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## (Trade)mark America Great Again: Should Political Slogans Be Able to Receive Trademark Protection?

Katherine Kerrick

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Katherine Kerrick

## (Trade)mark America Great Again: Should Political Slogans Be Able to Receive Trademark Protection?

18 U.N.H. L. REV. 309 (2020)

**ABSTRACT.** In late 2016, Donald Trump was granted trademark protection for his presidential campaign slogan, “Make America Great Again.” This registration is one of few—if not the only—political slogans registered as a trademark with the USPTO. Four years later, and four years after the completion of the presidential campaign which effectuated the slogan, the MAGA registration is still live and President Trump and his campaign committee continue to sell merchandise featuring the slogan prominently. However, looking at the applications and the evidence presented therein, it is not clear that the MAGA slogan constitutes a phrase worthy of trademark protection. This Note examines whether the MAGA trademarks should have been granted by the United States Patent and Trademark Office.

In Part I, the Note will look at the doctrinal issues specific to the MAGA applications, highlighting ways in which the registrations may be problematic. Part II discusses the broader issues these applications introduce, namely, the ever-present tension between political and commercial speech in trademark law, and whether political slogans should ever receive trademark protection based on the state of this debate. Lastly, in Part III, the Note examines how President Trump’s treatment of his slogan may be illustrative of a larger issue that has been controversial in the first half of the Trump presidency: emoluments. In essence, this Note considers how Donald Trump is breaking the mold in terms of how presidents navigate and distinguish between their business and their politics.

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INTRODUCTION.....311

I. REGISTRABILITY OF THE MAGA MARKS.....313

    A. *Trademark Registration Generally* ..... 313

    B. *Make America Great Again* ..... 317

    C. *Merely Informational Matter* ..... 319

    D. *Keep America Great*.....324

II. THE POLITICAL/COMMERICAL DICHOTOMY IN THE AGE OF  
PRESIDENT TRUMP..... 327

    A. *MAGA as Political and Commercial Speech*..... 331

    B. *Political Slogans in the Future* ..... 334

III. BROADER IMPLICATIONS ..... 336

    A. *Emoluments* ..... 336

CONCLUSION..... 341

## INTRODUCTION

The United States of America is one of the most powerful countries in the world.<sup>1</sup> As a result, the President of the United States is an important figure not only for American citizens who democratically elect this person into office, but also for the world as a whole. Due to the United States' global prominence and the fact that American political campaigns are the longest, most expensive, and most conspicuous in the world,<sup>2</sup> Americans are constantly faced with candidates employing various tactics to try to garner support from constituents. These tactics include ad campaigns, social media outreach, and creating a brand, among others.<sup>3</sup>

One important strategy candidates often employ is campaign slogans. Campaign slogans are memorable and can serve as a representation or a summary of a candidate's campaign. Memorable slogans such as "I Like Ike," "Not Just Peanuts," and "Hope" remind a voter about a particular candidate, and perhaps more importantly, what they stood for.<sup>4</sup>

Another campaign slogan that will go down in history is "Make America Great Again." President Donald Trump used this phrase as a slogan during the 2016 presidential election, weaving it into most of his speeches and selling various items adorned with the phrase, such as hats, bumper stickers, and even more unique

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<sup>1</sup> See *Best Countries for Power*, US NEWS & WORLD REPORT, <https://www.usnews.com/news/best-countries/power-rankings> [https://perma.cc/3U56-3MVU] (last visited Nov. 16, 2019); *Most Powerful Countries 2019*, WORLD POPULATION REVIEW, <http://worldpopulationreview.com/countries/most-powerful-countries/> [https://perma.cc/DJ4N-7X3J] (last visited Nov. 16, 2019); Amarendra Bhushan Dhiraj, *Here are the World's 25 Most Powerful Countries in 2019*, CEOWORLD MAGAZINE (last updated Dec. 16, 2019), <https://ceoworld.biz/2019/03/05/here-are-the-worlds-25-most-powerful-countries-in-2019/> [https://perma.cc/V28D-BQ7N].

<sup>2</sup> See Thomas K. Grose, *Elections: Is There a Better Way Than America's?*, US NEWS & WORLD REPORT (Nov. 9, 2016, 12:16 PM), <https://www.usnews.com/news/best-countries/articles/2016-11-09/the-us-elections-is-there-a-better-way> [https://perma.cc/3LNF-SMMF]; Danielle Kurtzleben, *Why Are U.S. Elections So Much Longer Than Other Countries?*, NPR (Oct. 21, 2015, 10:16 AM), <https://www.npr.org/sections/itsallpolitics/2015/10/21/450238156/canadas-11-week-campaign-reminds-us-that-american-elections-are-much-longer> [https://perma.cc/7YS3-EZ6N].

<sup>3</sup> See AJ Agrawal, *5 Marketing Lessons You Can Learn from the Presidential Election*, FORBES (Oct. 8, 2016, 3:49 PM), <https://www.forbes.com/sites/ajagrawal/2016/10/08/5-marketing-lessons-you-can-learn-from-the-presidential-election/#341f50ef59e2> [https://perma.cc/36QA-JY5G]; Henna Ray, *Top 11 Marketing Ideas for Promoting an Election Campaign*, DESIGN HILL (July 14, 2018), <https://www.designhill.com/design-blog/marketing-ideas-for-promoting-an-election-campaign/> [https://perma.cc/4MWM-JRGN].

<sup>4</sup> *Presidential Campaign Slogans*, PRESIDENTSUSA.NET, <https://www.presidentsusa.net/campaignslogans.html> [https://perma.cc/KKJ9-MAN3] (last visited Nov. 16, 2019).

goods like swimsuits, and pet accessories like dog hoodies and collars.<sup>5</sup> While using a campaign slogan or tagline in ads and on swag is not a new concept, President Trump took an extra step with his slogan that other presidential candidates have not done historically: he registered that slogan as a trademark.<sup>6</sup> President Trump filed an application to register “Make America Great Again” (hereinafter MAGA) with the United States Patent and Trademark Office (hereinafter the USPTO) in 2012 as a trademark for political action committee services and fundraising.<sup>7</sup> The USPTO approved the application in 2015.<sup>8</sup> Since then, President Trump applied to register the MAGA mark in two separate applications comprised of various other classes for different goods like hats, buttons, and sports bags; one of two additional marks has been granted, while the other has not.<sup>9</sup>

While President Trump may not be the first to assert trademark rights in a slogan used in a political campaign,<sup>10</sup> the MAGA trademarks are problematic and warrant scrutiny. As this Note will demonstrate, there are significant issues surrounding the registration of the marks themselves, the broader notion of registering a political slogan as a trademark, and even more generally the political landscape in the United States.

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<sup>5</sup> *Official Trump Store*, SHOP DONALD J. TRUMP, <https://shop.donaldjtrump.com/> [<https://perma.cc/MV6G-M85H>] (last visited Apr. 3, 2019) (As of this writing, the official campaign store now solely focuses on re-electing Donald Trump in 2020).

<sup>6</sup> MAKE AMERICA GREAT AGAIN, Registration No. 4,773,272.

<sup>7</sup> *Id.*

<sup>8</sup> *Id.*

<sup>9</sup> See MAKE AMERICA GREAT AGAIN, Registration No. 5,020,556. President Trump registered this second trademark for various goods including bumper stickers, clothing, campaign buttons, political campaign services such as promoting public awareness for Donald Trump and fundraising in the field of politics, online journals, and online social networking services in the field of politics. See also MAKE AMERICA GREAT AGAIN, Serial No. 8,671,074 (filed Aug. 13, 2015). President Trump applied to register this third mark for various miscellaneous items and accessories, like all-purpose athletic bags, backpacks, pet clothing, footwear, hats, jackets, and pants among others, which was initially refused as ornamental. *Id.* In a 333-page response to this initial refusal, Trump argued the uses were not ornamental and the specimens they attached were appropriate by comparing it to other trademarks that were granted and were placed similarly on the front of hats. *Id.* The USPTO has not yet ruled on Trump’s response. However, one key difference between the MAGA specimens and the specimens cited in Trump’s response is that none of the examples he provides are slogans.

<sup>10</sup> See, e.g., GENERATIONFORTYFOUR, Registration No. 85,322,314. Former President Barack Obama’s campaign registered this mark in 2012 but abandoned the mark in 2016. While various presidential candidates have registered their logos as trademarks, there are few—if any—presidential *slogans* currently registered with the USPTO.

The discussion is split into three sections. First, I will address the initial registrability issues surrounding the MAGA marks, discussing some potential reasons why the USPTO should have denied registration. These registrability issues pertain both specifically to MAGA itself and to whether MAGA meets the fundamental requirements of trademark registrability, such as ornamentality, use in commerce, and failure to function as a mark. Second, I will discuss the broader doctrinal issues with registering political slogans as trademarks and how the MAGA marks exemplify the tension between political and commercial speech. Third, I will address the larger implications of the MAGA registrations, explaining how this may have an impact on the broader concepts of trademark law and politics.

## I. REGISTRABILITY OF THE MAGA MARKS

### A. *Trademark Registration Generally*

The registrability of the MAGA mark is debatable on the most basic level. To understand the questionable registration, an explanation of the fundamentals of trademark protection and what trademark registration provides for the owner once granted will illustrate these issues.

A trademark can be many things: a word, a logo, a product's packaging design, or even a color or a scent.<sup>11</sup> The main quality that enables one of those things to qualify as a trademark is its ability to signify or indicate the source of the specific goods or services with which it is used.<sup>12</sup> Trademark rights exist in any matter that functions as a source indicator regardless of whether that matter is registered as a trademark with the USPTO.<sup>13</sup> However, trademark registration affords owners stronger protection and more concrete means of enforcement against infringers, among other benefits.<sup>14</sup>

To obtain a registration, the owner of the mark applies to the USPTO. The USPTO examines applications to ensure that the applied-for marks are legitimate source indicators by considering whether a consumer would use the mark to

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<sup>11</sup> *Trademark, Patent, or Copyright?*, USPTO.GOV <https://www.uspto.gov/trademarks-getting-started/trademark-basics/trademark-patent-or-copyright> [<https://perma.cc/8387-ALBY>] (last visited Nov. 16, 2019).

<sup>12</sup> Alexandra J. Roberts, *Tagmarks*, 105 CALIF. L. REV. 599, 602 (2017).

<sup>13</sup> *Protecting Your Trademark*, USPTO.GOV 11 (Aug. 2019), <https://www.uspto.gov/sites/default/files/documents/BasicFacts.pdf> [<https://perma.cc/DKX7-N7UL>] (last visited Nov. 18, 2019).

<sup>14</sup> *Id.*

identify the goods or services as coming from one singular source.<sup>15</sup> The applicant must state the specific goods and services their mark is used with, and the protection afforded by a successful registration are limited to those goods and services.<sup>16</sup> Goods and services in trademark applications and registrations are divided into ‘classes,’ which are defined on both national and international levels.<sup>17</sup>

The USPTO ensures that the applied-for marks are actually able to—and do—function as trademarks.<sup>18</sup> The USPTO would deny a mark that is “functional,” meaning it has a specific use in addition to indicating source that would impair competitors in that they would not be able to also take advantage of that valuable use.<sup>19</sup> For example, colors are denied trademark protection when they “inform the user of some property of the product, such as drug type or dosage”<sup>20</sup> and “pictorial designs, located on the abdomens of toy animals, which convey an emotional message” have also been denied protection on the same grounds.<sup>21</sup> The goal of the functionality doctrine is to prevent one entity from monopolizing matter that has an actual use for all producers of the same or similar products.<sup>22</sup>

Another ground for denial pertaining specifically to word marks is lack of distinctiveness, as mandated by *Abercrombie* and its progeny.<sup>23</sup> The USPTO engages in a classification of each mark, assessing the mark’s level of distinctiveness. Distinctiveness functions as a proxy for a mark’s ability to be associated with one unique source, rather than simply being a logical connection a consumer would make between the mark and the goods or services that mark pertained to in a more

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<sup>15</sup> Roberts, *supra* note 12, at 624.

<sup>16</sup> *Protecting Your Trademark*, *supra* note 13, at 18; *Guides, Manuals, and Resources*, USPTO.Gov, <https://www.uspto.gov/trademark/guides-and-manuals/manuals-guides-official-gazette> [<https://perma.cc/QT8C-8LRW>] (last visited Feb. 22, 2020).

<sup>17</sup> *Protecting Your Trademark*, *supra* note 13, at 19.

<sup>18</sup> Roberts, *supra* note 12, at 625.

<sup>19</sup> *Id.* at 603–04.

<sup>20</sup> 4 LOUIS ALTMAN & MALLA POLLACK, *CALLMANN ON UNFAIR COMPETITION, TRADEMARKS & MONOPOLIES* § 19:29 (4th ed. 2019).

<sup>21</sup> *Id.*

<sup>22</sup> *Id.* at § 19:20.

<sup>23</sup> See generally *Abercrombie & Fitch Co. v. Hunting World, Inc.*, 537 F.2d 4 (2d Cir. 1976); see also Roberts, *supra* note 12, at 630.

general sense.<sup>24</sup> The *Abercrombie* case resulted in a classification spectrum.<sup>25</sup> The spectrum ranges from arbitrary (such as APPLE as a mark for computers) or fanciful (such as GOOGLE as a mark for online services), to suggestive (such as NETFLIX for an online movie and streaming service), to descriptive (such as SHARP for televisions), and lastly, to generic (such as ASPIRIN for pain relief medication<sup>26</sup>).<sup>27</sup> This is all meant to indicate that the lower the trademark's classification is on this spectrum, the less likely a consumer will classify the mark as a source indicator, and the less likely the mark is entitled to protection.<sup>28</sup>

A common issue with slogans is they are often assumed to be descriptive because they are simple phrases that are descriptive of the goods or services they pertain to—thus, they need to acquire distinctiveness through market presence.<sup>29</sup> For this reason, registering a slogan is challenging on its own. For example, consider the slogan “Soil It–Wash It–Never Needs Pressing” for neckties, which a court found to be descriptive because it was “merely informative advertising which does not serve as an identifying mark.”<sup>30</sup> As leading trademark treatise author J. Thomas McCarthy explained: “The more commonly used the phrase, the less likely that the public will use it to identify one seller and the less likely that it can achieve

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<sup>24</sup> *Trademark Strength*, INT’L TRADEMARK ASS’N, <https://www.inta.org/TrademarkBasics/FactSheets/Pages/TrademarkStrengthFactSheet.aspx> [<https://perma.cc/M83V-J4QQ>] (last updated Mar. 2019). To be considered “distinctive,” the mark itself has to be more than a logical connection to the goods/services it applies to. For example, “Apple” for fruits is a logical connection since it just describes what the good is, but “Apple” for technology like computers and cellphones is not a logical connection that consumers would make. The fact that this logical connection does not exist in the second example means that the mark is more distinctive, and more worthy of protection because of its originality.

<sup>25</sup> See *Abercrombie & Fitch Co.*, 537 F.2d at 11.

<sup>26</sup> *Protecting Your Trademark*, *supra* note 13, at 8.

<sup>27</sup> *Trademark Strength*, *supra* note 24.

<sup>28</sup> See, e.g., Laverne Berry, *The Abercrombie Formulation*, BERRY ENT. LAW [http://berryentertainmentlaw.com/articles/trademark\\_abcrombie.pdf](http://berryentertainmentlaw.com/articles/trademark_abcrombie.pdf) [<https://perma.cc/LLY2-64J3>] (last visited Nov. 16, 2019); *Trademark Strength*, *supra* note 24. See generally *Abercrombie & Fitch Co.*, 537 F.2d 4.

<sup>29</sup> 4 ALTMAN & POLLACK, *supra* note 20, at § 18:75; see also 8 TRADEMARK MANUAL OF EXAMINING PROCEDURE (TMEP) § 1209.03(s) (Oct. 2018) (explaining that: “slogans that are considered to be merely informational in nature, or to be common laudatory phrases or statements that would ordinarily be used in business or in the particular trade or industry, are not registrable.”).

<sup>30</sup> 1 J. THOMAS MCCARTHY, MCCARTHY ON TRADEMARKS AND UNFAIR COMPETITION § 7:22 (5th ed. 2019) (citing *In re Superba Cravats, Inc.*, 149 U.S.P.Q. 852 (T.T.A.B. 1966)).



trademark status.”<sup>31</sup> Notably, a slogan may be considered to have only a small amount of distinctiveness, which results in a very narrow scope of trademark protection.<sup>32</sup>

Moreover, a mark must also be used in commerce “as a mark” in connection with the specific goods or services it is related to; in other words, the mark must not fail to function in an actual trademark way, i.e., in an actual trademark capacity.<sup>33</sup> Trademark professor and scholar Alexandra Roberts describes functioning as a trademark, or in other words, “in a trademark way” as follows: it must appear where consumers expect a trademark to appear, and it must be sufficiently set off from the surrounding text and images to attract notice.<sup>34</sup> Applicants attach illustrations such as photos that are called “specimens” to their applications to demonstrate to the USPTO that their applied-for mark functions as a trademark and is being used in commerce.<sup>35</sup>

One of the most common ways a mark can fail to function as a trademark is when it is used ornamentally in connection with the goods or services to which it pertains.<sup>36</sup> Trademarks that are used ornamentally on goods are merely a decorative feature, thus failing to identify and distinguish a party’s goods and failing to function as a trademark in general.<sup>37</sup> Put differently, ornamental goods are products that use a trademark as a design or an adornment rather than serving the actual function of a trademark by identifying the source. Examples of uses that are often deemed ornamental are: floral patterns on tableware or silverware, stitching designs on the back pockets of jeans, and, most relevant in this context, a logo on the front of a hat.<sup>38</sup> To quell concerns of ornamentation, a trademark applicant or owner can place the mark in certain specific locations on goods, like the “neck label of a shirt, the hang tag of a dress, or on a label applied to the back or

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<sup>31</sup> *Id.* at § 7:23.

<sup>32</sup> *Id.*

<sup>33</sup> Roberts, *supra* note 12, at 604.

<sup>34</sup> Alexandra J. Roberts, *Trademark Failure to Function*, 104 IOWA L. REV. 1977, 1981 (2019).

<sup>35</sup> *Protecting Your Trademark*, *supra* note 13, at 21.

<sup>36</sup> *Id.* at 8.

<sup>37</sup> Christian Lemke & Rachel B. Rudensky, *Registering Advertising Slogans as Trademarks in the United States and Europe*, 71 INTA BULLETIN 7 (Apr. 15, 2016), [https://www.inta.org/INTABulletin/Pages/Slogans\\_as\\_Trademarks\\_7107.aspx](https://www.inta.org/INTABulletin/Pages/Slogans_as_Trademarks_7107.aspx) [<https://perma.cc/TRX8-WUW2>].

<sup>38</sup> “Ornamental” Refusal and How to Overcome This Refusal, USPTO.GOV <https://www.uspto.gov/trademark/laws-regulations/ornamental-refusal-and-how-overcome-refusal> [<https://perma.cc/83HL-KZEP>] (last visited Nov. 16, 2019).

undersurface of an article.”<sup>39</sup>

Ornamentality is a common issue that results in the refusal of trademark applications for slogans. In the context of slogans specifically, ornamental use is determined by taking size, manner, and placement into account while trying to figure out the underlying issue: whether a slogan is seen by consumers as a source-identifier.<sup>40</sup> For example, the USPTO denied a trademark application for “Clothing Facts” as a mark for apparel because the phrase “simply played on consumers’ familiarity with the United States Food and Drug Administration’s mandatory ‘Nutrition Facts,’ but had no source-identifying function.”<sup>41</sup> In sum, a slogan can surpass the ornamentality bar when the slogan is “set apart in an attention-grabbing way, and used consistently.”<sup>42</sup> Thus, the slogan is not purely decorative by placement in the characteristic trademark spots discussed above.

### **B. *Make America Great Again***

President Trump applied to register the MAGA trademark for the first time in two classes of services: political action committee services in International Class 35 and fundraising in the field of politics in International Class 36.<sup>43</sup> The trademark was officially registered on June 6, 2015.<sup>44</sup> He extended the registration to cover bumper stickers, clothing, campaign buttons, online journals and online social networking services later that same year.<sup>45</sup>

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<sup>39</sup> GREGORY J. BATTERSBY & CHARLES W. GRIMES, *THE LAW OF MERCHANDISE AND CHARACTER LICENSING* § 8:7 (2019–2020 ed.).

<sup>40</sup> Lemke & Rudensky, *supra* note 37.

<sup>41</sup> *Id.*

<sup>42</sup> *Id.*

<sup>43</sup> MAKE AMERICA GREAT AGAIN, Registration No. 4,773,272.

<sup>44</sup> *Id.*

<sup>45</sup> MAKE AMERICA GREAT AGAIN, Registration No. 5,020,556. Notably, the first MAGA registration (MAKE AMERICA GREAT AGAIN, Registration No. 4,773,272) was registered by President Trump as an individual and then assigned to Donald J. Trump for President, Inc. (President Trump’s principal campaign committee), while this second registration was registered by the principal campaign committee directly. To add to this PAC puzzle, see TRUMP, Registration No. 4,874,427. This trademark was registered with the USPTO in 2015, originally by Trump individually, then assigned to DTTM Operations, rather than an actual PAC associated with President Trump’s campaign, for the same classes of services: IC035 political action committee services and IC036 fundraising in the field of politics. A search on the Trademark Electronic Search System brought up no similar registrations by any other recent or current presidential candidates or campaign committees. Another interesting piece of this puzzle is the MAGA COALITION registration in the same classes (MAGA COALITION, Registration No.

Based on these foundational trademark concepts and the above facts, there are a few issues with the MAGA trademarks that are immediately apparent. For one, there is an argument that the MAGA slogan, as represented in the specimens President Trump submitted to the USPTO in support of his application,<sup>46</sup> fails to function as a trademark. Despite the number of specimens attached, most of the uses of the slogan look more like ornamental use than trademark use.<sup>47</sup> As the images below illustrate, the specimens attached to the registration illustrate an ornamental use of the mark because the use is purely decorative, rather than actually identifying the source of the mark. Arguably, a Twitter cover photo, a domain page background, and placement on the front of a hat are not trademark uses but are ornamental uses. While the use of the slogan may be consistent and set apart, there is no evidence in the specimens of the MAGA slogan being used in the quintessential trademark spots and in the quintessential trademark ways. Given that these specimens—among twenty other pages of similar uses—were provided to the USPTO as proof of trademark use, it is highly problematic that the mark was registered on this basis.

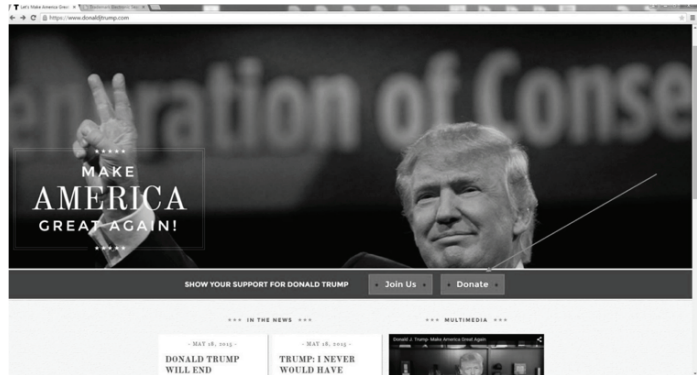


5,597,014). MAGA Coalition is an actual political action committee that is only indirectly affiliated with President Trump in that they support his platform. See *Committee Details: MAGA Coalition, Inc.*, FED. ELECTION COMM'N, <https://docquery.fec.gov/cgi-bin/fecimg/?Coo654343> [<https://perma.cc/8REN-78D2>]; *Our Mission*, THE MAGA COAL., <https://magacoalition.com/our-mission/> [<https://perma.cc/8U42-6DK3>] (last visited Feb. 21, 2020).

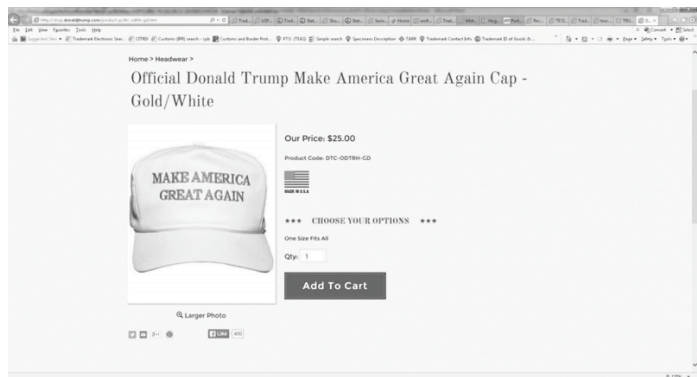
<sup>46</sup> MAKE AMERICA GREAT AGAIN, Registration No. 5,020,556 at Specimens.

<sup>47</sup> *Id.*

<sup>48</sup> *Id.* at Specimen page 24 (depicting the Twitter cover photograph of @realdonaldtrump).



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Another basic issue with the original MAGA mark is its distinctiveness. It is conceivable that a politician running for office *wants* to make America great again. By that logic, the MAGA slogan's connection to goods and services relating to politics is not arbitrary, fanciful, or suggestive as the current MAGA registration implies; rather, it is simply descriptive of what the politician is trying to achieve.

### C. Merely Informational Matter

The strongest argument against the USPTO's acceptance of the MAGA mark relates to a concept called "merely informational matter," or "incapable informational matter." In basic trademark terms, a mark that is merely informational matter cannot be granted registration "[b]ecause such 'merely

<sup>49</sup> *Id.* at Specimen page 15 (depicting the home page of [www.donaldjtrump.com](http://www.donaldjtrump.com)).

<sup>50</sup> *Id.* at Specimen page 4 (depicting an Official Donald Trump MAKE AMERICA GREAT AGAIN baseball cap in gold and white).

informational' designations do not serve to indicate a unique source."<sup>51</sup> In other words, the words making up the mark are actually nothing more than information and "consumers would perceive it as merely conveying information about the goods [or] services or an informational message" rather than as indicating a singular source as a valid trademark is required to do.<sup>52</sup> This relates to one of the main protectability issues pertaining to slogans mentioned above in that the slogans deemed merely informational matter are so commonplace and in such widespread use that they cannot be distinctive. Thus, they cannot indicate a single source, even upon a showing of secondary meaning, according to some Trademark Trial and Appeals Board (TTAB)<sup>53</sup> and federal court opinions.<sup>54</sup>

Merely informational matter has resulted in denials and cancellations of trademarks in various contexts, including a specific subset of phrases coined "widely used messages."<sup>55</sup> This subset of merely informational matter includes messages like slogans, terms, and phrases that are "used by a variety of sources in [a] marketplace" and are thus "considered commonplace and will be understood as conveying the ordinary concept or sentiment normally associated with them, rather than serving any source-indicating function."<sup>56</sup> For example, "Think Green"<sup>57</sup> and "Drive Safely,"<sup>58</sup> two commonplace sayings, were denied registration on this basis. THINK GREEN, used on products advertised as recyclable and as promoting energy conservation, was denied protection because the slogan was found not to function

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<sup>51</sup> *Examination Guide 2-17 Merely Informational Matter*, USPTO (July 2017), [https://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=2&ved=2ahUKEwiOmv2k7fvmAhUMvVkKHY1OAuQQFjABegQIAxAE&url=https%3A%2F%2Fwww.uspto.gov%2Fsites%2Fdefault%2Ffiles%2Fdocuments%2FMerely\\_Informational\\_Matter\\_Exam\\_Guide\\_July\\_2017.doc&usq=AOvVaw1fOS-duRbDppAPUHAx3vyp](https://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=2&ved=2ahUKEwiOmv2k7fvmAhUMvVkKHY1OAuQQFjABegQIAxAE&url=https%3A%2F%2Fwww.uspto.gov%2Fsites%2Fdefault%2Ffiles%2Fdocuments%2FMerely_Informational_Matter_Exam_Guide_July_2017.doc&usq=AOvVaw1fOS-duRbDppAPUHAx3vyp) [https://perma.cc/M7LN-KS65].

<sup>52</sup> *Id.*

<sup>53</sup> The TTAB is a body operated by the USPTO that hears two kinds of proceedings: appeals from denials of trademark applications and *inter partes* opposition, cancellation or concurrent use proceedings filed by third parties who own trademarks they allege are interfered with by the trademark at issue. For more information about the TTAB, see *Trademark Trial and Appeal Board (TTAB) FAQs*, USPTO <https://www.uspto.gov/trademarks-application-process/appealing-trademark-decisions/trademark-trial-and-appeal-board-ttab> [https://perma.cc/4ZMJ-BEVN] (last visited Jan. 8, 2020).

<sup>54</sup> MCCARTHY, *supra* note 30, at § 7:23 ("The Board said that such terms, while not "generic names," should not be registered even upon showing of secondary meaning.").

<sup>55</sup> 8 TRADEMARK MANUAL OF EXAMINING PROCEDURE (TMPEP) § 1202.04(b) (2019).

<sup>56</sup> *Id.*

<sup>57</sup> *In re Manco Inc.*, 24 U.S.P.Q.2d (BNA) 1938, 1942 (T.T.A.B. 1992).

<sup>58</sup> *In re Volvo Cars of N. Am., Inc.*, 46 U.S.P.Q.2d (BNA) 1455, 1460-61 (T.T.A.B. 1998).

as a mark because it “merely conveys a message of environmental awareness or ecological consciousness.”<sup>59</sup> Similarly, DRIVE SAFELY was found not to function as a mark when used in connection with structural parts for cars and cars themselves because the TTAB concluded the phrase would be perceived as an everyday, commonplace safety admonition.<sup>60</sup>

The most relevant example is *In re Hulting*.<sup>61</sup> In this case, Thomas Hulting applied to register “No More RINOs!” (RINO is an abbreviation for Republican in Name Only<sup>62</sup>) for various products he planned on selling, including bumper stickers, signs, clothes, and campaign buttons.<sup>63</sup> The USPTO rejected the application because it was found to be a political slogan simply suggesting information rather than signifying the source of the goods.<sup>64</sup> In reaching the same conclusion as the USPTO on appeal, the TTAB highlighted the exact risk that exists with applications containing merely informational matter. The reason this kind of mark is not registrable is that “[c]onsumers purchasing applicant’s goods will perceive applicant’s proposed mark as a political slogan commonly used by multiple individuals and entities rather than a sole source of products or services.”<sup>65</sup> In other words, the applicant in *Hulting* was unable to prove his slogan functioned as a trademark because the slogan was so common in the political market that consumers were unlikely to identify that applicant specifically as the source of the goods.

Another key consideration by the TTAB in *Hulting* was the same ornamentation issue mentioned above, that the phrase simply being placed on the goods did not, on its own, qualify as a trademark use worthy of protection.<sup>66</sup> TTAB noted that the prominence of “No More RINOs” on the goods Hulting intended to sell indicated that his intent was to convey information rather than signify a brand.<sup>67</sup> Ultimately,

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<sup>59</sup> *In re Manco*, 24 U.S.P.Q.2d (BNA) at 1942.

<sup>60</sup> *In re Volvo Cars*, 46 U.S.P.Q.2d (BNA) at 1460.

<sup>61</sup> *In re Hulting*, 107 U.S.P.Q.2d (BNA) 1175, 1179 (T.T.A.B. 2013).

<sup>62</sup> RINO, CONSERVAPEDIA, <https://www.conservapedia.com/RINO> [<https://perma.cc/H8L8-HYDL>] (last visited Apr. 3, 2019).

<sup>63</sup> *In re Hulting*, 107 U.S.P.Q.2d (BNA) at 1179.

<sup>64</sup> *Id.* at 1181.

<sup>65</sup> *Id.* at 1179.

<sup>66</sup> *Id.*

<sup>67</sup> Natasha Dhillon, ‘No More RINOs!’ Is a Political Slogan, Fails to Function as a Mark, TTAB Says, BLOOMBERG LAW (June 24, 2013, 12:00 AM), <https://news.bloomberglaw.com/ip-law/no-more-rinos-is-a-political-slogan-fails-to-function-as-a-mark-ttab-says?context=search&index=7> [<https://perma.cc/ZL6S-X22V>].

Hulting did not engage in a use that the USPTO could deem as a trademark use in commerce.



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The merely information matter concept should have applied to the MAGA applications the same way it did in with No More RINOs in *Hulting* because of the similar prevalence of the phrase in political speech for the last several decades. In fact, MAGA may be more prevalent or commonly used because of its positive undertones and as a uniting phrase or rallying cry, rather than the negative connotation the slogan in *Hulting* carried, allowing it to be applied more broadly and in more contexts. Despite President Trump maintaining that he came up with the phrase and denying having any knowledge that the phrase was used in the past, there is evidence indicating that the opposite is true.<sup>71</sup> These contradictory findings

<sup>68</sup> NO MORE RINOS!, Serial No. 77,666,826 at Specimen page 2 (filed Feb. 9, 2009) (depicting NO MORE RINOS! T-shirt).

<sup>69</sup> *Id.* at Specimen page 1 (depicting red NO MORE RINOS! yard sign and bumper sticker).

<sup>70</sup> *Id.* at Specimen page 3 (depicting red NO MORE RINOS! campaign buttons).

<sup>71</sup> Emma Land, *If You Thought Donald Trump Came up with the Slogan "Make America Great Again," You'd Be Mistaken*, NOW TO LOVE (Dec. 14, 2018, 7:00 AM), <https://www.nowtolove.co.nz/news/current-affairs/donald-trump-president-make-america-great-again-39911> [<https://perma.cc/Z9GP-KUDE>] ("Even though Trump claims to have come up with 'Make America Great Again' himself—despite it being used so prominently in a previous campaign his own political advisor

by the USPTO beg the question of why two similar marks were treated differently.

The most striking example of previous uses of MAGA was by Ronald Reagan in his presidential campaign in 1980. Not only was “Let’s Make America Great Again” Reagan’s main slogan for his campaign, but the phrase was also present on his campaign merchandise in ways very similar to President Trump’s 2016 campaign.<sup>72</sup>



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worked so closely on, and despite being involved in the periphery of the campaign himself—he hasn't hesitated to jump on others he felt were trying to steal the slogan.”); Emma Margolin, ‘*Make America Great Again*’ – *Who Said It First?*, NBC NEWS (Sept. 9, 2016, 10:00 PM), <https://www.nbcnews.com/politics/2016-election/make-america-great-again-who-said-it-first-n645716> [<https://perma.cc/Z7GH-JZBP>]; Karen Tumulty, *How Donald Trump Came Up with ‘Make America Great Again’*, WASH. POST (Jan. 18, 2017), [https://www.washingtonpost.com/politics/how-donald-trump-came-up-with-make-america-great-again/2017/01/17/fb6acf5e-dbf7-11e6-ad42-f3375f271c9c\\_story.html?noredirect=on&utm\\_term=.98d252d20b29](https://www.washingtonpost.com/politics/how-donald-trump-came-up-with-make-america-great-again/2017/01/17/fb6acf5e-dbf7-11e6-ad42-f3375f271c9c_story.html?noredirect=on&utm_term=.98d252d20b29) [<https://perma.cc/9UU4-LCZJ>] (“The slogan itself was not entirely original. Ronald Reagan and George H.W. Bush had used ‘Let’s Make America Great Again’ in their 1980 campaign—a fact that Trump maintained he did not know until about a year ago.”).

<sup>72</sup> Matt Taibbi, *Donald Trump Claims Authorship of Legendary Reagan Slogan; Has Never Heard of Google*, ROLLING STONE (Mar. 25, 2015, 1:23 PM), <https://www.rollingstone.com/politics/politics-news/donald-trump-claims-authorship-of-legendary-reagan-slogan-has-never-heard-of-google-193834/> [<https://perma.cc/J53X-ZUVV>].

<sup>73</sup> *Make America Great Again*, WIKIPEDIA, [https://en.wikipedia.org/wiki/Make\\_America\\_Great\\_Again#/media/File:Let%27s\\_Make\\_America\\_Great\\_Again\\_button](https://en.wikipedia.org/wiki/Make_America_Great_Again#/media/File:Let%27s_Make_America_Great_Again_button) [<https://perma.cc/22S6-NK4Y>] (last visited Apr. 3, 2019).

<sup>74</sup> President Trump’s 2016 campaign buttons are no longer available for sale on his website, see *Official Trump-Pence 2020 Campaign Buttons*, SHOP DONALD J. TRUMP, [https://shop.donaldjtrump.com/products/official-trump-pence-2020-campaign-buttons-white-set-of-3?\\_pos=7&\\_sid=0675f767c&\\_ss=r](https://shop.donaldjtrump.com/products/official-trump-pence-2020-campaign-buttons-white-set-of-3?_pos=7&_sid=0675f767c&_ss=r) [<https://perma.cc/2NZ9-XXW7>] (last visited Feb. 21, 2020), but older versions can be found at second-hand retailers. See *Trump-Pence Make America Great Again Buttons*, EBAY, <https://www.ebay.com/itm/WHOLESALE-LOT-OF-22-TRUMP-PENCE-MAKE-AMERICA-GREAT-AGAIN-BUTTONS-WHITE-2016-GOP-/401165702004> [<https://perma.cc/8CFA-4VTE>] (last visited Feb. 21, 2020).



Similar to President Reagan's use, former President Bill Clinton used the same phrase in a few speeches in the early 1990s.<sup>75</sup> Moreover, Florida Senator Ted Cruz and Wisconsin Governor Scott Walker used the phrase in speeches in the same 2016 election cycle, prompting cease and desist letters from President Trump.<sup>76</sup> With such similar uses—but, as discussed below, potentially not trademark uses—of the protected phrase in the exact same context of presidential campaigns, it lends itself to the question of whether the USPTO should have granted President Trump this trademark. Since this phrase was used frequently in the same ways as President Trump uses it, the phrase itself could be seen as merely informational matter rather than a distinctive phrase worthy of registration. Clearly, multiple sources have used this phrase rather than just one, which supports a finding of failure to function as a trademark based on the fact that the phrase could not indicate a singular source and thus functions as a widely used message. Thus, when the USPTO reviewed the MAGA application in 2015, the mark could have been denied in the same way as in *Hulting* because of how prevalent the phrase was before President Trump.

Analyzing the problematic nature of the MAGA registration is exacerbated by the fact that since the USPTO's initial examination and acceptance of the MAGA registration, four years and many millions of dollars sold of merchandise with the slogan have passed. To raise a viable argument against the MAGA trademark now would be difficult because the slogan has acquired a level of distinctiveness since the arguably problematic registration in 2015. There is no doubt that in 2020, if someone were to see a hat that says Make America Great Again, they would assume that President Trump—or at least his campaign—was the source of that hat. While failure to function as a mark remains as a ground for cancellation of a mark for the first five years after the USPTO accepts it for registration,<sup>77</sup> the distinctiveness Trump's MAGA slogan has acquired since the 2015 registration would make any argument for cancellation much more difficult.

#### **D. Keep America Great**

President Trump has applied for a trademark for his 2020 presidential

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<sup>75</sup> Margolin, *supra* note 71; Bill Clinton: "Make America Great Again", C-SPAN (Oct. 3, 1991), <https://www.c-span.org/video/?c4600782/bill-clinton-make-america-great> [https://perma.cc/Y25A-G74T]; Clinton Campaign Speech, C-SPAN (Sept. 23, 1992), <https://www.c-span.org/video/?32698-1/clinton-campaign-speech> [https://perma.cc/WZ8V-7V99].

<sup>76</sup> Tumulty, *supra* note 71.

<sup>77</sup> 15 U.S.C.A. § 1064 (West 2020) (Petitions to cancel a registration of a mark, including petitions on the basis of failure to function as a mark, can be filed within five years of the mark's registration and at any time if the registered mark becomes generic.).

campaign: “Keep America Great!,” which presents issues very similar to the MAGA registration.<sup>78</sup> Interestingly, Keep America Great! “was the tagline for the 2016 horror movie *The Purge: Election Year*, a film based around one night a year where citizens can go out and commit murder without fear of repercussion.”<sup>79</sup> Thus, there may be questions in a consumer’s mind about the mark’s function as a source indicator for one specific source. The same could have been said for the MAGA mark at the time of its application. So, the continued misrepresentation of fact concerning the origins of this slogan by President Trump appears troubling.<sup>80</sup>

The other compelling issue with Keep America Great! is the previous application for the mark by Andreas Mueller. In 2016, Andreas Mueller sought to register KEEP AMERICA GREAT for various goods such as sunglasses, t-shirts, and hats,<sup>81</sup> but it was refused because the USPTO Examining Attorney said the slogan failed to function as a trademark as it “merely convey[ed] an informational . . . political . . . message.”<sup>82</sup> In a description of the USPTO’s explanation for refusing Mueller’s application, the Examining Attorney stated:

“[T]he applicant’s slogan is commonly used as a counter to the ‘Make America Great Again’ phrase . . . . Because consumers are accustomed to seeing this slogan or term commonly used in everyday speech by many different sources, the public will not perceive the term or slogan as a trademark . . . that identifies the source of applicant’s

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<sup>78</sup> U.S. Trademark Application Serial No. 87,305,582 (filed Jan. 18, 2017).

<sup>79</sup> Land, *supra* note 71.

<sup>80</sup> Catherine J. Ross, *Ministry of Truth: Why Law Can’t Stop Prevarications, Bullshit, and Straight-Out Lies in Political Campaigns*, 16 FIRST AMEND. L. REV. 367, 367 (2017) (“Many observers fear there is an increasing disconnect between verifiable facts and political discourse, a lack of embarrassment about even complete fabrication, and a divide between voters who appear to be operating based on completely different sets of ‘facts.’”); Sam Dangremond, *Who Was the First Politician to Use “Make America Great Again” Anyway?*, TOWN & COUNTRY (Nov. 14, 2018), <https://www.townandcountrymag.com/society/politics/a25053571/donald-trump-make-america-great-again-slogan-origin/> [<https://perma.cc/TM42-4JSN>] (“The like of “Make America Great Again,” the phrase, that was mine, I came up with it about a year ago, and I kept using it, and everybody’s now using it, they are all loving it,’ Trump reportedly said in March of 2015. ‘I don’t know, I guess I should copyright it, maybe I have copyrighted it,’ he added.”); Land, *supra* note 71 (“Even though Trump claims to have come up with ‘Make America Great Again’ himself—despite it being used so in a previous campaign his own political advisor worked so closely on, and despite being involved in the periphery of the campaign himself—he hasn’t hesitated to jump on others he felt were trying to steal the slogan.”).

<sup>81</sup> U.S. Trademark Application Serial No. 87,094,382 (filed July 6, 2016).

<sup>82</sup> Dennis Crouch, *Keep America Great*, PATENTLYO (Jan. 25, 2017), <https://patentlyo.com/patent/2017/01/keep-america-great.html> [<https://perma.cc/E32T-BJZC>].

goods and/or services but rather only as conveying an informational message.”<sup>83</sup>

Thus, the USPTO denied the application because it was merely informational and incapable of being identified with one particular source. A few short months later, President Trump filed for the same mark on an intent-to-use (ITU) basis, requiring the applicant to prove in the future that he uses the mark in a trademark way in order to receive approval for the mark; and the mark was examined and published.<sup>84</sup> Notably, however, there is an opposition pending against Trump’s Keep America Great! registration, which was filed by a party with a similar trademark who alleges they will be damaged should Trump’s trademark make it all the way through the registration process.<sup>85</sup> The party opposing Trump’s registration cites failure to function as a trademark as one of their grounds for opposing the mark.<sup>86</sup> In their notice of opposition, they state: “Especially in this case, where KEEP AMERICA GREAT is being used in a hotly contested presidential campaign, this slogan is being used by Mr. Trump to promote a view that Donald Trump is GREAT, and that America can be kept GREAT by keeping . . . Mr. Trump as President. If ever there was a prototypical case of a message which conveys a belief and a call to action rather than a mark which identifies source, this is the case.”<sup>87</sup>

It will be interesting to see how this opposition proceeding progresses, and while we wait, we should consider: how can President Trump’s “Keep America Great!” surpass the merely informational matter hurdle only a few short months after Mueller was denied registration on these grounds for the exact same phrase? Again, this is alarming because it seems as though different standards are being applied to different people in applying for marks.<sup>88</sup> Given the glaring issues in the

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<sup>83</sup> *Id.*

<sup>84</sup> U.S. Trademark Application Serial No. 87,305,551 (filed Jan. 18, 2017).

<sup>85</sup> For more information on opposition proceedings, see *Protecting Your Trademarks*, *supra* note 13, at 25. An opposition proceeding is a thirty-day window where the public is able to object to the trademark registration at issue. *Id.* This thirty-days begins when the trademark is ‘published,’ signifying that the USPTO has examined and accepted the trademark. *Id.*

<sup>86</sup> Notice of Opposition at ¶ 9, *America in Harms Way v. Donald J. Trump for President, Inc.*, Opposition No. 91251641 (T.T.A.B. 2019), <http://ttabvue.uspto.gov/ttabvue/v?pno=91251641&pty=OPP&eno=1> [<https://perma.cc/C6VU-UT2D>].

<sup>87</sup> *Id.*

<sup>88</sup> For more information on Trump getting special treatment in other government licensing contexts, see Chris Mills Rodrigo, *Former NYPD Commander Claims Trump Got Special Treatment for Gun Licenses*, THE HILL (Jan. 23, 2019, 9:54 PM), <https://thehill.com/regulation/court-battles/426715-former-nypd-commander-claims-trump-got-special-treatment-for-gun> [<https://perma.cc/RV2T-A5FJ>], and Hamza Shaban, *Here’s Why a Historic Site Remained Open at Trump’s Hotel Despite the Government Shutdown*, WASH. POST (Jan. 25, 2019, 5:25 PM)

MAGA registration, perhaps this was the case with that registration as well. While it may not seem significant that President Trump is able to register some slogans with the USPTO, these government grants are a part of a larger issue: President Trump is acting in ways that presidents have not acted before, doing things presidents have not done, and there are few holding him accountable for when that behavior may be wrong, including the government and some of its agencies specifically.

## II. THE POLITICAL/COMMERICAL DICHOTOMY IN THE AGE OF PRESIDENT TRUMP

To further complicate these circumstances, the registrability of political slogans like MAGA is concerning on a more general level. There is a strong tension between commercial speech and political speech, and this tension has been discussed at length as it pertains to trademark law.<sup>89</sup> In essence, the tension is between the First Amendment—the importance of free speech being at its apex in political discourse—and an entity's ability to commercialize a mark and reap the rewards of its work through trademark protection, effectively taking some form of ownership and being able to profit off of this ownership over the phrase. Should political speech, inherently protected by the First Amendment, ever be limited so that only one entity can use it? This is effectively what registering a trademark does: it grants the owner the exclusive right to use the mark in connection with the goods and services the mark is used on and protects that right by supplying various causes of action the owner can avail themselves of should they so choose.<sup>90</sup> If words, logos, and slogans that are inherently political and used in inherently political contexts like presidential campaigns can be registered as trademarks, they are effectively being taken out of the competing candidates' use and being monopolized in that context by the owner. While the MAGA registrations seem to be solely a trademark issue at first glance, exploring this larger debate about political and commercial speech illustrates that much more is at play.

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<https://www.washingtonpost.com/business/2019/01/25/heres-why-historic-site-remained-open-trump-hotel-despite-government-shutdown/> [<https://perma.cc/35GR-P9HA>].

<sup>89</sup> See generally Richard Cheung, *Political Speech and Trademark Infringement: A Review Essay*, 12 J. CONTEMP. LEGAL ISSUES 284 (2001); Byron Crowe II, *[Insert Company Name] Sucks: A Response to Speech, Citizenry and the Market*, 99 MINN. L. REV. HEADNOTES 38 (2014); Patrick D. Curran, Comment, *Diluting the Commercial Speech Doctrine: "Noncommercial Use" and the Federal Trademark Dilution Act*, 71 U. CHI. L. REV. 1077 (2004); John Zevitas, Comment, *If It Doesn't Fit, Keep on Trying?: The Courts' Attempt to Find a Place for Pure Political Speech in the Lanham Act*, 60 CATH. U. L. REV. 243 (2010).

<sup>90</sup> *Protecting Your Trademark*, *supra* note 13, at 3, 11, 27.

The political/commercial dichotomy has been a longstanding problem in trademark registration and enforcement, and the issue has many facets. One key facet is the inconsistency in which courts deal with the distinction.<sup>91</sup> Courts disagree on whether trademark law should apply to pure political speech—which is given the highest protection under the Constitution and “includes activities such as circulating a petition, running campaign commercials, and soliciting campaign donations”—at all.<sup>92</sup>

Notably, this dichotomy has a conceptual or philosophical basis, and it plays out in different contexts. For example, the tension between political and commercial speech is exemplified in the specific context of slogans where politicians or political candidates use commercial slogans in their campaigns. One of the most notable of these instances can be summarized from the *Nader* case:

[T]he Ralph Nader 2000 campaign for President ran a television ad borrowing a theme used in ads for MasterCard credit cards. MasterCard ran a series of television ads showing goods purchased by a credit card, followed by some priceless intangible that cannot be bought, followed by the words: “Priceless. There are some things money can't buy, for everything else there's MasterCard.” Nader's political campaign ads showed a series of items with the price of each (e.g., “grilled tenderloin for a fund-raiser: \$1,000 a plate;” “promises to special interest groups: over \$100 billion”). The Nader political ad ended with a phrase identifying a priceless intangible that cannot be purchased: “Finding out the truth: priceless. There are some things that money can't buy.” The court dismissed MasterCard's claim of dilution of its marks as being statutorily exempted because Nader's use was a “noncommercial” use.<sup>93</sup>

While it makes sense theoretically to separate political from commercial speech because of the different contexts in which they are used, *Nader* presents an example of where the two kinds of speech intersect. This intersection illustrates an obvious tension in deeming political speech broadly as noncommercial, and thus affording it certain protections (such as the First Amendment and fair use), when there are clear instances of commercial speech being used in political contexts, and vice versa.

The issue with the MAGA registrations is slightly different than the issue in the *Nader* scenario because it involves a politician creating and attempting to protect his own slogan rather than appropriating an already-established commercial slogan that has been registered by a commercial entity. While there is no caselaw on this specific issue, there is some discussion of trademark protection for political slogans in academia, which centers around the differences between the kinds of slogans

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<sup>91</sup> See generally Zevitas, *supra* note 89.

<sup>92</sup> *Id.*

<sup>93</sup> MCCARTHY, *supra* note 30, at § 31:147.

(and speech more generally).<sup>94</sup>

A political slogan serves to “influence the political opinions of the public and to steer them towards a certain candidate or policy.”<sup>95</sup> A commercial slogan, on the other hand, aims to: “remind[] the consumer of a specific brand and . . . [to] influenc[e] his or her future purchases.”<sup>96</sup> Some see this difference as easily surmountable, arguing that political slogans deserve trademark protection because they resemble slogans with a commercial use: marketing. The product political slogans attempt to market: the politicians themselves.<sup>97</sup> Following this argument, and as long as the slogan successfully functions as a source indicator—it markets the politician and consumers understand that the slogan is referring specifically to that politician, their campaign, and their ideas, separating them from their competitors—it seems as though there is no reason why political slogans should not be registrable.<sup>98</sup>

On the other hand, it is difficult to reconcile political and commercial slogans because of their ultimate purposes and aims. What are the goods or services comprising the politician? Are those goods or services used or sold in commerce? When a political campaign employs a slogan, what is it trying to do with that slogan?

Some argue that the goals of political slogans are not the same as commercial slogans because of the differences inherent in the contexts and the types of speech these separate contexts espouse. Political ads are given lenience in terms of what they are allowed to present because political speech is inherently afforded protection by the First Amendment.<sup>99</sup> A significant impact of this protection is that

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<sup>94</sup> See generally Anabelle Torres Colberg, *Trademarks and Political Speech*, 3 No. 2 U. P.R. BUS. L.J. 296 (2012).

<sup>95</sup> *Id.* at 301.

<sup>96</sup> *Id.*

<sup>97</sup> *Id.* at 298.

<sup>98</sup> *Id.* at 307.

<sup>99</sup> Randy Bergmann, *First Amendment Protects Right to Lie, Distort*, ASBURY PARK PRESS (Oct. 21, 2019, 5:00 AM), <https://www.app.com/story/opinion/columnists/2019/10/21/political-ads-nj-first-amendment-protects-right-lie-distort/4015118002/> [<https://perma.cc/X9TC-RN6K>] (“The Supreme Court has ruled that [political] ads are protected by the First Amendment. In other words, the Constitution protects the right of political candidates to lie to their heart's content.”); Amy Sullivan, *Truth in Advertising? Not for Political Ads*, TIME (Sept. 23, 2008), <http://content.time.com/time/politics/article/0,8599,1843796,00.html> [<https://perma.cc/NJZ7-2S83>] (“Commercial companies are bound by restrictions that prevent them from making false claims about their products or those of their competitors . . . Candidates are not held to the same commercial standard, and the reason is simple: their statements and advertisements are considered ‘political speech,’ which falls under the protection of the First Amendment.”).

the information political ads present is more likely to be deceptive or untrue.<sup>100</sup> This is a common concern cited during political campaign seasons, which has led various sources to conduct fact-checking on presidential advertisements and speeches.<sup>101</sup> However, the same protections do not exist in a commercial advertising context, and the Lanham Act actually provides a specific cause of action for deceptive advertising practices in section 43(a) of the Act.<sup>102</sup> This is not to say that the slogans employed are deceptive or confusing themselves, but it is worth noting that the context of the speech can dictate what that speech is allowed to do, which is part of the reason for the separation of commercial and political speech in the first place.<sup>103</sup>

The *Nader* case, mentioned above, exemplifies this conflict coming to a head and what impact this collision could have on trademark enforcement.<sup>104</sup> Ultimately, the political nature of Nader's ad prevailed over the commercial nature.<sup>105</sup> The court held that the use was political rather than commercial, meaning it was exempted from the Federal Trademark Dilution Act, which specifically exempts noncommercial use of trademarks from its coverage.<sup>106</sup> By concluding that Nader's

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<sup>100</sup> Daniel Kegan, *Political Trademarks: Intellectual Property in Politics and Government*, 44 ILL. ST. B. ASS'N SEC. INTELL. PROP. 1 (Oct. 2004), [https://www.researchgate.net/publication/279538871\\_Political\\_trademarksIntellectual\\_property\\_in\\_politics\\_and\\_government](https://www.researchgate.net/publication/279538871_Political_trademarksIntellectual_property_in_politics_and_government) [<https://perma.cc/KW3R-JW69>].

<sup>101</sup> William P. Marshall, *False Campaign Speech and the First Amendment*, 153 U. PA. L. REV. 285, 286 (2004) ("On one side, unchecked excesses in campaign speech can threaten the legitimacy and credibility of the political system. On the other, regulating campaign speech is problematic because of the serious dangers and risks in allowing the government and the courts to interfere with the rough and tumble [and constitutional protections] of political campaigns."). See also Gillian Brassil, *5 Ways Candidates Mislead you in Debates*, POLITICO (Sept. 25, 2016), <https://www.politico.com/magazine/story/2016/09/political-candidates-mislead-tactics-debates-214288> [<https://perma.cc/TFV7-XSEL>] (finding half of Clinton's factual assertions were true or mostly true while 15% of Trump's were); Gleb Tsipursky, *The Brain Science of Political Deception in the Election*, PSYCHOL. TODAY (Mar. 29, 2017), <https://www.psychologytoday.com/us/blog/intentional-insights/201703/the-brain-science-political-deception-in-the-election> [<https://perma.cc/6KBP-AW57>]. For discussion of truth in political ads specifically in the last presidential election, see Linda Qiu, *10 Most Aired Political Ads, Fact-Checked*, POLITIFACT (Nov. 3, 2016, 11:26 AM), <https://www.politifact.com/truth-o-meter/article/2016/nov/03/10-most-aired-political-ads-fact-checked/> [<https://perma.cc/E4U4-VYQ8>].

<sup>102</sup> 15 U.S.C.A. § 1125 (West 2006).

<sup>103</sup> Victor Brudney, *The First Amendment and Commercial Speech*, 53 B.C. L. REV. 1153, 1165–69 (2012).

<sup>104</sup> MasterCard Intern. Inc. v. Nader 2000 Primary Comm., Inc., No. 00 Civ.6068(GBD), 2004 WL 434404, at \*9 (S.D.N.Y. Mar. 8, 2004).

<sup>105</sup> *Id.*

<sup>106</sup> *Id.*

use of MasterCard's trademark was political rather than commercial, the court determined that, even assuming the advertisement caused greater contributions to be made to his political campaign, this would not be enough to deem the ad commercial speech rather than political.<sup>107</sup> This case illustrates that when certain speech could be considered *both* political and commercial, there is a compelling argument that *only one* kind of speech should be recognized for each specific instance because of the different meanings behind the different kinds of speech and the different protections they are afforded.

Thus, there should be hesitation before combining political and commercial speech on any level because they stand for completely different things, and once they are combined, it becomes increasingly difficult to tell them—or the goals they are trying to accomplish—apart. Keeping political speech separate from commercial speech promotes clarity and simplicity, and it ensures that the goals of each context, and the protections afforded to the different kinds of speech to insulate those goals, remain intact.

#### **A. MAGA as Political and Commercial Speech**

The MAGA marks represent another example of political speech and commercial speech colliding, and this collision highlights some of the key repercussions of allowing the two kinds of speech to co-exist in the same matter. The MAGA phrase is political speech in that it has a certain meaning, referring back to a certain time in American history as is often done by the Republican party.<sup>108</sup> It is also commercial in some sense because of the merchandise on which it is sold. Additionally, the slogan is arguably merely informational matter because of the common use within the Republican party and with politicians in general, who use history as a model and also as a way to attract constituents by associating themselves with popular moments and figures of the past. Due to all of these connections pertaining to the phrase, it would be difficult to assume that consumers would identify it with one singular source, thus constituting merely

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<sup>107</sup> *Id.* at \*7.

<sup>108</sup> Tom Jacobs, *Conservatives' Love of Nostalgia Can Be Used to Promote Liberal Values*, PAC. STANDARD MAG. (Feb. 1, 2018), <https://psmag.com/news/the-grand-old-party-longs-for-the-good-old-days> [<https://perma.cc/2XGX-3VCB>] (“Conservatism has been called the ‘politics of nostalgia’ since at least 1955, the researchers note. Those on the right . . . ‘have an intuitive preference for political ideas that contribute to maintaining society how it was and has been.’”); David Masciotra, *The Party of Myth and Nostalgia: The GOP Jobs Narrative is Hopelessly Stuck in the Past*, SALON (July 24, 2016, 2:00 PM), [https://www.salon.com/2016/07/24/the\\_party\\_of\\_myth\\_and\\_nostalgia\\_the\\_gop\\_jobs\\_narrative\\_is\\_hopelessly\\_stuck\\_in\\_the\\_past/](https://www.salon.com/2016/07/24/the_party_of_myth_and_nostalgia_the_gop_jobs_narrative_is_hopelessly_stuck_in_the_past/) [<https://perma.cc/A947-WZSV>].



informational matter.

One impact of these MAGA registrations is that President Trump is asserting his ownership of this phrase by threatening others who use it in purely political ways (e.g. competing politicians using the phrase in their own campaign speeches),<sup>109</sup> ways that are not traditionally understood to constitute trademark use. President Trump has asserted his ownership of the MAGA phrase by sending cease and desist letters to other politicians who used the phrase and to online marketing outfits that sold merchandise with the slogan on it.<sup>110</sup>

President Trump sent cease and desist letters to competing candidates like Senator Ted Cruz and Wisconsin Governor Scott Walker who said “make America great again” in their campaign speeches in the 2016 election cycle.<sup>111</sup> However, as briefly mentioned already, saying the words of a slogan may not constitute a trademark use (and thus, if by someone other than the owner, an infringing use), especially given the tendency of slogans to be descriptive, and the informational nature of this slogan particularly. Interestingly, upon sending the cease and desist letters to competing politicians, Trump Organization lawyer Alan Garten explained that President Trump would “soon own the exclusive legal rights to use the phrase ‘Make America Great Again’ in the political arena.”<sup>112</sup> Notably, however, this is *not* the result of President Trump getting registration for MAGA. Politicians merely saying a phrase, especially a phrase that has been commonly used in the political context, might not identify a particular source and thus might not constitute

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<sup>109</sup> See Enrico Bonadio, *How Donald Trump Trademarked the Slogan ‘Make America Great Again’*, THE CONVERSATION (Oct. 15, 2015, 8:09 AM), <http://theconversation.com/how-donald-trump-trademarked-the-slogan-make-america-great-again-49070> [https://perma.cc/7L9Z-HWTF]; Tumulty, *supra* note 71.

<sup>110</sup> Robert Hennelly, *Trump Cries Foul on Unofficial Campaign Gear Sellers*, CBS NEWS (Oct. 6, 2015, 5:15 AM), <https://www.cbsnews.com/news/trump-cries-foul-on-unofficial-campaign-gear-sellers/> [https://perma.cc/D3E7-CJYD] (“Donald Trump’s organization is sending cease-and-desist letters to such online marketing outfits, warning them that a use of Trump’s name, likeness and trademarked slogan — “Make America Great Again” — are illegal infringements on Trump’s trademark rights.”); Bonadio, *supra* note 109.

<sup>111</sup> Tumulty, *supra* note 71.

<sup>112</sup> David Martosko, *Trump Trademarked Slogan ‘Make America Great Again’ Just DAYS After the 2012 Election and Says Ted Cruz has Agreed Not to Use it Again After Scott Walker Booms it TWICE in Speech*, THE DAILY MAIL.COM (May 12, 2015, 12:04 PM), <https://www.dailymail.co.uk/news/article-3077773/Trump-trademarked-slogan-Make-America-Great-just-DAYS-2012-election-says-Ted-Cruz-agreed-not-use-Scott-Walker-booms-TWICE-speech.html> [https://perma.cc/DLA4-3GUE] (“‘The issue is not whether it is being used verbally by others in public,’ he said. ‘The problem is that it is repeatedly being used by others as a slogan or catchphrase. That is what the trademark filing protects against.’”).

trademark use; as a result, perhaps these kinds of uses of this phrase should be protected as noncommercial use as in *Nader*. This highlights another problem inherent in mixing political with commercial speech: once President Trump transforms political speech (a slogan used in a presidential campaign) into commercial speech (a slogan used to sell merchandise, far beyond the limits of the original presidential campaign the slogan was used and registered for),<sup>113</sup> it is difficult to discern which protections the registered slogan affords to its owner. If President Trump has indeed transformed political speech into commercial speech, he could argue that others' similar uses of the phrase are in fact infringing commercial speech. However, this would mean that the phrase's developed commercial nature is more important than the nature of the phrase at its inception: political speech in the form of a campaign slogan. So, what is the nature of this speech, and what kind of protection should it receive as a result? Should it be trademark protection reflecting its developed commercial nature, given to commercial matter that identifies its source? Should it be First Amendment protection given to political speech reflecting the political nature the slogan held at its inception? Should it—and can it—be both?

President Trump also sent cease and desist letters through his Trump Organization legal team to online stores selling merchandise adorned with “Make America Great Again,”<sup>114</sup> despite the fact that some of the alleged infringement is based on merchandise from his trademark applications that have not been granted yet.<sup>115</sup> Another concerning aspect of this policing is the fact that it is coming from Trump Organization lawyer Alan Garten, despite the MAGA marks having been assigned to President Trump's campaign committee, Donald J. Trump for President, Inc.<sup>116</sup> This presents yet another example of the blending of President Trump's business and politics in that his personal, Trump Organization lawyer is engaging in enforcement activities for his political slogan registered to his

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<sup>113</sup> For more information about how the MAGA slogan is still in use and being sold on merchandise, see Justin Rohrlich, *Donald Trump's Campaign is Still Spending Millions on MAGA Merchandise*, QUARTZ (Nov. 22, 2018), <https://qz.com/1469335/donald-trumps-campaign-is-still-spending-millions-on-maga-merchandise/> [<https://perma.cc/T7CT-5ZYS>] (describing how Trump spent millions of dollars creating MAGA merchandise in 2018 alone).

<sup>114</sup> Hennelly, *supra* note 110; *Donald Trump Threatens Lawsuits Over Make America Great Again Trademark*, MANDOUR & ASSOC.: CALIF. INTELL. PROP. BLOG, <https://www.mandourlaw.com/blog/donald-trump-threatens-lawsuits-over-make-america-great-again-trademark/> [<https://perma.cc/QQ8K-UTUU>] (last visited Apr. 3, 2019).

<sup>115</sup> MAKE AMERICA GREAT AGAIN, Registration No. 5,921,166.

<sup>116</sup> Hennelly, *supra* note 110; MAKE AMERICA GREAT AGAIN, Registration No. 4,773,272; MAKE AMERICA GREAT AGAIN, Registration No. 5,020,556.

campaign committee.

These two circumstances in which President Trump is engaging in the initial stages of policing his marks are especially problematic given that the marks may not actually constitute proper trademarks in the first place.

### ***B. Political Slogans in the Future***

The issues highlighted by the MAGA registration are instructive on how political slogans in general may be problematic: there are practical concerns like distinctiveness and ornamentation, and the fact that political slogans can be at risk of being merely informational matter, and more theoretical concerns like the complicated tension between political and commercial speech. If political slogans are entitled to protection under trademark law, these issues should be addressed so that protection afforded to these political slogans aligns with the broader philosophies of trademark law. The USPTO, courts, and others who are responsible for granting and enforcing trademark protection should be united in how to approach them in the future. The following discussion contains suggestions for how trademark law should treat political slogans given the issues highlighted above.

Firstly, political slogans should be required to have a showing of acquired distinctiveness in order to be approved by the USPTO, given the fact that slogans are often descriptive rather than distinctive. Secondly, since one of the main uses for these slogans is placing them on products for advertising, particular attention should be paid to trademark use as opposed to ornamentation. Thirdly, particular attention should also be paid to the nature of the speech. While there are compelling arguments for allowing the registration of political slogans because they can also function as commercial speech,<sup>117</sup> this reasoning should not overshadow the constitutional protections that have consistently been afforded to political speech.<sup>118</sup>

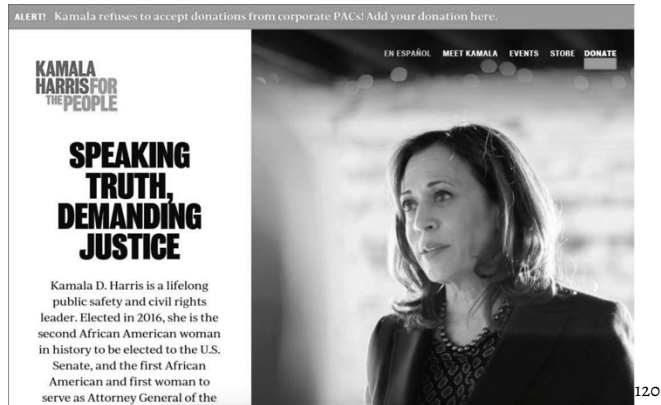
Notably, 2020 presidential candidate California Senator Kamala Harris registered her campaign slogan, KAMALA HARRIS FOR THE PEOPLE, with the USPTO.<sup>119</sup> As proof of use, Harris attached a specimen almost identical to the specimens President Trump used for his registration:

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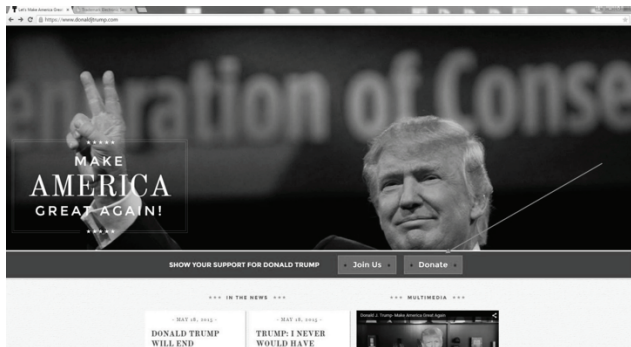
<sup>117</sup> Colberg, *supra* note 94, at 306.

<sup>118</sup> See Zevitas, *supra* note 89, at 243–44.

<sup>119</sup> KAMALA HARRIS FOR THE PEOPLE, Serial No. 88,285,706 (filed Feb. 1, 2019).



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Both of these specimens were accepted as proof of use and both of these trademarks were granted. This could be an indication that trademark protection of political slogans may be increasing, despite the fundamental issues discussed above like failure to function as a mark, descriptiveness, and ornamentality. It is worth noting, though, that Harris' mark is different from the MAGA marks in one important way: the trademark itself features her name. This makes the source of the slogan abundantly clear, which would eliminate the merely informational matter argument, one of the key concerns described above. Had the trademark application been for FOR THE PEOPLE, without Harris' name at the beginning, there would have been a strong argument that this was merely informational matter; however, with the addition of the name, the slogan directs consumers immediately to one particular source rather than to a generic phrase that is often

<sup>120</sup> *Id.* at Specimen page 1 (depicting KAMALA HARRIS FOR THE PEOPLE displayed on the website homepage of www.kamalaharris.org).

<sup>121</sup> MAKE AMERICA GREAT AGAIN, Registration No. 5,020,556 at Specimen page 15 (depicting MAKE AMERICA GREAT AGAIN displayed on the website homepage of www.donaldjtrump.com).

used in political discourse. The 2020 election campaign will likely shed light on the future of protection for political slogans as the candidates become more solidified.

### III. BROADER IMPLICATIONS

In addition to highlighting issues within trademark law specifically, the MAGA trademark registrations also exemplify some of the larger trends within Donald Trump's presidency in general. While the details about the President of the United States have always been of global interest and importance, that has perhaps reached new heights with President Trump. It seems like there is a new story about President Trump almost every day, whether political or personal. There have been stories about people all over the world who are concerned about certain aspects of Donald Trump's presidency.<sup>122</sup> In December of 2019 the United States House of Representatives voted to impeach President Trump, but the United States Senate voted to acquit him early in 2020.<sup>123</sup> This section will explore how the MAGA registration relates to some of these key issues.

#### A. Emoluments

Many in the media have voiced concerns about President Trump's potential violations of the Emoluments Clauses. In essence, these clauses "preclude the president from receiving a class of benefits or perquisites extending beyond salary," or some form of public or private gain or advantage.<sup>124</sup> There are two emoluments clauses in the Constitution, one pertaining to domestic emoluments and the other to foreign;<sup>125</sup> President Trump has been accused of violating both.<sup>126</sup>

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<sup>122</sup> Jack Goldsmith, *Will Donald Trump Destroy the Presidency?*, THE ATLANTIC (Oct. 2017), <https://www.theatlantic.com/magazine/archive/2017/10/will-donald-trump-destroy-the-presidency/537921/> [<https://perma.cc/5TFX-Y5T7>]; Aaron Rupar, *Trump's UK Trip Illustrates Why People Worried About a Trump Presidency*, VOX (June 5, 2019, 1:10 PM), <https://www.vox.com/2019/6/5/18653677/trump-uk-trip-ireland-golf-bad-tweets> [<https://perma.cc/EWL4-N76W>].

<sup>123</sup> Nicholas Fandos & Michael D. Shear, *Trump Impeached for Abuse of Power and Obstruction of Justice*, NY TIMES, <https://www.nytimes.com/2019/12/18/us/politics/trump-impeached.html> [<https://perma.cc/98J2-WWBD>] (last updated Jan. 16, 2020). Philip Ewing, *'Not Guilty': Trump Acquitted on 2 Articles of Impeachment as Historic Trial Closes*, NPR (Feb. 5, 2020, 4:33 PM) <https://www.npr.org/2020/02/05/801429948/not-guilty-trump-acquitted-on-2-articles-of-impeachment-as-historic-trial-closes> [<https://perma.cc/DE8R-35PG>].

<sup>124</sup> Phil Schuster, *The Safeguard*, 77-JAN OR. ST. B. BULL. 62, 62(2017).

<sup>125</sup> U.S. CONST. art. I, § 9, cl. 8.

<sup>126</sup> Stephen F. Rohde, *Is the Emoluments Clause a Threat to Trump's Presidency?*, 40-MAR. L.A. LAW. 36, 36 (2017); Scott Bomboy, *An Update on the Emoluments Cases*, NAT'L CONST. CTR.: CONST. DAILY

At one point, there were “three pending lawsuits alleging that President Trump ha[d] violated the . . . Emoluments Clauses, which were intended to prevent government corruption.”<sup>127</sup> There is much discussion about how President Trump is toeing the line along the Emoluments Clause unlike any other president before because “the size of the stream of financial benefit flowing from [President Trump]’s global business interests, inextricably intertwined with foreign and domestic governmental functioning, is vast.”<sup>128</sup> Two of the three lawsuits have been dismissed on a procedural basis.<sup>129</sup>

Generally, President Trump has made some efforts to separate himself from his business. Although he retains ownership of his businesses and has not put his interests in a blind trust, he has “turned over control of those businesses to his sons, pledged not to enter into new foreign transactions,” and promised to have only a “heightened review of domestic transactions.”<sup>130</sup> Moreover, the Trump Organization donated close to \$200,000 to the U.S. Treasury representing profits from foreign governments using the Organization’s properties so far during his presidency.<sup>131</sup> However, these efforts have not satisfied critics who are concerned

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(Aug. 1, 2018), <https://constitutioncenter.org/blog/an-update-on-the-emoluments-cases> [https://perma.cc/5R9T-YCEV].

<sup>127</sup> Caroline Frederickson, *The Least Dangerous Branch-And the Last Hope of the Left*, 12 HARV. L. & POL’Y REV. 121, 131 (2018). For more detail about complaints, see *D.C. v. Trump*, 930 F.3d 209, 211 (4th Cir.), *reh’g en banc granted*, 780 F. App’x 38 (4th Cir. 2019); *Blumenthal v. Trump*, No. 17-1154, 2019 WL 3948478 (D.D.C. Aug. 21, 2019), *leave to appeal granted sub nom. In re Trump*, No. 19-8005, 2019 WL 4200443 (D.C. Cir. Sept. 4, 2019); *Blumenthal, et al. v. Trump*, CONST. ACCOUNTABILITY CTR., <https://www.theusconstitution.org/litigation/trump-and-foreign-emoluments-clause/> [https://perma.cc/96L5-PJP4] (last visited Apr. 3, 2019); *The District of Columbia v. Trump*, COURT LISTENER, <https://www.courtlistener.com/docket/6072774/the-district-of-columbia-v-trump> [https://perma.cc/HBU4-4BAL] (last updated Feb. 20, 2019).

<sup>128</sup> Rohde, *supra* note 126. Trump’s response to these concerns has been worrisome: “[Trump] has boldly declared: ‘I have a no-conflict situation because I’m president.’ That sounds hauntingly like Richard Nixon’s infamous statement that ‘when the president does it, that means it is not illegal.’ Remember what happened to him.” *Id.*

<sup>129</sup> Bomboy, *supra* note 126.

<sup>130</sup> *The Emoluments Clause and the President*, CONST. RTS. FOUND., <http://www.crf-usa.org/images/pdf/TheEmolumentsClause.pdf> [https://perma.cc/2SYE-Y274] (last visited Apr. 3, 2019); Chase Peterson-Withorn, *Trump Refuses to Divest Assets, Passes Control to Sons*, FORBES (Jan. 11, 2017, 11:41 AM), <https://www.forbes.com/sites/chasewithorn/2017/01/11/donald-trump-will-hand-over-business/#bbb9d1f60d71> [https://perma.cc/W8V4-WGJ4].

<sup>131</sup> Bernard Condon, *Trump Org Donates Nearly \$200k to Cover Foreign Profits*, ASSOCIATED PRESS (Feb. 25, 2019), <https://apnews.com/a4349ac80a7048bdb61f017fffd9623f> [https://perma.cc/J5DR-CRXX].

about the potential emoluments violations being committed by President Trump, and what this may mean moving forward.<sup>132</sup>

These lawsuits, and various other reports, were based on a variety of controversies that have arisen surrounding President Trump's ongoing business in the United States and abroad during his presidency.<sup>133</sup> Part of this concern comes from President Trump's refusal to open a blind trust account, which is what most recent presidents have done to separate themselves from their business interests during their presidency.<sup>134</sup> Instead, President Trump's trust remains in the control of his family and close associates, with President Trump himself remaining as the sole beneficiary.<sup>135</sup> Many see this as alarming because it demonstrates that President Trump is diverging from established presidential practice to separate business from politics, when he has perhaps the most business to be separated of any president in history. Some other issues that have caused this concern are President Trump's continued ownership and operation of hotels and other real estate and business ventures all over the world and his continued royalty earnings from his television shows.<sup>136</sup>

In addition to these issues, President Trump's trademark practices also illustrate a questionable mix of politics and business unlike what we have seen with previous presidents. One example of this is Trump and his daughter Ivanka Trump's Chinese trademark prosecution noticeably improving since Trump took office.<sup>137</sup>

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<sup>132</sup> Ciara Torres-Spelliscy, *How Will the Courts Handle the Trump Emoluments Cases?*, BRENNAN CTR. FOR JUST. (Feb. 20, 2019), <https://www.brennancenter.org/our-work/analysis-opinion/how-will-courts-handle-trump-emoluments-cases> [https://perma.cc/PRP7-EM7F] ("Regardless of outcome, clarity on the emoluments issue is needed not just for this administration, but potentially for future ones: Americans should know if they need to be concerned about voting for someone who potentially could put his or her own business interests ahead of the national interest. If Howard Schultz or Jeff Bezos or Michael Bloomberg runs for president next, Americans should know whether they're voting again for someone who would run into an emoluments problem on day one.").

<sup>133</sup> See Condon, *supra* note 131; Torres-Spelliscy, *supra* note 132.

<sup>134</sup> Schuster, *supra* note 124.

<sup>135</sup> Karen Yourish & Larry Buchanan, *Trump Still Makes Money from His Properties. Is this Constitutional?*, NEW YORK TIMES, <https://www.nytimes.com/interactive/2018/12/17/us/politics/trump-emoluments-money.html> [https://perma.cc/NLG3-VSB2] (last updated July 10, 2019).

<sup>136</sup> *Id.*

<sup>137</sup> Edward Helmore, *Ivanka Trump Won China Trademarks Days Before Her Father's Reversal on ZTE*, THE GUARDIAN (May 28, 2018, 2:10 PM), <https://www.theguardian.com/us-news/2018/may/28/ivanka-trump-won-china-trademarks-donald-trump-zte-reversal> [https://perma.cc/2FFH-GN9Z]; Caroline Zhang, *Ivanka Trump's Business Wins Approval for 16 New Chinese Trademarks Despite*

One specific illustration of this is six days after the Chinese government approved five trademarks in May 2019 for applications Ivanka Trump filed in 2017, President Trump announced the reversal of a Department of Commerce decision to ban Chinese corporation ZTE from doing business with the United States because they had violated U.S. sanctions.<sup>138</sup> A Washington D.C. ethics expert commented: “[The timing of the announcement] raises significant questions about corruption, as it invites the possibility that [Ivanka Trump] could be benefiting financially from her position and her father’s presidency or that she could be influenced in her policy work by countries’ treatment of her business.”<sup>139</sup>

Another iteration of President Trump’s suspicious trademark practice is the MAGA registration and applications. As mentioned earlier, the practice of applying to register political slogans as trademarks is rare. There are likely many reasons for this, and perhaps emoluments concerns are one of them. The MAGA slogan has become so famous largely because of the merchandise President Trump sold during the campaign—and continued to sell after his election.<sup>140</sup> In fact, President Trump seems to have departed from traditional campaign tactics and strategies in this merchandizing, evidenced by “his Federal Election Commission filings show[ing] that his campaign was spending more on ‘Make America Great Again’ trucker caps than on polling, political consultants, staff or television ads.”<sup>141</sup> In January of 2016, the MAGA merchandise machine cost more than all the other presidential candidates’ merchandise spending, reaching 7.9 percent of President Trump’s campaign’s expenses (with 75% of his total spending going to marketing in general), compared to Bernie Sanders’ 2.6% spending on merchandise and other candidates’ spending even less.<sup>142</sup>

Moreover, as alluded to earlier, MAGA merchandise is still sold today; President

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*Shutting Down, CITIZENS FOR RESP. AND ETHICS IN WASH.* (Nov. 5, 2018), <https://www.citizensforethics.org/ivanka-trump-trademarks/> [<https://perma.cc/9YKE-DMHS>].

<sup>138</sup> Helmore, *supra* note 137; Zhang, *supra* note 137.

<sup>139</sup> Zhang, *supra* note 137. Ivanka’s case is even more troubling than just that: “Ivanka announced the immediate closure of her brand in July 2018, citing her official government responsibilities in Washington, DC. However, her trademarks remain a potential conflict of interest as she continues to work on policy in the White House and meet with foreign leaders.” *Id.* In another potentially telling example, in 2017, the business received three new Chinese trademarks on the same day she dined with Chinese President Xi Jinping. *Id.*

<sup>140</sup> Rohrich, *supra* note 113.

<sup>141</sup> Tumulty, *supra* note 71.

<sup>142</sup> Hannah Abrams, *How Much Do Presidential Candidates Spend on Campaign Merchandise?*, PROMOMARKIT (Mar. 15, 2016), <http://www.promomarkit.com/article/how-much-do-presidential-candidates-spend-on-campaign-merchandise/> [<https://perma.cc/6DY7-WKW4>].



Trump's campaign spent and earned millions of dollars in 2017 and 2018 from the merchandise with the 2016 campaign slogan.<sup>143</sup> Many have called this Trump's "permanent presidential campaign," questioning whether the president's focus is on running the country or running his re-election campaign, highlighting things like more than fifty political rallies Trump has put on since his inauguration which were funded in part by his campaign.<sup>144</sup> This merchandizing strategy has led President Trump's campaign to be very successful in earning attention and money.<sup>145</sup> It is an innovative approach, but perhaps no one else has done this in the past because of the intersection it creates between commercial and political speech.

These circumstances provide another lens through which to look at why the mixing of commercial and political speech may be problematic: preventing unfair profiting off political speech rather than simply reinforcing or protecting freedom of speech. Given President Trump's career, the fact that his campaign spent the most on merchandise is striking because it is easy, and arguably logical, to compare the MAGA brand with any of Trump's other brands. President Trump is first and foremost a businessman, and that mentality has clearly impacted the way he conducted and continues to conduct his campaign. His MAGA registration makes his money-making intentions even more clear because it is difficult to think of a motivation to register a trademark other than preventing competition from profiting from the mark. Trump's profit-seeking was clearly a driving force in his presidential campaign, and it continues to be a driving force given the trademark registration is still in effect and Trump's campaign is still selling merchandise with the MAGA phrase on it, which again is not a common practice for presidents.

Another way President Trump has used trademarks in politically problematic ways is in the promotion of his brands more generally. During President Trump's first year in office, "he and other members of his administration made public reference to Trump brands and businesses on at least 54 different occasions," and another forty-nine times in the first eight months of 2018.<sup>146</sup> Ethics consultants explained that this self-promotion is unavoidable with a businessman like Donald

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<sup>143</sup> Rohrlich, *supra* note 113.

<sup>144</sup> Dave Levinthal, *Donald Trump Created a Permanent Presidential Campaign. Here's How.*, PUB. RADIO INT'L. CTR. FOR PUB. INTEGRITY (Feb. 18, 2019, 5:30 PM), <https://www.pri.org/stories/2019-02-18/donald-trump-created-permanent-presidential-campaign-here-s-how> [<https://perma.cc/HF68-LJ8D>].

<sup>145</sup> *Id.*

<sup>146</sup> Eli Lee, *Trump Administration Increases its Promotion of President's Business*, CITIZENS FOR RESP. AND ETHICS IN WASH. (Aug. 24, 2018) <https://www.citizensforethics.org/trump-administration-increases-its-promotion-of-presidents-business/> [<https://perma.cc/EEJ3-FLZ4>].

### Trump as president:

For those working in the Trump administration, the basic functions of government often intersect with the president's private businesses in ways that essentially require them to promote those businesses. For example, before President Trump hosted Japanese Prime Minister Shinzo Abe at Mar-a-Lago, Press Secretary Sarah Huckabee Sanders mentioned the club by name in her official statement announcing Abe's visit.<sup>147</sup>

Perhaps MAGA represents a bridge between the commercial/political gap in trademark law. Referring back to the argument that supports the registration of political slogans as trademarks, perhaps President Trump's MAGA is only political speech in the sense that it is used in a political context, but the more important meaning of the mark is commercial, representing another iteration of the Trump brand as a whole. This is supported by the fact that the cease and desist letters sent to online outfitters selling counterfeit MAGA merchandise mentioned earlier were sent by Trump Organization lawyers rather than someone within his campaign organization.<sup>148</sup> The lawyer who sent the letters argued that they were policing these uses of the MAGA slogan to protect President Trump's trademark and his brand more generally.<sup>149</sup> This illustrates that perhaps all President Trump is doing with this slogan is promoting himself, and thus the commercial nature of the speech should outweigh its political nature. Thus, this branding effort is illustrative of more than Trump's business acumen; it illustrates the blending of business and politics in a way that has not been done before and raises some striking ethical issues—the trademark protection of MAGA being chief among them.

However, while it may be conceivable and acceptable to bridge the gap between commercial and political speech, we must consider whether it should ever be okay to bridge the gap between commercial and political interests, especially by the President of the United States. Given that President Trump clearly emphasized through how he treats the MAGA trademarks that MAGA represents another iteration of his brand rather than political speech that may not be protected as a trademark in a commercial sense, should he be allowed to use the phrase in his capacity as President, which is an inherently political position? Would this not be a president using their political office to promote their own commercial interests? Is that not exactly what the Emoluments Clauses are meant to prevent?

## CONCLUSION

President Trump has more business success and perhaps as much independent

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<sup>147</sup> *Id.*

<sup>148</sup> *Donald Trump Threatens Lawsuit*, *supra* note 114.

<sup>149</sup> *Id.*

notoriety than any President before him. With his career and infamy, it is not surprising that Trump's presidency looks very different compared to past presidencies. President Trump is revolutionizing what it means to be the President of the United States, what it means to run a presidential campaign, and what it means to own trademarks as a political figure. Arguably, the MAGA registration is an illustration of President Trump's business sense. The registration is indicative of his ability to create a brand and, through this brand, market himself by intertwining it with his politics and his presidency. Moving forward, the USPTO, the American government, and the American people must decide whether this combination of commercial and political interests is an arrangement that they are willing to endorse as we all endeavor to Make America Great Again.