.13-14, the Board explained that President Trump's March 13, 2018 "public announcement using the term 'space force' in connection with a branch of the U.S. Armed Forces," as well as the "immediate national media coverage" of the President's remarks, preceded the filing date. Appx30-31. When considered with the 2017 congressional interest in establishing a new military organization to handle space operations, the Board concluded that "the record shows that use of the term US Space Force was already being associated with the U.S. Government's military." Appx30. For similar reasons, this evidence supported the determination that the public would recognize US SPACE FORCE "as referring unambiguously to the U.S. Government's military forces," especially because the term uses the same "naming convention" used by the other military branches. Appx32 (quotation marks omitted).

SUMMARY OF ARGUMENT

The Trademark Trial and Appeal Board's decision that applicant's proposed mark, US SPACE FORCE, may falsely suggest a connection with the U.S. government's military forces is supported by substantial evidence. Against the backdrop of prior efforts to create a U.S. military organization devoted to space, President Trump publicly endorsed the idea of establishing the U.S. Space Force. That public announcement, and the extensive national media coverage that followed, preceded applicant's filing date. Applicant fails to cast doubt on the Board's

conclusion that the U.S. Space Force name was already being associated with the U.S. military by that time.

The Board also had an ample basis to find that US SPACE FORCE points uniquely and unmistakably to the U.S. government's military forces. In addition to the evidence that President Trump's announcement regarding the creation of the U.S. Space Force garnered widespread media attention, the term US SPACE FORCE on its own mimics the naming convention of the other branches of the U.S. military. The Board also considered the evidence that applicant put forward, which often supported and in no case undermined the Board's determination. The Board correctly determined that refusal to register applicant's proposed mark was warranted given the risk that the U.S. government would be falsely perceived as the source or sponsor of applicant's goods.

Applicant's various constitutional challenges to the false suggestion provision lack merit. The Board's decision should be affirmed.

ARGUMENT

I. Standard of Review

The false suggestion refusal at issue here presents factual questions about the public's perception of a mark or name in the marketplace that are reviewed for substantial evidence. *Piano Factory Grp., Inc. v. Schiedmayer Celesta GmbH*, 11 F.4th 1363, 1377-78 (Fed. Cir. 2021). The Board's findings in this regard must be upheld so long as the record reflects "such relevant evidence as a reasonable mind would accept as

adequate to support a conclusion." *In re 1800Mattress.com IP, LLC*, 586 F.3d 1359, 1361 (Fed. Cir. 2009) (quotation marks omitted).

This Court reviews de novo constitutional challenges to federal statutes. *See Demko v. United States*, 216 F.3d 1049, 1052 (Fed. Cir. 2000).

II. The Mark US SPACE FORCE May Falsely Suggest a Connection with U.S. Military Forces.

The Lanham Act directs the USPTO to refuse registration of a mark that "[c]onsists of or comprises . . . matter which may . . . falsely suggest a connection with persons, living or dead, [or] institutions." 15 U.S.C. § 1052(a). There is no dispute here that the U.S. government and its agencies qualify as "persons" or "institutions." *See id.* § 1127 (defining "person" to include "the United States" and "any agency or instrumentality thereof"). In this case, the Board applied the four-factor test for a false suggestion claim derived from this Court's precedent: (1) the mark is the same as, or a close approximation of, a name or identity previously used by a government entity; (2) the mark would be recognized as pointing uniquely and unmistakably to that government entity; (3) the government entity has no connection with the activities performed by the challenged party under the mark; and (4) the government entity's fame or reputation is such that consumers would presume a connection when the applicant uses the mark in connection with its goods or services. Appx6-7; *Piano Factory*, 11 F.4th at 1377.

Substantial evidence supports the Board's conclusion that each of these elements was met here. Applicant does not challenge the legal test or the Board's findings on the third and fourth elements—namely, that there is no connection between applicant and the U.S. military, and that the government entity's fame and reputation would lead consumers to presume a connection with the U.S. government's military forces. Appx20. Applicant disputes only (Br. 14-25) the Board's findings as to the first and second elements—namely, (1) that the name U.S. Space Force was already being used by the government, and (2) that US SPACE FORCE points uniquely and unmistakably to the government's military forces.

As the underlying decision makes clear, the Board carefully considered the evidence presented to it and rendered its determination based on the record as a whole. Although applicant believes that the Board drew the wrong inferences from this record, such an argument provides no basis to set aside the Board's decision. *See, e.g.*, *Arkansas v. Oklahoma*, 503 U.S. 91, 113 (1992) (holding that reviewing courts "should not supplant the agency's findings merely by identifying alternative findings that could be supported by substantial evidence"); *Stratus Networks, Inc. v. UBTA-UBET Commc'ns Inc.*, 955 F.3d 994, 998 (Fed. Cir. 2020) (holding that reviewing courts do not reweigh the evidence on substantial evidence review).

A. Substantial Evidence Supports the Board's Determination that US SPACE FORCE Is the Same as the Designation Already Used by U.S. Military Forces.

It is uncontested that the proposed mark, US SPACE FORCE, is "identical" to the name of "the U.S. Space Force branch of the U.S. Armed Forces." Appx8. However, in addition to asking whether the mark "is the same as, or a close approximation of, the name or identity" of another person, factfinders also examine when the association with the other person arose. *Piano Factory*, 11 F.4th at 1377 (quotation marks omitted); *see* TMEP § 1203.03(b)(i) ("A refusal on this basis requires, by implication, that the person or institution with which a connection is falsely suggested must be the prior user."); 3 *McCarthy on Trademarks*, *supra*, § 19:76 (same). Here, applicant challenges only the Board's determination that at the time of his application "use of the term US Space Force was already being associated with the U.S. Government's military." Appx30.

1. The Board had an ample basis to find that applicant was not the prior user. Even assuming the universe of relevant facts is limited to those predating applicant's March 19, 2018 trademark application, substantial evidence supports the Board's determination. Appx29. On March 13, 2018, President Trump visited troops at an air station in California, where he delivered his public statements calling for the formation of the U.S. Space Force. *See* Appx234. The speech definitively attached a name to the new military service. The President declared that "we'll call it the Space Force." Appx283. He drew parallels to the other branches, noting that "[w]e have

the army, the navy," "[w]e have the Air Force[,] [w]e'll have the Space Force." Appx283. The name "Space Force" was reiterated multiple times over the course of the President's remarks. *See* Appx262-263.

These were not isolated comments at a private event that received no attention. In fact, applicant submitted (Br. 1) its intent-to-use application only after "hear[ing] the speech given by President Donald Trump at the Miramar Marine Corps Air Station on March 13, 2018." And as documented in the record, the President's remarks were covered extensively by large national media organizations in the following days. *See* Appx29. Among others, *The Atlantic*, *Newsweek*, *CNBC*, and *Vox* published online articles on March 13 and 14. *See* Appx234-237; Appx282-285; Appx288-292; Appx563-568. The headlines of those articles themselves mentioned the "Space Force" moniker and, by also mentioning the President who is Commander in Chief of the Armed Forces, connected that term to the U.S. military. For example, *The Atlantic* queried "What Does Trump Mean By 'Space Force'?," Appx234; *CNBC* described "What Trump's 'Space Force' might look like – and when it would be ready," Appx288; and *Vox* proclaimed that "'Trump thinks it would be a good idea to have a Space Force" as a sub-heading under the title "'Trump's call for a Space Force, explained," Appx563.

These articles also made clear that "Space Force" referred to U.S. military forces. In the opening paragraphs of the *Vox* article, the author explained that "[President] Trump endorsed the idea of a Space Force, which would take the Air

Force's current space missions and put them under a brand new branch of the US armed forces." Appx564. Similarly, the first key point listed in the *CNBC* article provided that "President Donald Trump floated the idea of developing another service branch, dubbed the 'space force.'" Appx288. The other news stories were to the same effect. *See, e.g.*, Appx284 (describing the President's comments about creating "a U.S. Space Force"). The Board highlighted the President's "public announcement, and immediate national media coverage thereof." Appx30-31.

The dispatch with which the U.S. Space Force was realized only confirms the salience and impact of President Trump's March 2018 announcement. *Cf. Piano Factory*, 11 F.4th at 1379 (permitting factfinders "to draw inferences" about earlier facts based on later developed evidence).[1] In June 2018, mere months after his March 2018 speech, President Trump ordered the Department of Defense to establish the U.S. Space Force. Appx77. The Department of Defense's detailed proposal was

[1] There is an arguable basis for the Board to consider facts that post-date applicant's March 19, 2018 filing date. The Board noted that applicant's intent-to-use application does not establish that applicant has yet engaged in any use of the mark. *See* Appx9-10. The constructive notice provision that applicant invoked could be read as addressing only the "right of priority" as between different trademark holders. Appx27-28 (quoting 15 U.S.C. § 1057(c)). Furthermore, this Court has indicated that the Board assesses facts related to registrability "as of the time the mark was registered," rather than the time the application was submitted. *Piano Factory*, 11 F.4th at 1379; *In re Chippendales USA, Inc.*, 622 F.3d 1346, 1354 (Fed. Cir. 2010). Regardless, the Court need not resolve this issue because the Board's decision was supported by substantial evidence even with a hard cutoff at March 19, 2018, as the Board explained in denying applicant's reconsideration request. *See* Appx29-30.

submitted to Congress early the next year, Appx192, and Congress enacted legislation to create the U.S. Space Force as a new military branch by the end of 2019, Appx9.

2. Applicant's efforts to downplay this substantial evidence are unavailing. In general, applicant objects (Br. 18) to the Board's reliance on the online articles, noting that they do not indicate "how many people read [them] prior to March 19, 2018" and asserting that they "appear to target specific audiences, such as those interested in military or defense news, space technology, rather than the general public." Nothing in the record supports the surprising assertion that *The Atlantic* and *Newsweek* target only "those interested in military or defense news" or "space technology." To the contrary, it was reasonable for the Board to conclude that members of the public were exposed to a prominent story published across a range of major news outlets, particularly given the record evidence about President Trump's fame and notoriety. *See* Appx628; Appx634-636. The subject-matter tags for the articles, moreover, were not limited to the military or aerospace sphere but instead categorized the articles as pertaining to areas of general interest, like science and politics. *See* Appx234; Appx288. Applicant does not identify any countervailing evidence on this score.

Applicant misunderstands the nature of the inquiry in asking (Br. 22) whether government actors or entities could "assert rights to the US SPACE FORCE mark at the time that the subject application was filed." The type of use necessary in this context is not formal commercial exploitation of the name as a trademark; the test focuses on the association of the name with another entity. *See* Appx9; *Piano Factory*,

11 F.4th at 1369 n.3 (describing the false suggestion provision as concerned with "identity" and "persona" (quotation marks omitted)). The relevant statutory question, after all, is whether the applicant's proposed mark consists of or comprises matter which "may . . . falsely suggest a connection" with the government. 15 U.S.C. § 1052(a). This inquiry does not require that the government have used the term at issue in any particular way. Thus, the Board reasonably determined that, even though "the U.S. Space Force did [not] come into existence until shortly after" the application was filed, the public would perceive a connection between US SPACE FORCE and the U.S. government's military forces at the time of the application. Appx30. Applicant's suggestion (Br. 22) that the relevant question is whether there was a "legally recognized branch of the U.S. military" at the time of the application cannot be correct. On that flawed view, an application for registration of the mark at issue here would not be subject to a false suggestion refusal even if the application were filed after the bill authorizing the U.S. Space Force was passed by both houses of Congress but before it was signed by the President.

Applicant is mistaken to suggest that the USPTO should have published the application for opposition to allow a more complete record on the exact goods on which applicant would use the mark. Contrary to applicant's assertion (Br. 27-28), it is not "regular practice" to defer raising refusals under § 1052(a) for intent-to-use applications. Rather, "[t]o the fullest extent possible, the examining attorney will examine an intent-to-use application for registrability under . . . 15 U.S.C. §§ 1051,

1052(a)-(e), according to the same procedures and standards that apply to any other application." TMEP § 1102.01. The examining attorney "should investigate all possible issues regarding registrability through all available sources" and "make all appropriate refusals." *Id.* Here, the examining attorney cited evidence that the "consumer merchandise" for which applicant sought registration is frequently sold or licensed for sale by government agencies. Appx693. And applicant has not meaningfully demonstrated—before the examining attorney, the Board, or this Court—that there are categories of goods as to which use of the mark US SPACE FORCE would not falsely suggest a connection with the U.S. military.

Furthermore, the Board had a sound basis to find that the government's plans to create the U.S. Space Force were sufficiently concrete as of March 19, 2018. The President's proposal came on the heels of similar bipartisan legislation that passed in one chamber of Congress the previous year. Appx29-30. The President supported a "new national strategy for space recogniz[ing] that space is a war-fighting domain," where the country was already "spending a lot" and "doing a tremendous amount of work." Appx283. And while he indicated that, in the past, he "was not really serious" about developing the U.S. Space Force, he had come to believe that it was "a great idea." Appx283. This context rebuts applicant's assertion (Br. 19-20) that the President's statements could only plausibly be understood as "part of a wish or joke made by President Trump."

Indeed, the media did not treat the President's speech as an empty gesture. *Vox* characterized the President's remarks as "endors[ing] the idea of a Space Force," Appx564, and *Newsweek* explained that the President "said he want[ed] to create an army capable of fighting wars in space in what began as a joke but he later said was 'a great idea,'" Appx282-283. Although some reporters voiced skepticism about the prospects of developing a new military branch, Appx812, others expressed the view that "it could become a reality" once the President "openly advocat[ed] for it," Appx565; *see also* Appx290 ("[E]ven though Trump didn't elaborate on what a U.S. space force would look like, experts say it's only a matter of time before a program of this magnitude begins to take shape."). The Board properly relied on "the U.S. Government's contemplation of and attempts to create an impending division or branch of the U.S. Armed Forces responsible for space." Appx31.

B. Substantial Evidence Supports the Board's Determination that US SPACE FORCE Points Uniquely and Unmistakably to U.S. Military Forces.

1. The same evidence described above also justifies the Board's finding that US SPACE FORCE would "be understood as pointing uniquely and unmistakably to" the U.S. government's military forces. Appx19. In particular, the Board "point[ed] to the evidence of [President] Trump's public announcement, which received prompt national attention, as well previous U.S. Government efforts to create a branch within the U.S. Armed Forces to handle space operations." Appx32;

see also Appx10 (reiterating that "[t]he record reveals that the U.S. Space Force has received considerable attention since it was first announced in 2018").

The Board also found that applicant's own evidence bolstered this conclusion. Notably, applicant relied on Netflix's recent production of multiple highly watched seasons of "Space Force" parodying the military branch. Featuring well-known actors such as Steve Carell and John Malkovich, Appx857-859, the series followed a decorated general "plucked from his position at the Air Force and placed atop" the new military branch, Appx1016—the United States Space Force, Appx877. The show was "dreamed up . . . when President Donald Trump announced the founding of a sixth . . . branch of the armed forces," Appx1020, and was "[c]learly designed to spoof President Trump's pet military project," Appx1016.

As the Board observed, the "target of [a] parody" must be sufficiently "well-known to the public" for the commentary and humor to be effective. Appx13; *cf. Andy Warhol Found. for the Visual Arts, Inc. v. Goldsmith*, 143 S. Ct. 1258, 1276 (2023) ("Parody . . . needs to mimic an original to make its point." (quotation marks omitted)). Thus, "the Netflix show is an indicator of the U.S. Space Force's renown and further reinforces a direct association of the term U.S. SPACE FORCE with the actual branch of the military." Appx14; *see also* Appx20 (noting that the "U.S. Space Force's popularity is reflected by, and has been accentuated by, multiple seasons of the Netflix show"). Indeed, the military branch itself embraced the affiliation on social media when the series began streaming. *See* Appx879.

Moreover, as the Board observed, applicant seeks to register not just SPACE FORCE, but US SPACE FORCE. *See* Appx31. By design, the latter term reinforces the association with the U.S. government and its instrumentalities. The term imitates the nomenclature of vast swaths of federal agencies whose names begin with "U.S." signifying that they are part of the federal government. This structure is commonly utilized and well recognized, with examples ranging from the U.S. Department of Justice to the U.S. Department of Transportation to the U.S. Department of Defense. Applicant itself admits (Br. 2) that it chose US SPACE FORCE over SPACE FORCE because the former conveys a greater "patriotic connotation."

The association is even more pronounced in this context because the federal military follows the same naming convention. As the Board explained, "the general public has long been exposed to the names of the other service branches of the U.S. Armed Forces, namely, the U.S. Navy, the U.S. Army, the U.S. Marines Corps, U.S. Coast Guard, and the U.S. Air Force." Appx31. In fact, U.S. Space Force "bears the strongest resemblance" to U.S. Air Force, the branch responsible for aerial missions. Appx31. It is no logical leap to conclude that the public "will understandably perceive US SPACE FORCE as an additional branch of the U.S. Armed Forces . . . with operations in and responsible for space." Appx31. Accordingly, the Board determined that members of the public would recognize the phrase US SPACE FORCE as referencing "the U.S. Government's military forces" even if they had not specifically "encountered the newest branch of the armed forces referred to precisely"

in this way. Appx31-32; *see In re Urbano*, 51 U.S.P.Q.2d 1776, 1779 (T.T.A.B. 1999) ("[W]hile the general public in the United States may or may not have seen the upcoming Olympic Games referred to precisely as 'Sydney 2000,' . . . the general public in the United States would recognize this phrase as referring unambiguously to the upcoming Olympic Games in Sydney, Australia, in the year 2000.")

2. The materials that applicant submitted during examination did not undermine the Board's evidence-supported determination. As a preliminary matter, applicant forfeited its arguments as to virtually all of these materials by failing to explain their significance in the opening brief. Instead, applicant recites (Br. 24-25) a laundry list of documents with cross-references to the briefing before the agency. But "arguments may not be properly raised by incorporating them by reference from the appendix rather than discussing them in the brief." *Rueter v. Department of Commerce*, 63 F.4th 1357, 1372 (Fed. Cir. 2023) (quotation marks omitted). And litigants forfeit arguments raised in a "conclusory, skeletal" manner in the brief. *In re Killian*, 45 F.4th 1373, 1386 (Fed. Cir. 2022), *cert. denied*, No. 22-1220, 2023 WL 6377962 (U.S. Oct. 2, 2023).

Even if the Court were to overlook applicant's forfeiture, however, the Board reasonably considered and discounted applicant's evidence. Applicant primarily relied on the usage of terms similar to the proposed mark, US SPACE FORCE, from several decades before the development of the military organization. For example, in 1987, the USPTO registered UNITED STATES SPACE FORCE for games and toys,

Appx367, and U.S. SPACE FORCE for educational materials, Appx369. Those registrations have since been cancelled, and they shed no light on whether the public associates U.S. Space Force with a military branch that was formed much later. Appx411; *see also In re Shinnecock Smoke Shop*, 571 F.3d 1171, 1174 (Fed. Cir. 2009) (holding that prior registrations do not bind the USPTO); *In re Morton-Norwich Prods., Inc.*, 671 F.2d 1332, 1344 (C.C.P.A. 1982) (noting that "trademark rights are not static" and that registrability "must be determined on the basis of the factual situation as of the time when registration is being sought"). And the registrations of SPACEFORCE and SPACE FORCE for various products, Appx368; Appx370; Appx1326, omit "the prefix 'US'" that reinforces the connection to the U.S. government's military forces by mimicking the stylization of the "military branch designated 'U.S. Space Force,'" Appx17-18.

The one-season run of the unsuccessful 1987 animated "Starcom: the U.S. Space Force" television series and associated toy line similarly do not call into question the connection with the U.S. government's military forces. As applicant's own evidence indicated, the television show "did not get much of a chance to reach the intended audience before it was cancelled after one brief season," and the toys were "discontinued [in the United States] after two years" due in part to "the fact that [the] parent show only lasted a year in syndication." Appx669. According to a toy collector, the toys "are still available for purchase online," but at most "a sizeable number of other space toy collectors" would recognize them. Appx891. On this

record, the Board had a sound basis to conclude that "it is unlikely that a significant portion of the public will make an association with the short-lived animated television show or collectable toys." Appx15. Particularly given the significant media attention to the government entity since its inception in 2018, the Board reasonably found a false suggestion even if "there may have been limited use" by others more than 30 years before applicant sought to register the mark. *Piano Factory*, 11 F.4th at 1378.

The evidence of more recent usage in many instances strengthened, rather than diminished, the association. As noted, the Board explained how the Netflix parody series created a stronger, not weaker, connection to the military organization that the show was targeting. *See* Appx11-14. At a minimum, none of the other evidence overrode or negated the Board's determination.

The Board reasonably questioned the "reliability and overall probative value" of applicant's 2021 Google Surveys Report because applicant did not explain the basics of "how the survey was conducted." Appx16-17. Applicant's submission consisted of computer screenshots displaying a breakdown of responses to the question "The term US SPACE FORCE points uniquely and unmistakably in my mind to:" with five multiple-choice options (a branch of the U.S. military, Donald J. Trump, NASA, a Netflix television show, or none of these). Appx1056-1058. Variously referring to "997 respondents" on one page, Appx1056, and "1,499 responses" on the next, Appx1057, the printouts left no way to determine whether the response group constituted "a representative sampl[e]" or whether the

combination of question and answers was properly framed, Appx1072. Contrary to applicant's suggestion (Br. 26), the Board did not require "a full blown professionally conducted nation-wide survey supported by expert testimony." Rather, the Board lacked necessary information to assess "the survey methodology." Appx16.

And the Board explained that the survey results would not alter its analysis in any event. Even putting aside that survey takers could not select the U.S. government as a response, three of the answer choices—U.S. military, Donald J. Trump, and NASA—could "be understood as generally pointing to agencies and instrumentalities of the U.S. Governmental body." Appx17 (quotation marks omitted); *see also* Appx19 (observing that various government actors and instrumentalities can be "used interchangeably for purposes of explaining the origin and creation of the latest military branch of the U.S. Armed Forces"). And those three government-centric answer choices accounted for 65.3%—that is, "nearly two-thirds"—of the survey responses. Appx17. Applicant's desire (Br. 27) that the Board weigh the other "one-third of the responses" more heavily does not provide a reason to disturb the Board's well-grounded decision.

Applicant also cited instances in which the term "space force" was used in relation to private entities and other countries in an effort to show that "space force" refers to "the influential persons and enterprises which exert their power and energy towards conducting operations in space." Appx17-18 (quotation marks omitted). As applicant conceded, however, the term has also been used to refer to "a military

branch that conducts space warfare." Appx1325. And again, applicant largely ignores the "US" prefix. The Board demonstrated the point with an analogy to the U.S. Army, U.S. Navy, and U.S. Air Force: "while other countries may have armies, navies, and air forces," affixing "U.S." before these terms "helps point uniquely and unmistakably to a specific military branch within the U.S. Armed Forces." Appx18.

At bottom, applicant's complaint is that the Board should have given more weight to the evidence that applicant put forward. But reweighing of the evidence on appeal is improper unless the Board's factual findings were unreasonable. *See, e.g.*, *Stratus Networks*, 955 F.3d at 998; *Real Foods Pty Ltd. v. Frito-Lay N. Am., Inc.*, 906 F.3d 965, 979-80 (Fed. Cir. 2018). And here, the record overwhelmingly established the public perception of a connection between US SPACE FORCE and the U.S. government's military forces beginning with President Trump's announcement of the new military branch on March 13, 2018 and continuing ever since. The Board's decision is supported by substantial evidence and should be affirmed.

III. Applicant's Constitutional Challenges to the False Suggestion Provision Lack Merit.

The Board correctly rejected applicant's constitutional challenges. Appx20-22. Applicant implies (Br. 31-32) that the entire trademark scheme is unconstitutional because, unlike patents and copyrights, trademarks are not explicitly mentioned in the Constitution. In addition to being self-defeating on its face because it would suggest that no trademarks (including applicant's) could be registered, this argument ignores

that the trademark laws represent an exercise of Congress's authority under the Commerce Clause, not the Patent or Copyright Clause. *See* Appx21 n.46. Following the Supreme Court's instruction to invoke the regulation of commerce "on the face of the law," *In re Trade-Mark Cases*, 100 U.S. 82, 96 (1879), Congress enacted the Lanham Act—which provides benefits for trademarks used in "commerce which may lawfully be regulated by Congress," 15 U.S.C. § 1127—pursuant to the commerce power. *See Person's Co. v. Christman*, 900 F.2d 1565, 1568 (Fed. Cir. 1990) ("No specific Constitutional language gives Congress power to regulate trademarks, so the power of the federal government to provide for trademark registration comes only under its commerce power."); *see also International Bancorp, LLC v. Societe des Bains de Mer et du Cercle des Etrangers a Monaco*, 329 F.3d 359, 363-64 (4th Cir. 2003) (collecting cases).

Both on its face and as applied to applicant's proposed mark, § 1052(a) does not represent an unconstitutional restriction on speech. Applicant does not have a constitutional right to use a trademark that falsely suggests a connection with another person, much less to the additional benefits that would be associated with federal registration of such a trademark. *See Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n*, 447 U.S. 557, 563 (1980) ("The government may ban forms of communication more likely to deceive the public than to inform it . . . ."). As the Board explained, the bar on registering marks that "*falsely* suggest a connection with" another person, 15 U.S.C. § 1052(a) (emphasis added), "directly furthers the goal of

prevention of consumer deception in source-identifiers." Appx21 (quotation marks omitted).

Section 1052(a)'s false suggestion clause is materially different from the clauses at issue in *Matal v. Tam*, 582 U.S. 218 (2017), and *Iancu v. Brunetti*, 139 S. Ct. 2294 (2019), that applicant mentions (Br. 31) in passing. *Tam* involved the Lanham Act's bar on registering marks that "disparage" any "persons, living or dead," 582 U.S. at 227-29, and *Brunetti* involved the Lanham Act's bar on registering marks that comprise "immoral" or "scandalous matter," 139 S. Ct. at 2298. Each provision thus targeted the "expressive message" of the mark, *see In re Brunetti*, 877 F.3d 1330, 1349 (Fed. Cir. 2017), and in each case, the Supreme Court concluded that the provision did so in a manner that "discriminate[d] on the basis of viewpoint," *Brunetti*, 139 S. Ct. at 2299; *see also In re Elster*, 26 F.4th 1328, 1331 (Fed. Cir. 2022) (noting that both *Tam* and *Brunetti* "were carefully cabined to the narrow, presumptive unconstitutionality of section 2(a)'s viewpoint-based restrictions" (alterations and quotation marks omitted)), *cert. granted sub nom. Vidal v. Elster*, 143 S. Ct. 2579 (2023). *Tam* and *Brunetti* do not control here because registration under § 1052(a)'s false suggestion clause does not turn on "the ideas or opinions" that a proposed mark conveys. *Brunetti*, 139 S. Ct. at 2299. Rather, § 1052(a) as applied in this case serves the primary goal of the federal registration program by denying benefits to those trademarks that would be misleading as to source or sponsorship.

Applicant's facial vagueness challenge fails at the outset because the statutory provision at issue does not "purport[] to define the lawfulness or unlawfulness of speech or conduct." *Nyeholt v. Secretary of Veterans Affairs*, 298 F.3d 1350, 1357 (Fed. Cir. 2002). Section 1052(a)'s prohibition on registering marks that may falsely suggest a connection with another person is precisely the sort of condition on a government benefit that is "not analogous to standards that inform the public what one can or cannot do without incurring civil and/or criminal penalties." *Id.* The due process concerns that arise when a law threatens the loss of life, liberty, or property without "giv[ing] ordinary people fair notice of the conduct it punishes" or protecting against "arbitrary enforcement," *Johnson v. United States*, 576 U.S. 591, 595 (2015), are absent here.

Even assuming that the vagueness doctrine applies and does so under the same standards applicable in cases involving punitive statutes, the false suggestion restriction in § 1052(a) is not "so vague that men of common intelligence must necessarily guess at its meaning." *Connally v. General Const. Co.*, 269 U.S. 385, 391 (1926). As applicant appears to acknowledge (Br. 29-30), this Court and the Board have applied a four-factor test that gives content to § 1052(a)'s bar on registration of marks that may "falsely suggest a connection with persons, living or dead, [or] institutions." 15 U.S.C. § 1052(a). Applicant criticizes (Br. 29-30) one passage of the TMEP as providing inadequate guidance on when a name or identity has been "previously used" by another person but overlooks that the very same section of the

TMEP goes on to discuss prior use specifically and includes examples of how the element has been applied in case law. *See* TMEP § 1203.03(b)(i).

More broadly, applicant has not put forward any evidence demonstrating "pervasive disagreement" or inconsistency in how to apply the false suggestion provision. *Johnson*, 576 U.S. at 601. Nor has applicant provided support for the claim (Br. 29) that the public has had "a hard time drawing much reliable guidance as to what constitutes the name or identity previously used by another person or institution." Regardless, the Supreme Court has made clear that laws "are not automatically invalidated as vague simply because difficulty is found in determining whether certain marginal offenses fall within their language." *United States v. National Dairy Prods. Corp.*, 372 U.S. 29, 32 (1963). Applicant's constitutional arguments accordingly fail.

CONCLUSION

For the foregoing reasons, the decision of the Trademark Trial and Appeal Board should be affirmed.

Respectfully submitted,

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November 2023

CERTIFICATE OF SERVICE

I hereby certify that on November 3, 2023, I electronically filed the foregoing brief with the Clerk of the Court for the United States Court of Appeals for the Federal Circuit by using the appellate CM/ECF system. Service will be accomplished by the appellate CM/ECF system.

/s/ Brian J. Springer
Brian J. Springer

CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limit of Federal Rule of Appellate Procedure 32(a)(7)(B) because it contains 7,733 words. This brief also complies with the typeface and type-style requirements of Federal Rule of Appellate Procedure 32(a)(5)-(6) because it was prepared using Word for Microsoft 365 in Garamond 14-point font, a proportionally spaced typeface.

/s/ Brian J. Springer
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ADDENDUM

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15 U.S.C. § 1052

§ 1052. Trademarks registrable on principal register; concurrent registration

No trademark by which the goods of the applicant may be distinguished from the goods of others shall be refused registration on the principal register on account of its nature unless it—

(a) Consists of or comprises immoral, deceptive, or scandalous matter; or matter which may disparage or falsely suggest a connection with persons, living or dead, institutions, beliefs, or national symbols, or bring them into contempt, or disrepute; or a geographical indication which, when used on or in connection with wines or spirits, identifies a place other than the origin of the goods and is first used on or in connection with wines or spirits by the applicant on or after one year after the date on which the WTO Agreement (as defined in section 3501(9) of title 19) enters into force with respect to the United States.

. . .