Headline: Supreme Court rejects First Amendment challenge to restriction on trademarking a living person's name
Case Name and Number: *Vidal v. Elster*, No. 22-704
Introduction: Today, the Supreme Court unanimously held that the Lanham Act's restriction on trademarking a living person's name without consent did not violate the First Amendment.
Background: A provision of the Lanham Act, 15 U.S.C. § 1052(c), prohibits an applicant from registering a trademark that uses the name of a living person unless that person provides written consent. In this case, the Patent and Trademark Office rejected an application to trademark the phrase "Trump too small" because the applicant did not have former President Trump's consent to use his name. The Federal Circuit reversed, holding that restricting the trademarking of a living person's name without consent violates the First Amendment.
Issue: Whether the Lanham Act's restriction on trademarking a living person's name without consent violates the First Amendment.
Court's Holding: In an opinion written by Justice Thomas, the Supreme Court unanimously held that the Lanham Act's prohibition on trademarking a living person's name without consent did not violate the First Amendment. The Court first held that the provision did not facially discriminate against any viewpoint because it applies regardless of whether the trademark's use is complimentary or disparaging. The Court next held that although the provision is a content-based speech restriction, it was not subject to heightened judicial scrutiny because there is a history and tradition of content-based trademark restrictions. The Court also noted that trademark regulation inherently requires assessing the content of a requested trademark.
A concurrence written by Justice Kavanaugh and joined by Chief Justice Roberts emphasized that a content-based trademark restriction that is viewpoint neutral may be constitutional even without the history and tradition that supported the restriction here.
Two other concurrences rejected history and tradition as the appropriate bases on which to determine the constitutionality of a trademark restriction. A concurrence written by Justice Barrett, and joined by Justice Kagan and by Justices Sotomayor and Jackson in part, agreed that heightened scrutiny does not always extend to content-based trademark restrictions, but based that conclusion on the public-forum doctrine, under which the government may create a forum that can be used only by certain groups. A concurrence written by Justice Sotomayor, and joined by Justices Kagan and Jackson, proposed a two-step inquiry to determine whether heightened scrutiny applies to a content-based trademark restriction, focusing on whether the restriction targets viewpoints, and if not, whether the restriction serves the purposes of trademark law.
Read the opinion here.