

NO. _____

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In The **OFFICE OF THE CLERK**
Supreme Court of the United States

IN RE
SHINNECOCK SMOKE SHOP

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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**PARTIES TO THE PROCEEDINGS
IN THE COURT BELOW AND
CORPORATE DISCLOSURE STATEMENT**

Petitioner

Petitioner, Jonathan K. Smith, is a reservation member of the Shinnecock Indian Nation, and was the applicant of two trademark applications to the United States Patent and Trademark Office, SHINNECOCK BRAND FULL FLAVOR (Serial No. 78918061) and SHINNECOCK BRAND LIGHTS (Serial No. 78918500), which were consolidated on all appeals. Petitioner was the Appellant before the United States Patent and Trademark Office, Trial and Appeal Board, and was the Appellant before the United States Court of Appeals for the Federal Circuit. Petitioner is not a publicly owned corporation or subsidiary or affiliate of a publicly owned corporation.

Respondent

Respondent is the Commissioner of the United States Patent and Trademark Office. Respondent is not a publicly owned corporation or subsidiary or affiliate of a publicly owned corporation.

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PETITION FOR WRIT OF CERTIORARI

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

OPINIONS BELOW

In an administrative action, the United States Patent and Trademark Office, issued a Final Office Action on July 7, 2007, which refused Petitioner's two trademark applications at issue in this case. The refusal was upheld on administrative appeal to the United States Patent and Trademark Office, Trademark Trial and Appeal Board, Order on September 10, 2008. The United States Court of the Appeals for the Federal Circuit upheld the refusal by an Order and Judgment, July 1, 2009, and the Mandate issued, September 4, 2009. The United States Court of Appeals for the Federal Circuit by Order denied rehearing *en banc* on August 28, 2009.

STATEMENT OF JURISDICTION

The United States Court of the Appeals for the Federal Circuit issued its Order and Judgment, on July 1, 2009, and its Mandate issued, September 4, 2009. The United States Court of Appeals for the Federal Circuit issued its Order denying rehearing *en banc* on August 28, 2009. Petitioner invokes this Court's jurisdiction pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the constitutional provision reproduced in the Appendix at App. 83-84.

- A. U.S. CONST. amend. V
- B. 15 U.S.C. § 1052(a)

STATEMENT OF THE CASE AND FACTS

The following registrations were granted by the USPTO to *non-Indian* applicants with marks using the identical Indian tribe name used by the Petitioner, namely "SHINNECOCK" (Reg. No. 1447929); SHINNECOCK HILLS GOLF CLUB 1891 (Reg. No. 1447929); 1891 SHINNECOCK (Reg. No. 76408860); NICK'S SHINNECOCK MARINA (Reg. No. 0915793). (App. B).

The following registrations were granted to *non-Indian* applicants with marks using other Indian tribe names. CHEROKEE (Reg. No. 1663757), CHEROKEE (Reg. No. 2706122), CHEROKEE (Reg. No. 2881671), CHEROKEE BRAND (Reg. No. 0908927), APACHE (Reg. No. 2912969), CHIPPEWA (Reg. No. 0773714), TUSCARORA (Reg. No. 2417630), CAYUGA (Reg. No. 2396499), SENECA (Serial No. 78841901, published for opposition November 7, 2006, now Reg. No. 3201748). (App. B).

The following registrations were granted to *non-Indian* applicants with marks using names of deceased Indian persons. GERONIMO (Reg. No. 2274143), GERONIMO (No. 2629289), CRAZY HORSE (Reg. No. 2968623), SACAGAWEA (Reg. No. 2548215), KATONAH (Serial. No. 78727068, approved and published for opposition 12/12/07 (now abandoned)). (App. B).

The following registrations were granted to non-governmental applicants with marks denoting the United States and the states of New York and Michigan. U.S. STEEL (Reg. No. 2469301); AMERICAN TELEPHONE AND TELEGRAPH COMPANY (Reg. No. 1959591); NEW YORK DONOR EGG (Reg. No. 2984380); and MEA (Reg. No. 2124061). (Briefed by Petitioner, but not cited in the TTAB Opinion or any lower court opinion).

The same EA as in the present case granted an Indian corporation, organized under the laws of the Sac and Fox Nation, registration for the mark, SENECA (Reg. No. 2827776). In addition, a Notice of Allowance was granted by the USPTO on July 17, 2007, for the mark LUMBEE (Serial No. 78972292). (Briefed, but not considered part of the record by the TTAB; App. B).

The Petitioner is Shinnecock Smoke Shop, a sole proprietorship of Jonathan K. Smith, a member of the Shinnecock Indian Nation (“the Tribe”), residing and doing business on the Tribe’s reservation, the Shinnecock Indian Reservation, located within the territorial boundaries of the State of New York. (App. F, G).

Petitioner filed applications to register the marks, SHINNECOCK BRAND FULL FLAVOR AND SHINNECOCK BRAND LIGHTS, serial numbers 78918061 and 78918500, on June 27, 2006 and June 28, 2006, respectively. After Office Actions and Responses by the Petitioner, the United States Patent and Trademark Office (“USPTO”), Examining Attorney (“EA”), made a final refusal to register based on a disputed determination that Petitioner’s Tribe is a “person” within the meaning of the Section 2(a) prohibition under the Trademark Act, and rejected Applicant’s claims of illegal discrimination under rights protected by the federal constitution and international treaty. (App. C).

On appeal to the USPTO, Trademark Trial and Appeal Board (“TTAB”), the EA’s refusal was upheld under Section 2(a), but on a *different* determination, that Petitioner’s Tribe is an “institution,” first raised by the TTAB, without considering the disputed “person” issue. “Applicant and the Trademark Examining Attorney have argued at length on the question of whether the tribe is ‘person’ within the meaning of Section 2(a). We need not and do not decide that question, however, because regardless of whether the tribe is a ‘person,’ it clearly is an ‘institution’ and thus is protected under Section 2(a).” (App. B). The TTAB also rejected Petitioner’s claims of discrimination. (App. B).

Petitioner submitted many examples of similarly situated marks which passed to registration when filed by non-Indians, which supported Petitioner’s statutory construction of Section 2(a), and which supported claims of

discrimination if Petitioner's registrations were refused.

REASONS FOR GRANTING THE WRIT

This case presents the Court with a nationally important case involving the status of Native American Tribes under the Trademark Act as applied by the United States Patent and Trademark Office, and a documented history of illegal favorable treatment by the USPTO granting Non-Native American applications for similarly situated marks.

- I. Native American trademark applicants should not be refused on the erroneous basis that Native American Tribes are "Persons" or "Institutions" under Section 2(a) of the Trademark Act.**

The TTAB determined that the Shinnecock Indian Nation is an "institution" within the meaning of Section 2(a) of the Trademark Act. This "institution" issue was not briefed by the parties before the TTAB, and was not the Section 2(a) basis of refusal by the Examining Attorney. This was a linchpin issue, because if the Shinnecock Indian Nation is not an "institution" within the prohibition of Section 2(a), the mark must pass to registration.

The Trademark Act specifies that no distinctive trademark shall be refused registration unless it violates one of the statutory exceptions. 15 U.S.C. § 1052. One exception is if the mark "Consists of or comprises ... matter which may ... falsely suggest a connection with persons, living or dead,

institutions” 15 U.S.C. § 1052(a). “The PTO has the burden of proving that a trademark falls within a prohibition of Section 1052.” *In re Mavety Maven Group*, 33 F.3d 1367, 1371 (Fed. Cir. 1994).

The Examining Attorney consistently took the same position and refused registration under Section 2(a) of the Trademark Act based on a determination that Applicant’s Tribe constitutes “persons, living or dead” within the prohibition and meaning of 15 U.S.C. § 1052(a), citing, *In re White*, 73 USPQ2d 1713 (TTAB 2004)”. The Examining Attorney’s determination rested squarely on *In re White*.

The TTAB avoided dealing with the “person” issue in *In re White* by completely disregarding the Examining Attorney’s “person” determination and Peitioner’s arguments, and instead made a different determination that the Tribe is an “institution” and denied registration under Section 2(a). In making this “institution” determination, the TTAB cited no legal authority or analysis other than a general cite to *In re White*:

Applicant and the Trademark Examining Attorney have argued at length on the question of whether the tribe is a ‘person’ within the meaning of Section 2(a).⁵ We need not and do not decide that question, however, because regardless of whether the tribe is a ‘person,’ it clearly is an ‘institution’ and thus is protected under Section 2(a). See *In re White, supra*, (Apache tribes are

‘institutions’ for purposes of Section 2(a)).

(App. B)

The TTAB reliance on *In re White* for its “institution” determination appears to refer to the following language in the holding in *In re White*:

We find that each federally recognized Apache tribe is necessarily either a juristic person or an institution.

In re White, 2004 TTAB LEXIS 529, at 12.

The analysis by the TTAB in *In re White* in support of this “person” holding applied the definition of 15 U.S.C. § 1127 to Section 2(a). *In re White*, 2004 TTAB LEXIS, at 10-12. There is no analysis or legal support cited in support of including the word “institution” in the holding in *In re White*.

On appeal to the United States Court of Appeals for the Federal Circuit (“the Federal Circuit”), the Federal Circuit “affirm[ed] the Board’s conclusion that the Shinnecock Indian Nation is an ‘institution’ and thus falls within section 1052(a)’s protection.” The Federal Circuit cited and heavily relied upon the TTAB case, *In re White*. (App. A)

Applicant's Tribe is neither a "Person" or "Institution" within the meaning of Section 2(a) of the Trademark Act

15 U.S.C. § 1052 (a)

Section 2(a) of the Trademark Act provides:

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

(a) Consists of or compromises immoral, deceptive, or scandalous matter; or matter which may disparage or falsely suggest a connection with persons, living or dead, institutions, beliefs, or national symbols, or bring them into contempt, or disrepute; or a geographical indication which, when used on or in connection with wines or spirits, identifies a place other than the origin of the goods and is first used on or in connection with wines or spirits by the applicant on or after one year after the date on which the WTO Agreement (as defined in section 2(9) of the Uruguay Round Agreements Act [19 USCS § 3501(9)] enters into force with respect to the United States. [emphasis added]

15 U.S.C. § 1127

Also known as Section 45 of the Trademark Act, 15 U.S.C. § 1127 includes a rule of construction, and a definition of “person”:

In the construction of this Act, unless the contrary is plainly apparent from the context—

...

The term “person” and any other word or term used to designate the applicant or other entitled to a benefit or privilege or rendered liable under the provisions of this Act includes a juristic person as well as a natural person. The term “juristic person” includes a firm, corporation, union, association, or other organization capable of suing and being sued in a court of law. [emphasis added]

The term “person” also includes the United States, any agency or instrumentality thereof, or any individual, firm, or corporation acting for the United States and with the authorization and consent of the United States. The United States, any agency or instrumentality thereof, and any individual, firm, or corporation acting for the United States and with the authorization and consent of the United States, shall be subject to the provisions

of this chapter in the same manner and to the same extent as any nongovernmental entity.

The term “person” also includes any State, any instrumentality of a State, and any officer or employee of a State or instrumentality of a State acting in his or her official capacity. Any State, and any such instrumentality, officer, or employee, shall be subject to the provisions of this chapter in the same manner and to the same extent as any nongovernmental entity.

Regarding statutory construction, the United States Supreme Court has stated ‘where ... the statute’s language is plain, the “sole function of the courts is to enforce it according to its terms.” *U.S. v. Ron Pair Enterprises*, 489 U.S. 235, 241 (1988).

Indian Tribes are nations. As Chief Justice John Marshall recognized in *Worcester v. Georgia*, 6 Pet. 515, 556-557 (1832):

From the commencement of our government, congress has passed acts to regulate trade and intercourse with the Indians; which treat them as nations, respect their rights, and manifest a firm purpose to afford that protection which treaties stipulate.... The treaties and laws of the United States contemplate the Indian territory as completely separated from that of the states.

“As separate sovereigns pre-existing the Constitution, tribes have historically been regarded as unconstrained by those constitutional provisions framed specifically as limitations on federal or state authority.” *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 56 (1978) Indian nations cannot be sued without their consent under the doctrine of sovereign immunity. *Martinez*, 436 U.S., at 58.

The broad definition of “person” in Section 1127 does not apply to Section 2(a) use of the phrase “persons, living or dead”. It is plainly apparent from the context of Section 2(a) that the phrase “persons, living or dead” means *natural persons* because of the statute’s use of the words “living or dead” following the word “persons”. The language “persons, living or dead” in Section 2(a) is plain, and the rule of construction as to “context” in Section 1127 operates to exclude the Section 1127 definition of “person” from the phrase “persons, living or dead” in Section 2(a). *Ron Pair Enterprises*.

It would make no sense for a “juristic person” to be living or dead. In addition, the use of such a broad definition to extend from a natural person, to, a juristic person, strains and swallows the statutory language of section 2(a) because a juristic person would also include at least two separate statutory phrases, an “institution” as well as a “persons, living or dead”.

In addition to the Section 1127 rule of construction as to “context” which limits its application, the textual language of Section 1127 contains a second limitation. The Section 1127

sentence beginning “The term ‘person’” is followed by the limiting phrase, “*and any other word or term used to designate the applicant or other entitled to a benefit or privilege or rendered liable ...*” [emphasis added] The phrase “persons, living or dead” from Section 2(a) is plainly a prohibitive category barring registration, and plainly is not a phrase used to designate the applicant or other entitled to a benefit or privilege or rendered liable. A contrary interpretation defies the plain reading of the statute.

Petitioner’s use of the term “SHINNECOCK” in the mark is no different than other private sector registrations of marks incorporating the name or initials of governments. For example, the “United States” and the states of “New York” and “Michigan,” have not been treated as “persons, living or dead” under Section 2(a), nor have any other states. *e.g.*, U.S. STEEL, AMERICAN TELEPHONE AND TELEGRAPH COMPANY, NEW YORK DONOR EGG, and MEA.

Petitioner’s marks refers to his political sovereign, which is not a “person” or “juristic person” as found by the USPTO Examining Attorney or an “institution” as found by the TTAB, and applicant’s registration is not barred by section 2(a).

Even if Section 1127 does apply, Indian tribes are not included in the Section 1127 definition of the term “person,” or “juristic person.”

Section 1127 expressly includes the United States and the states within the meaning of “person.” However, Section 1127 does not expressly

include Indian Tribes within the meaning of “person,” and the inclusion defies a plain reading of the statute.

For these reasons, the Federal Circuit erred in upholding the TTAB’s ruling that Petitioner’s Tribe is an “Institution,” justifying a refusal to register under Section 2(a) of the Trademark Act.

II. Native American trademark applicants should not be refused when a historical pattern of practice of illegal racial discrimination is shown by documented grants of trademark registrations to non-Native American applicants of similarly situated trademarks.

Petitioner documented sampling of registrations granted to *non-Indians* clearly show that registrations are granted to *non-Indians* for marks which use not only the names of Indian tribes and Indian natural persons, but the identical Indian tribe name used in Petitioner’s mark.

Racial Discrimination

Notably, the explanation for the documented pattern of registrations as set forth as discriminatory by Petitioner, was not raised by the EA, but was volunteered by the TTAB in its decision. i.e. proof problems. The EA did not raise such an explanation in the Final Office Action, and would be seriously constrained from doing so of course, because of the pending and post *In re White* applications pointed out by Petitioner.

The TTAB Decision determined that the refusal to register was not discriminatory in violation of Fifth Amendment due process and equal protection rights, as unsupported by the facts, and any right to relief was unavailable. (App. B).

The TTAB Decision determined that racial discrimination was not shown because all the marks may have passed to registration because of “proof problems” by the USPTO:

It is entirely reasonable to assume that these registrations were issued not because the applicants therein were non-Indians, but rather because the elements of the Section 2(a) refusal were not or could not be proven by the Office.

(App. B)

The TTAB Decision went on to explain that, even assuming the registrations cited by Applicant were incorrectly issued, this does not justify issuing registrations to Applicant, citing *In re Boulevard Entertainment Inc.*, 334 F.3d 1336 (Fed. Cir. 2003).

More fundamentally, even if all of the third-party registrations cited by applicant were issued inappropriately and should have been refused registration under Section 2(a), such errors by the Office would not justify the issuance of a registration to applicant in this case, where all of the

elements of the Section 2(a) refusal clearly have been established.

(App. B)

The TTAB suggested alternative possible explanation that the registrations to non-Indians resulted from proof problems by the USPTO is not a reasonable explanation, since it also favors Petitioner. Turning a blind eye to the pattern of previous registrations to non-Indian applicants and claiming a proof problem, but raising the bar for Petitioner, is a form of racial discrimination. This apparent difference in standards continued even as this matter remained pending. *See, LUMBEE*. Clearly, Petitioner was treated differently than non-Indian applicants.

The Federal Circuit held there was no due process violation because Petitioner 'was provided a full opportunity to prosecute [his] applications and to appeal the examining attorney's final rejections to the Board.' (App. A). The Federal Circuit held that even if Petitioner's argument was correct, "such errors do not bind the USPTO to improperly register Applicant's marks." (App. A). This ruling effectively legitimizes discrimination in the USPTO by declaring there is simply no relief to an affected applicant such as Petitioner.

Fifth Amendment Due Process and Equal Protection

The due process clause, U.S. CONST., Amend. V, provides in pertinent part:

No person shall ... be deprived of life, liberty, or property, without due process of law;

The due process clause of the Fifth Amendment bars unjustifiable racial discrimination by the federal government in the same way the equal protection clause of the Fourteenth Amendment bars the states. *Bolling v. Sharpe*, 347 U.S. 497 (1954)(Holding segregation in D.C. public schools violative of due process clause of Fifth Amendment.). The same equal protection analysis applies. *Weinberger v. Wiesenfeld*, 420 U.S. 636 (1975)(Gender based Social Security benefits statute providing for payments to a decedent's wife, but not husband, entirely irrational and violative of due process clause of Fifth Amendment.).

In the present case, the above registration evidence shows a clear pattern of similarly situated marks passing to registration when filed by non-Indians, but refusal to an Indian. This is substantial evidence of unjustifiable racial discrimination. The TTAB Decision asserting possible proof problems with the non-Indian applicants is not a reasonable explanation of the approval pattern. The EA made *no effort* to justify the pattern.

**The United Nations International
Convention on the Elimination of All
Forms of Racial Discrimination**

In 1994, the United States ratified the *Convention on the Elimination of All Forms of Racial Discrimination*, 660 UNTS 195 (“CERD”). Fundamental obligations of the United States are found in Article 2 of CERD.

Article 2(1)(a)-(b) provides:

- (1) States Parties condemn racial discrimination and undertake to pursue by all appropriate means and without delay a policy of eliminating racial discrimination in all its forms and promoting understanding among all races, and, to this end:
 - a. Each State Party undertakes to engage in no act or practice of racial discrimination against persons, groups or persons or institutions and to ensure that all public authorities and public institutions, national and local, shall act in conformity with this obligation;

- b. Each State Party undertakes not to sponsor, defend or support racial discrimination by any persons or organizations;

Article 5(a) of CERD provides:

In compliance with the fundamental obligations laid down in article 2 of this Convention, States Parties undertake to prohibit and to eliminate racial discrimination in all its forms and to guarantee the right of everyone, without distinction as to race, colour, or national or ethnic origin, to equality before the law, notably in the enjoyment of the following rights:

- a. The right to equal treatment before the tribunals and all other organs administering justice;

There is precedent that the United Nations' has found discriminatory actions of the United States with regard to Native Americans in violation of CERD.

The Office of the High Commissioner for Human Rights, Committee on the Elimination of Racial Discrimination, issued concerns and recommendations directed to the United States with regard to land issues involving the Western Shoshone Tribe. (A/56/18, para. 400, adopted on 13 August 2001). The failure of the United States to

respond triggered further U.N. action. (Early Warning and Urgent Action Procedure, Decision 1(68), adopted on 8 March 2006). The United States has still not responded as of this date. U.N. High Commissioner for Human Rights letter to United States, 9 March 2007.

In the present case, the above analysis also shows racial discrimination in violation of Article 2(1)(a) of CERD, and a government's defense of its discrimination also violates Article 2(1)(b).

United States tribunals and organs, are obligated to prohibit racial discrimination and to provide equal treatment to the applicant under Article 5(a). A refusal to register this Indian applicant's mark while granting numerous registrations to non-Indians under similarly situated circumstances, violates the CERD obligations of the United States.

Although not a treaty, the U.N. General Assembly Declaration on the Rights of Indigenous Peoples, was adopted on September 13, 2007, which benefits Petitioner. The United States was one of only four countries to have noted against the Declaration.

CONCLUSION

The TTAB affirmed the EA's refusal to register Petitioner's marks on different grounds than that relied upon by the EA in the Final Office Action. The Federal Circuit affirmed. Petitioner showed below that his Tribe is obviously not a "Person" or

“Institution,” and a refusal to register under Section 2(a) of the Trademark Act, under either ground was error. Further, Petitioner presented a documented *prima facie* case of discriminatory pattern of practice of the USPTO in previously, and even presently, granting trademark registrations to non-Native Americans with similarly situated marks.

FOR THE FOREGOING REASONS, Petitioner, Jonathan K. Smith, d/b/a Shinnecock Smoke Shop, respectfully requests this Court to reverse the United States Court of Appeals for the Federal Circuit, and remand this action to the United States Patent and Trademark Office, with instructions not to refuse registration of Serial Nos. 78918061 and 78918500 under Section 2(a) of the Trademark Act, and/or hold further proceedings on Petitioner’s claim of racial discrimination.

Respectfully submitted,

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