

This Opinion is a
Precedent of the TTAB

Mailed: October 29, 2020

UNITED STATES PATENT AND TRADEMARK OFFICE
Trademark Trial and Appeal Board

In re Texas With Love, LLC

Serial No. 87793802

Jerry C. Harris, Jr. of Wick Phillips Gould & Martin, LLP
for Texas With Love, LLC.

Laura Gorman Kovalsky, Trademark Examining Attorney, Law Office 110,
Chris A.F. Pedersen, Managing Attorney.

Before Kuhlke, Adlin and Larkin, Administrative Trademark Judges.

Opinion by Adlin, Administrative Trademark Judge:

Applicant Texas With Love, LLC seeks registration of TEXAS LOVE (in standard characters) for “hats; shirts.”¹ The Examining Attorney refused registration under Sections 1, 2 and 45 of the Trademark Act, on the ground that TEXAS LOVE fails to function as a mark, because it does not indicate the source of Applicant’s goods, or identify and distinguish them from those of others. More specifically, the Examining Attorney contends that the evidence shows that TEXAS LOVE conveys a well-

¹ Application Serial No. 87793802, filed February 12, 2018 under Section 1(a) of the Trademark Act, 15 U.S.C. § 1051(a), alleging first use dates of February 8, 2018.

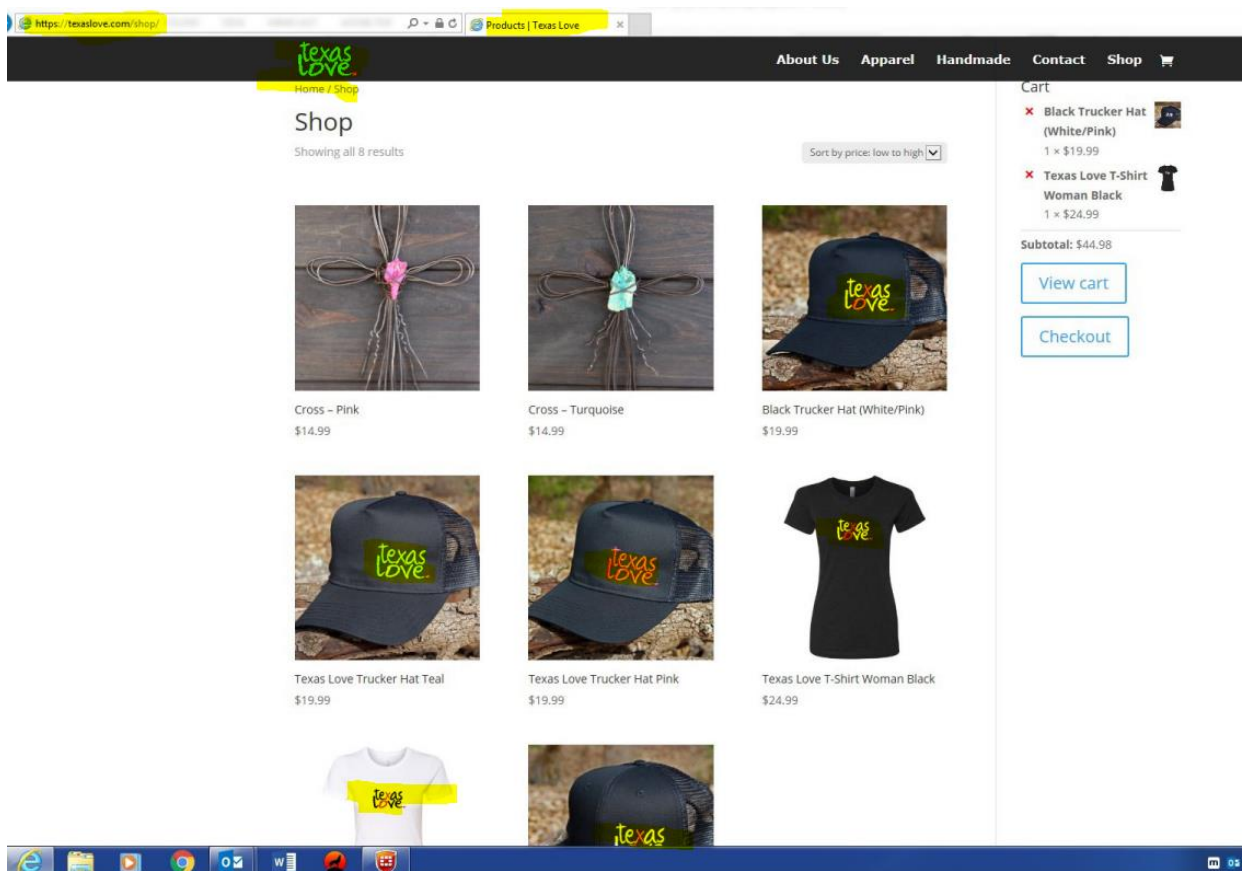
recognized and widely used concept or sentiment. After the refusal became final, Applicant appealed and Applicant and the Examining Attorney filed briefs.

I. Evidence and Arguments

The evidence consists of Applicant's specimens of use submitted with the involved application, and examples of third-party uses of TEXASLOVE and variations thereof. The arguments are primarily over the nature of the term TEXAS LOVE, and whether the Office's registration of a number of what Applicant alleges to be analogous marks justifies registration of Applicant's mark as well.

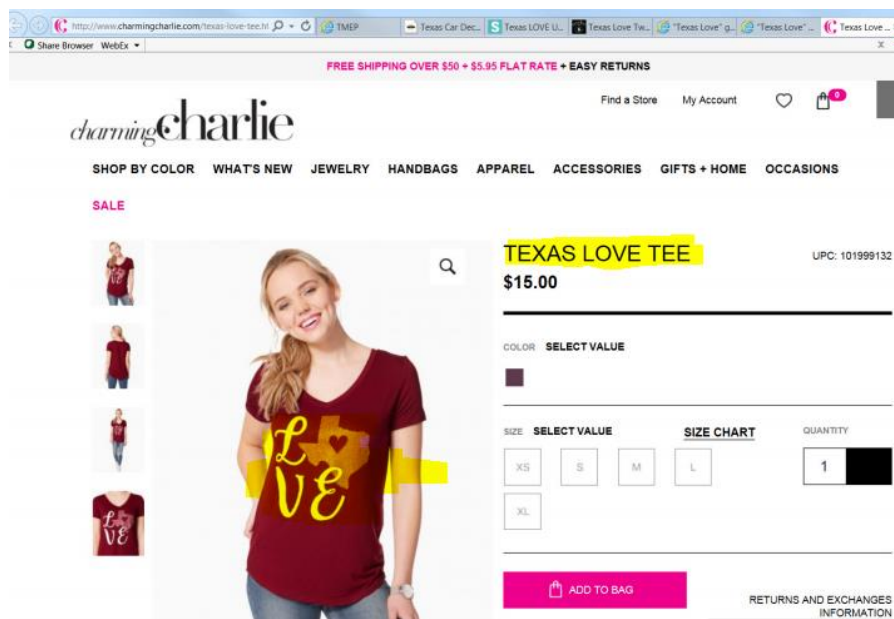
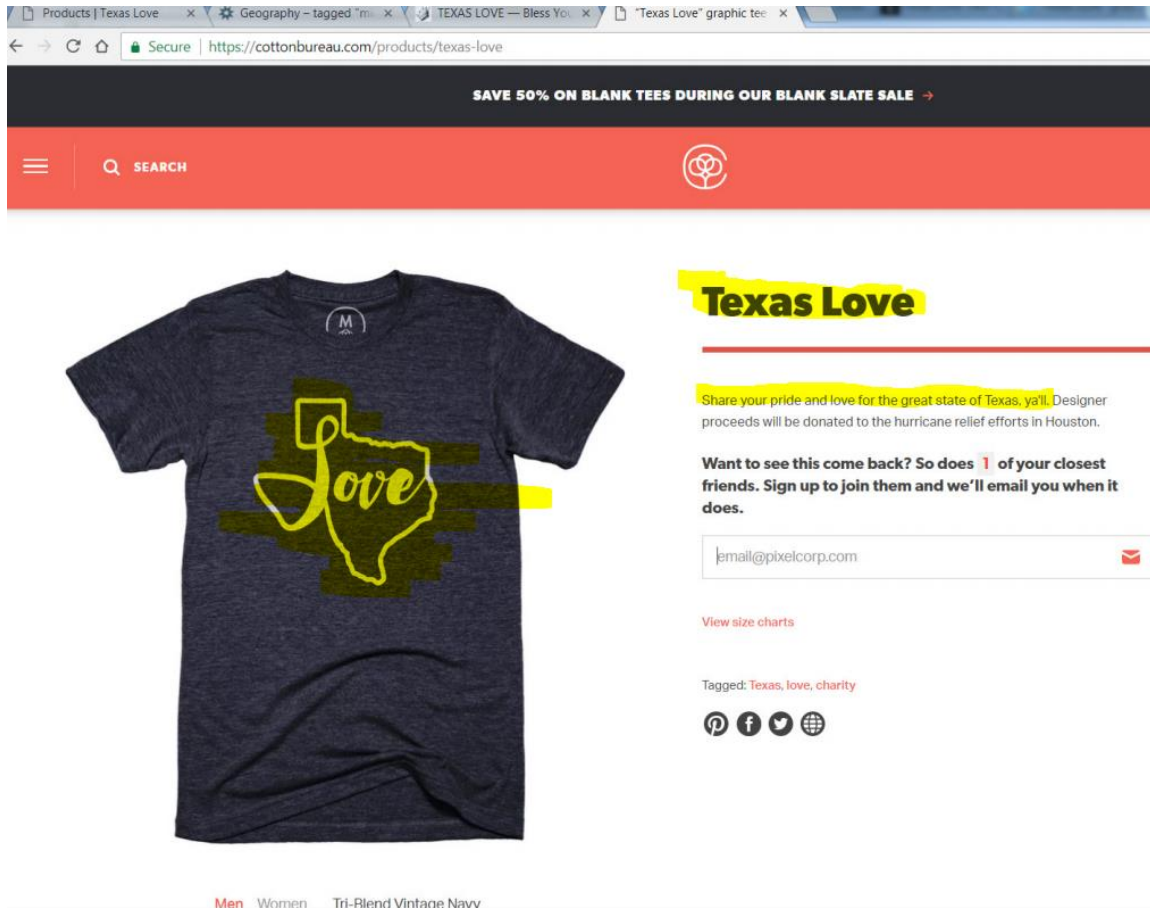
A. The Evidence

Applicant submitted specimens of use of the proposed mark, including the following page from its website, which is representative:



Serial No. 87793802

To support the failure to function refusal, the Examining Attorney submitted the following evidence of third-party use of TEXAS LOVE in various forms:




https://www.sevenly.org/products/texas-love-t... TMEP Texas Car D... Texas LOVE... Texas Love... Texas Love... Texas Love... Texas LO... X Conver

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sevenly™ Shop Products About Blog Search Account



100% of Net Proceeds from Your Purchase (and More!) Goes to Hurricane Harvey Relief via Convoy of Hope and American Red Cross

Texas LOVE Unisex Triblend Short Sleeve Tee

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\$28.00

Size

Quantity


Share

[ADD TO CART](#)

This classic crew neck t-shirt has a modern relaxed fit and is soft to the touch. It is easy and comfortable to wear for any occasion.



<https://envystylz.com/collections/t-shirts/products/texas-love-with-gold-foil-v-neck>
09/17/2018 07:08:31 PM

MY CART



ENVY stylz
B O U T I Q U E

Home / T-Shirts / Texas Love with Gold Foil V-neck



Texas Love with Gold Foil V-neck

8 Reviews

Texas Love with Gold Foil V-neck

\$24.99

or 4 automatic, interest free payments of \$6.25 with **sezzle** [Learn more](#)

Size

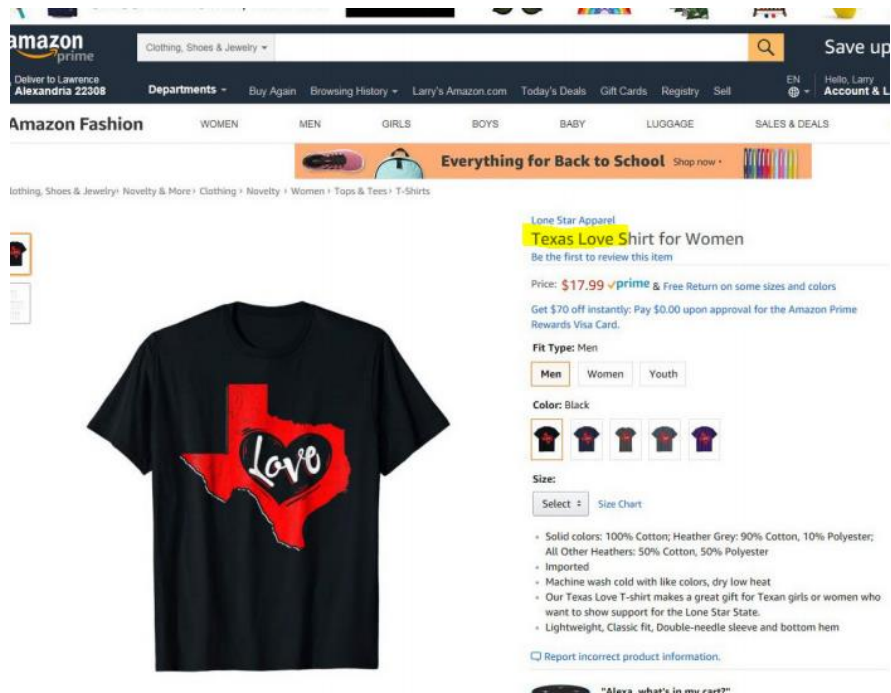
☒ S ☐ M ☐ L ☐ XL ☐ 2XL ☒ 3XL

Quantity

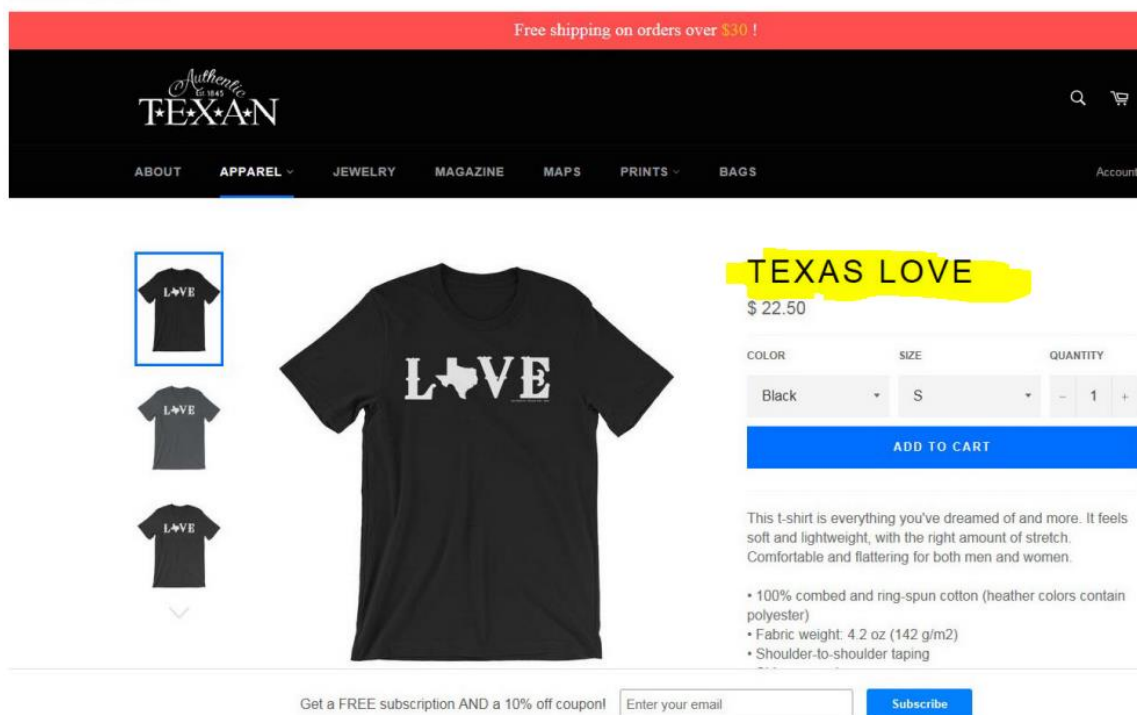
[Add to Cart](#)

CLICK TO EMAIL WHEN ITEM IS AVAILABLE

TO EMAIL




<https://www.authentic-texas.com/collections/authentic-texas-apparel/products/texas-love>
09/17/2018 07:10:36 PM



<https://barefootcampusoutfitter.com/alternative-37299-12147b1-new-texas-love-blue-klein>
09/17/2018 07:13:09 PM

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BAREFOOT
CAMPUS OUTFITTER

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Search entire store here...

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SHOP: Men Women Kids Home & Auto Gifts Sale

WOMEN

New Arrivals

Clothing

Jerseys

Short Sleeve Tees

Long Sleeve Tees

Tanks

Polos & Shirts

Dresses & Skirts

Shorts & Pants

Activewear




Sweatshirts

Outerwear

Caps & Hats

Adjustable

Fitted



New Texas Love- Blue
ALTERNATIVE

Show off your love for Texas with this cute tee!


- Color: Tomato
- Brand: Alternative
- 50% Polyester, 50% Cotton



<https://www.rootsandrevival.org/shop/texas-love-shiplap-muscle-tank/> 09/17/2018 07:14:17 PM


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BATH & BODY CLOTHING & ACCESSORIES HOME & GIFT JEWELRY PAPER GOODS & ART COMING SOON!

Gusto Graphic Tees



Shop Owner
Kelli Holman

Texas Love Shiplap Muscle Tank

\$28.00

Size


1

country rebel
CLOTHING CO.

MY ACCOUNT Search music or clothing...

HOME DECOR MENS WOMENS GIFTS & ACCESSORIES VIDEOS ABOUT CONTACT CART

< All Products



TEXAS LOVE TWO-TONE WOOD WALL ART

\$ 114.95

- TEXAS LOVE two-tone wall-decor with custom cut "Love" heart design
- Ready to hang. Measures approximately 24"x22" with 3/8" thickness. Finished with environmentally friendly clear coat to protect & last.
- Please note each piece is HAND-MADE, 100% unique and has a story to tell with its wood grain.
- All wall art is hand-crafted in San Diego, CA by a local veteran-owned small business.


ADD TO CART

Category: Rustic Decor, Rustic Wood, Texas, Texas Wall Art, Texas Wood Wall Art, Wall Decor, Wood Designs, Wood Wall Art

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Products | Texas Love x Geography - tagged "m... x TEXAS LOVE - Bless Yo... x "Texas Love" graphic tee... x Texas Car Decal Love Te... x

Secure https://texaslovegifts.com/products/love-texas-white-vinyl-car-window-decal-1?variant=36525758478



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HOME TEXAS DECOR TEXAS MUGS COASTERS & COOLERS ORNAMENTS CAR DECALS MORE

HOME > TEXAS CAR DECAL LOVE TEXAS WHITE VINYL CAR ...



TEXAS CAR DECAL LOVE TEXAS WHITE VINYL CAR WINDOW STICKER

\$ 7⁹⁹

SOLD OUT





February 26, 2018 Office Action TSDR 5-10² (highlighting added); September 17, 2018 Office Action TSDR 6-18 (highlighting added).

B. Arguments

The Examining Attorney argues that TEXAS LOVE fails to function as a mark because it is a “commonplace term, message, or expression widely used by a variety of sources that merely conveys an ordinary, familiar, well-recognized concept or sentiment,” specifically “support for, or affiliation or affinity with the State of Texas.”

February 26, 2018 Office Action TSDR 2.

Applicant argues that its proposed mark “does not relate to characteristics and/or usage” of its goods, and that this case is therefore distinguishable from some of the

² Citations to the examination record refer to the Trademark Status and Document Retrieval (“TSDR”) system, by page number, in the downloadable .pdf format.

cases the Examining Attorney relies upon to support the refusal. 4 TTABVUE 11-12³ (Applicant’s Appeal Brief at 10-11). Applicant also claims that none of the Examining Attorney’s third-party evidence shows use of Applicant’s standard character mark TEXAS LOVE, and that there is no evidence that the term TEXAS LOVE conveys a “specific meaning/idea.” *Id.* at 12-13.

Finally, Applicant argues that the refusal violates the U.S. Constitution’s equal protection clause. Specifically, Applicant “discerns no distinction” between its proposed mark and the following allegedly analogous marks which have been registered on the Principal Register:

<u>Mark/Reg. No.</u>	<u>Goods/Services</u>
FLORIDA LOVE (standard characters, FLORIDA disclaimed) Reg. No. 5187858	Stickers hats; t-shirts; tank tops
CALIFORNIA LOVE (standard characters, CALIFORNIA disclaimed) Reg. No. 4666233	Beer
VERONA LOVE (standard characters) Reg. No. 5539001	eyewear; eyewear accessories ...
BURMA LOVE (standard characters, BURMA disclaimed) Reg. No. 4935665	bar and restaurant services; restaurants
SOUTHERN LOVE (standard characters) Reg. No. 5337883	retail store services featuring a variety of goods, namely, gaming merchandise, souvenirs, mugs, glassware, gift items, consumer electronics, housewares,

³ For citations to the Board’s online docketing system, TTABVUE, the number preceding “TTABVUE” corresponds to the docket entry number(s), and any number(s) following “TTABVUE” refer to the page number(s) of the docket entry where the cited materials appear.

	paper products, sporting goods, books and magazines
EAST COAST LOVE (standard characters, EAST COAST disclaimed) Reg. No. 5091632	on-line retail store services featuring clothing, accessories, bumper stickers, and die cuts; retail stores featuring clothing, accessories, bumper stickers, and die-cuts
WAIKIKI LOVE (standard characters, WAIKIKI disclaimed) Reg. No. 5036892	clothing, namely, t-shirts, hoodies, pants, headwear, and dresses

August 25, 2018 Office Action response TSDR 6-29. Thus, Applicant, “as a citizen of Texas, is asserting that because other contextually identical trademarks have been registered to citizens of other states, the ‘TEXAS LOVE’ application **cannot be refused** on the Office Actions’ cited grounds.” 4 TTABVUE 19.

II. Analysis

We address the failure to function refusal and Applicant’s constitutional arguments separately.

A. Failure to Function

“The Trade-Mark Act is not an act to register words but to register trademarks. Before there can be registrability, there must be a trademark (or a service mark) and, unless words have been so used, they cannot qualify for registration.” *In re Standard Oil Co.*, 275 F.2d 945, 125 USPQ 227, 229 (CCPA 1960). Thus, we start our analysis with the Act’s definition of a trademark, which is “any word, name, symbol, or device, or any combination thereof – (1) used by a person ... to identify and distinguish his or her goods, including a unique product, from those manufactured or sold by others and to indicate the source of the goods, even if that source is unknown.” 15 U.S.C.

§ 1127. *See also In re Bose Corp.*, 546 F.2d 893, 192 USPQ 213, 215 (CCPA 1976) (“[T]he classic function of a trademark is to point out distinctively the origin of the goods to which it is attached.”).

Whether the term TEXAS LOVE falls within this definition and functions as a mark depends on whether the relevant public, i.e., purchasers or potential purchasers of Applicant’s goods, would perceive the term as identifying the source or origin of Applicant’s goods. *See, e.g., In re TracFone Wireless, Inc.*, 2019 USPQ2d 222983 at *1-2 (TTAB 2019); *In re Volvo Cars of N. Am. Inc.*, 46 USPQ2d 1455, 1459 (TTAB 1998) (“A critical element in determining whether a term or phrase is a trademark is the impression the term or phrase makes on the relevant public.”); *In re Safariland Hunting Corp.*, 24 USPQ2d 1380 (TTAB 1992). “To make this determination we look to the specimens and other evidence of record showing how the designation is actually used in the marketplace.” *In re Eagle Crest Inc.*, 96 USPQ2d 1227, 1229 (TTAB 2010) (citations omitted).

Here, Applicant’s specimens show trademark use because they display Applicant’s proposed TEXAS LOVE mark in proximity to the hats and shirts being offered for sale on Applicant’s website. *See* TMEP § 904.03(i)(B)(2). But that is not the only relevant inquiry in determining if the proposed mark functions as a source identifier.

In fact, “[n]ot every word, name, phrase, symbol or design, or combination thereof which appears on a product functions as a trademark,” and “[m]ere intent that a phrase function as a trademark is not enough in and of itself to make it a trademark.” *In re Pro-Line Corp.*, 28 USPQ2d 1141, 1142 (TTAB 1993); *see also In re TracFone*

Wireless, 2019 USPQ2d 222983 at *1; *In re Wal-Mart Stores, Inc.*, 129 USPQ2d 1148, 1152 (TTAB 2019) (“The mere fact that a phrase proposed for registration appears on the specimens of record does not establish its use as a service mark.”); *see generally Roux Labs, Inc. v. Clairol Inc.*, 427 F.2d 823, 66 USPQ2d 34, 39 (CCPA 1970) (“The mere fact that a combination of words or a slogan is adopted and used by a manufacturer with the intent Clairol has manifested here – does not necessarily mean that the slogan accomplishes that purpose in reality.”).

In this case, notwithstanding Applicant’s use of the term TEXAS LOVE and apparent intent that it function as a mark, the third-party evidence, as explained below, reveals that TEXAS LOVE does not perform the desired trademark function and does not fall within the Act’s definition of a mark, including because it would be perceived not as a source identifier, but instead as a widely-used phrase that merely conveys a well-recognized and commonly expressed concept or sentiment.

1. TEXAS LOVE is a Well-Recognized Concept or Sentiment

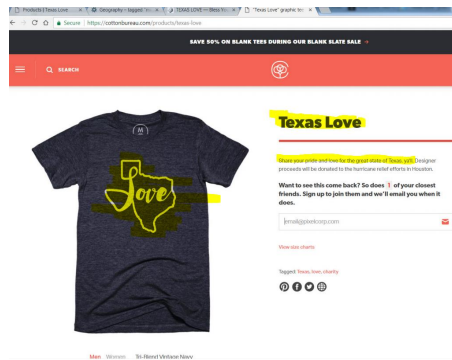
It is clear from how the term is used by multiple third parties that TEXAS LOVE merely conveys a well-recognized concept or sentiment, specifically love for or from Texas; the term does not identify the source of Applicant’s goods. While evidence of third-party use may be in connection with products other than the identified goods, here the record includes many examples of third-party uses for goods that are the

same as or similar to Applicant's identified goods, such as signs and car decals, for example.⁴

Specifically, the t-shirt listed on the "cottonbureau.com" site bears the concept or sentiment TEXAS LOVE in the following design format, with an outline of the state



of Texas signifying the word TEXAS: February 26, 2018 Office Action TSDR 5. While Applicant correctly points out that this design mark is different than the term TEXAS LOVE in standard characters, Cotton Bureau identifies the shirt by that exact term, which Applicant seeks to register (TEXAS LOVE):



. It is settled that designs that would be perceived as the equivalent of a word are generally not legally distinguishable from the word. *Shunk Mfg. Co. v. Tarrant Mfg. Co.*, 318 F.2d 328, 137 USPQ 881, 883 (CCPA 1963); *In re Eight Ball, Inc.*, 217 USPQ 1183, 1184 (TTAB 1983) ("it is clear that a picture or a design and the word or words which describe the design are legal equivalents and must be treated as such"). Furthermore, the listing articulates the same concept

⁴ Matter which is used only ornamentally may also fail to function as a source identifier. TMEP § 1202.03 ("Subject matter that is merely a decorative feature does not identify and distinguish the applicant's goods and, thus, does not function as a trademark.).

or sentiment as Applicant's proposed mark, as it states: "Share your pride and love for the great state of Texas, ya'll [sic]. Designer proceeds will be donated to the hurricane relief efforts in Houston." Thus, the term TEXAS LOVE is used on and in connection with a t-shirt, in both standard characters and with an outline of the state of Texas representing the word "Texas," to show "pride and love" for Texas and to help some of its citizens affected by a hurricane. It is therefore a clear and unequivocal expression of a concept or sentiment, which the record as a whole reveals to be widely recognized because it is so widely used.

Similarly, the t-shirt on the "sevenly.org" site bears a design mark, in which the word "Texas" is represented by an outline of the state of Texas and elements of the Texas state flag. The design includes the word "love," but the product listing identifies the shirt by the term TEXAS LOVE, which Applicant seeks to register, specifically: "Texas LOVE Unisex Triblend Short Sleeve Tee." *Id.* at 8. Furthermore, the Sevenly website displays the tagline "custom outfitters for world changers," and the t-shirt listing indicates that "100% of Net Proceeds from Your Purchase (and More!) Goes to Hurricane Harvey Relief via Convoy of Hope and American Red Cross." This use of TEXAS LOVE expresses a concept or sentiment similar to that conveyed by Cotton Bureau's use of the term. In neither example does TEXAS LOVE identify the product's source or origin.

The Amazon listing for Lone Star Apparel's "Texas Love Shirt for Women" reveals use of TEXAS LOVE in a similar manner, as it states "Our Texas Love T-shirt makes a great gift for Texas girls or women who want to show support for the Lone Star

State.” September 17, 2018 Office Action TSDR 6. Finally, Barefoot Campus Outfitter’s listing of its TEXAS LOVE t-shirt expresses the same sentiment directly: “show off your love for Texas with this cute tee!” *Id.* at 12.

Again, while Applicant is correct that the designs displayed on these products are not identical to the proposed mark TEXAS LOVE in standard characters which Applicant seeks to register, in each of these examples the products themselves are nevertheless identified as “TEXAS LOVE” products elsewhere on the websites. Moreover, at least some of those wishing to express the messages displayed on these products would be likely to use the term TEXAS LOVE, or LOVE TEXAS⁵, as the sources of these products do.

⁵ Word marks and transposed versions thereof, such as TEXAS LOVE and LOVE TEXAS, are often found to create highly similar commercial impressions. *Cf. Bakers Franchise Corp. v. Royal Crown Cola Co.*, 404 F.2d 985, 160 USPQ 192, 193 (CCPA 1969) (“Regarding the marks DIET-RITE and RITE DIET, the board said: ... applicant’s compound mark includes the same words which make up opposer’s mark, that is to say ‘RITE DIET’ is merely ‘DIET-RITE’ transposed. The marks of the parties create substantially the same commercial impressions and ‘RITE DIET’ is but a colorable imitation of ‘DIET-RITE’. Appellant found no fault with this analysis; nor do we.”); *In re Wine Soc’y of Am. Inc.*, 12 USPQ2d 1139, 1142 (TTAB 1989) (affirming refusal to register THE WINE SOCIETY OF AMERICA & Design based on registration of AMERICAN WINE SOCIETY 1967 & Design, finding that “the transposition of words does not change the overall commercial impression”); *In re Nationwide Indus., Inc.*, 6 USPQ2d 1882, 1884 (TTAB 1988) (affirming refusal to register RUST BUSTER for rust-penetrating spray lubricant based on the mark BUST RUST for penetrating oil); *In re Gen. Tire & Rubber Co.*, 213 USPQ 870, 871 (TTAB 1982) (affirming refusal to register SPRINT STEEL RADIAL for pneumatic tires based on registration for RADIAL SPRINT for vehicle tires); *Plus Prods. v. Physicians Formula Cosmetics, Inc.*, 198 USPQ 111, 114 (TTAB 1978) (“[T]he use of identical terms in inverse order as we have in the present case is likely to cause confusion in trade when used on such closely related cosmetic products.”); *Bank of Am. Nat’l Trust and Sav. Ass’n v. American Nat’l Bank*, 201 USPQ 842, 845 (TTAB 1978) (“[T]he words ‘BANKAMERICA’ and ‘BANK OF AMERICA’, on the one hand, and ‘AMERIBANC’, on the other, convey the same meaning and create substantially similar commercial impressions”).

The four examples listed above are not the only evidence that the word LOVE with a depiction of the Texas flag or a map of Texas is well-recognized as TEXAS LOVE or LOVE TEXAS. As noted by the Examining Attorney:

The “envystylz.com” website offers a t-shirt bearing the word LOVE with a map of Texas substituting for the “o” in LOVE, and refers to the shirt as “**Texas Love** with Gold Foil V-neck.” September 17, 2018 Office Action February 26, 2018 Office Action TSDR 8.

The “authentictexan.com” site displays a t-shirt bearing the same exact type of mark, with a map of Texas substituting for the “o” in LOVE, and also refers to the shirt as **TEXAS LOVE**. *Id.* at 11.

The t-shirt displayed on the “rootsandrevival.com” site bears a mark consisting of a map of Texas surrounding the word LOVE. The shirt is referred to as “**Texas Love** Shiplap Muscle Tank.” *Id.* at 13.


The “**TEXAS LOVE TEE**” displayed on the “charmingcharlie.com” site bears the word LOVE, with the “o” in the word represented by a map of Texas with a heart in the center. February 26, 2018 Office Action TSDR 6.

The “**TEXAS LOVE TWO-TONE WOOD WALL ART**” offered on the “countryrebel.com” website is a map of Texas which surrounds the word LOVE and a heart design. *Id.* at 7.


The “**TEXAS CAR DECAL LOVE TEXAS WHITE VINYL CAR WINDOW STICKER**” on the “**texaslovegifts.com**” site bears the Texas flag surrounding the word LOVE. While the sticker is referred to as a “**LOVE TEXAS**” sticker, rather than a TEXAS LOVE sticker, the website also uses “**Texas Love Gifts**” and “**The Best Souvenirs from Texas.**” *Id.* at 9.

The Texas Trading Post website is analogous, as it offers a sign bearing the word LOVE and a map of Texas, which is referred to as “Texas sign **Love Texas**,” thus

using a transposed version of Applicant's proposed mark. February 26, 2018 Office Action TSDR 10. As we have previously held, "a picture and the word that describes that picture," such as a Texas map and the word "Texas," are "given the same significance in determining likelihood of confusion." *In re Rolf Nilsson AB*, 230 USPQ 141, 142 (TTAB 1986). *See also In re Aquitaine Wine USA, LLC*, 126 USPQ2d 1181, 1187 (TTAB 2018) ("in this case, the house design in Applicant's mark may be interpreted as a large estate home or 'chateau' that would correspond to, or at least call to mind, the word CHATEAU in Registrant's mark").

Moreover, in this case, the particular form in which the term appears is much less significant than the impression it conveys. *See D.C. One Wholesaler, Inc. v. Chien*, 120 USPQ2d 1710, 1716 (TTAB 2016) ("We find that phrase [] on apparel and other souvenirs, whether displayed in the stacked format shown in the Registration or in the horizontal format shown in the Application, would be perceived by purchasers and prospective purchasers as an expression of enthusiasm for the city of Washington, DC."); *In re Melville Corp.*, 228 USPQ 970, 971 (TTAB 1986) ("The fact that applicant may convey similar information in a slightly different way than others is not determinative.").

What all of these examples have in common is that they do not use TEXAS LOVE or variations thereof (including where a map of Texas substitutes for the word "Texas") to refer to the sources of the products offered. Rather, as the Examining Attorney points out, they reflect use of the phrase in a manner that will only be perceived by consumers as conveying "support for, or affiliation or affinity with the

State of Texas,” a well-recognized sentiment. *In re DePorter*, 129 USPQ2d 1298, 1299 (TTAB 2019) (affirming failure to function refusal where “use of the wording #MAGICNUMBER108 in these messages identifies the subject matter of these tweets and posts as relating to and expressing support for the Chicago Cubs and their World Series win”); *In re Wal-Mart*, 129 USPQ2d at 1152 (“The slogan INVESTING IN AMERICAN JOBS is like other statements that would ordinarily be used in business or industry, or by certain segments of the public generally, to convey support for American-made goods, and thus would not be recognized as indicating source and are not registrable.”); *D.C. One Wholesaler*, 120 USPQ2d at 1710 ( fails to function as a mark because it is “an expression of enthusiasm, affection or affiliation with respect to the city of Washington, D.C.”); *Eagle Crest*, 96 USPQ2d at 1230-31 (“It is clear from the evidence that many consumers want to openly express their support or admiration for the Marines or their association with the Marines, and applicant’s shirts and hats accomplish that purpose.”). *Cf. In re Peace Love World Live, LLC*, 127 USPQ2d 1400, 1403 (TTAB 2018) (I LOVE YOU “conveys a term of endearment comprising the bracelet and, thus, it is ornamental”).

In other words, because Applicant’s specimens reflect that Applicant uses the term in the same manner as it is used in many of the third-party examples, we infer that consumers likewise will view Applicant’s use of the term as conveying support for, or affiliation or affinity with, the State of Texas rather than as a mark signifying a particular source of hats and shirts. When confronted with so many similar uses of a

term to convey essentially the same concept or sentiment, consumers will perceive the term as a common message rather than a source identifier.

The facts here are closely analogous to those in *D.C. One Wholesaler*, in which we found that **I ♥ DC** for t-shirts, hats and related products conveys a message of love for Washington, D.C., just as Applicant's proposed mark TEXAS LOVE conveys a message of love for or from Texas. In fact, what we said in *D.C. One Wholesaler* is equally applicable to the facts presented here: "The record before us indicates that [TEXAS LOVE] ... [is] an expression of enthusiasm, affection or affiliation with respect to the [state of Texas] ... [and] it does not create the commercial impression of a source indicator, even when displayed on a hangtag or label." *D.C. One Wholesaler*, 120 USPQ2d at 1716.

Thus, as shown by this case and *D.C. One Wholesaler*, some widely-used messages are primarily understood as an expression of enthusiasm or affection for, or affiliation with, a person, place or thing, and when that is how consumers perceive them they are not functioning as terms or symbols that identify and distinguish goods or services in commerce and indicate their source. Here, because the evidence shows that TEXAS LOVE is an expression of a well-recognized sentiment, specifically, enthusiasm and support for or from Texas or Texans, and would be perceived as such when used on Applicant's identified goods, it does not function as a mark for those goods.

2. TEXAS LOVE (and Variations Thereof) is Widely Used

Setting aside whether TEXAS LOVE is a well-recognized sentiment, the evidence makes clear that TEXAS LOVE, in various forms, is widely used by Applicant's competitors in the clothing field and other third parties. Such widely used phrases often fail to function as trademarks. *In re Wal-Mart*, 129 USPQ2d at 1153 (widespread third party use of a phrase "makes it less likely that the public will perceive it as identifying a single commercial source and less likely that it will be recognized by purchasers as a trademark"); *D.C. One Wholesaler*, 120 USPQ2d at 1716 (due to "ubiquity" of **I ♥ DC**, "it does not create the commercial impression of a source indicator, even when displayed on a hangtag or label"); *In re Hulting*, 107 USPQ2d 1175, 1177 (TTAB 2013) ("The more commonly a phrase is used, the less likely that the public will use it to identify only one source and the less likely that it will be recognized by purchasers as a trademark.") (quoting *In re Eagle Crest*, 96 USPQ2d at 1229); *In re Volvo Cars*, 46 USPQ2d at 1459 (DRIVE SAFELY is merely "an everyday, commonplace safety admonition"); *In re Manco Inc.*, 24 USPQ2d 1062, 1066 (TTAB 1992) (THINK GREEN, like others expressing a "general concern" would be "regarded simply as a slogan of environmental awareness and/or ecological consciousness, particularly as applied to applicant's paper and weatherstripping products"); *see also Cosmetically Sealed Indus. Inc., v. Chesebrough-Pond's USA Co.*, 125 F.3d 28, 43 USPQ2d 1956, 1958 (2d Cir. 1997) ("[T]he challenged phrase 'Seal it with a Kiss' (with or without the two exclamation points) is a clear instance of a non-trademark use of words.... The [plaintiff's] phrase 'sealed with a kiss' is a fixture of

the language"); *Reed v. Amoco Oil Co.*, 611 F.Supp. 9, 225 USPQ 876, 877 (M.D. Tenn. 1984) (“[C]ourts are reluctant to allow one to obtain monopoly rights to the use of a common word or phrase.... The more common a phrase is, the more it appears in everyday parlance, less is the likelihood that the phrase identifies the source of a certain product, and less is the likelihood that it deserves trademark protection”).

Here, as in these “widespread use” cases, TEXAS LOVE is too commonly used by too many third parties in a variety of forms for it to identify the source of Applicant’s goods. We hasten to point out that widespread use of a term or phrase may be enough to render it incapable of functioning as a trademark, regardless of the type of message.

Furthermore, granting the registration Applicant seeks “would achieve the absurd result of hampering others in their use of the common” phrase TEXAS LOVE for clothing or related products. *In re Schwauss*, 217 USPQ at 362; *In re Volvo Cars*, 46 USPQ2d at 1460 (“to grant exclusive rights to applicant in this ordinary and commonly used safety admonition would interfere with the rights of others in the automobile industry to freely use the familiar phrase” to promote safe driving); *see also America Online, Inc. v. AT&T Corp.*, 243 F.3d 812, 57 USPQ2d 1902, 1910-11 (4th Cir. 2001) (widespread use of “You Have Mail” in connection with an email service could not be protected as a trademark where consumers would perceive it “in its commonly understood way”).

In short, the evidence shows that the phrase TEXAS LOVE is too commonly used in connection with a wide variety of goods that typically carry such messages for it to

be perceived as a trademark, and Applicant should not be able to deny potential competitors (who according to the record also use the phrase) the right to use it freely.⁶ *Cf. In re Hulting*, 107 USPQ2d at 1179 (“The record evidence shows that consumers are accustomed to seeing the phrase ‘No More RINOs!’ displayed on bumper stickers, t-shirts, novelty pins and other items from many different sources. As a result, consumers will not perceive this wording as applied to applicant’s goods as a source indicator pointing uniquely to applicant.”).

B. Applicant’s Equal Protection and Related Arguments Are Unavailing

Applicant’s equal protection arguments are constitutional in nature. Specifically, Applicant seeks to rely on the Supreme Court’s observation that “[t]he Equal Protection Clause directs that ‘all persons similarly circumstanced shall be treated alike.’” 4 TTABVUE 18 (Applicant’s Appeal Brief at 17) (quoting *Plyler v. Doe*, 457 U.S. 202, 216 (1982)); *see also* U.S. Const. amend. XIV (“nor shall any State ... deny to any person within its jurisdiction the equal protection of the laws”). Applicant argues that the USPTO treats Texas citizens like itself differently from those of Florida, California, Nevada, Maine and Hawaii⁷ in “contextually identical” situations. 4 TTABVUE 19.

⁶ Applicant’s argument that its proposed mark “does not relate to characteristics and/or usage” of its goods is misplaced. *Cf. In re DePorter*, 129 USPQ2d at 1303 (“That the applied-for mark is arbitrary or fanciful does not necessarily mean that the public perceives it as an indication of source.”).

⁷ These are the states where the owners of the following registered marks are citizens: FLORIDA LOVE (Reg. No. 5187858), CALIFORNIA LOVE (Reg. No. 4666233), VERONA

We reject Applicant’s constitutional argument for two reasons.⁸ First, it lacks factual support. Second, even if it had factual support, the Federal Circuit has foreclosed the very argument Applicant raises.

Applicant’s position lacks factual support because Applicant points to no evidence, other than the bare existence of these registrations themselves, that, in “contextually identical” circumstances, the USPTO treats citizens of Texas differently than citizens of other states. The registrations themselves, however, do not reveal, for example: how the marks are used in connection with the registrants’ goods and services; whether third parties use the same or similar marks, and, if so, how; whether the marks convey particular meanings or commercial impressions, and if so what those meanings or impressions are; or how extensively the marks are used by others, if at all.⁹ And without that information, there is no support for Applicant’s contention that the refusal of its application was rendered in a situation that is “contextually

LOVE (Reg. No. 5539001), BURMA LOVE (Reg. No. 4935665), SOUTHERN LOVE (Reg. No. 5337883), EAST COAST LOVE (Reg. No. 5091632) and WAIKIKI LOVE (Reg. No. 5036892).

⁸ See *In re ADCO Inds. – Techs., L.P.*, 2020 USPQ2d 53786 at *9 (TTAB 2020) (“in addressing a constitutional challenge, an agency may properly address the statutes it administers”); see also TRADEMARK TRIAL AND APPEAL BOARD MANUAL OF PROCEDURE (“TBMP”) § 102.01 (June 2020) (“Where a party raises a constitutional claim, the Board may address the claim or issues raised by the claim, including any factual or statutory premises underlying the claim.”).

⁹ In any event, CALIFORNIA LOVE is registered for beer; VERONA LOVE is registered for eyewear and related products; BURMA LOVE is registered for bar and restaurant services; and SOUTHERN LOVE is registered for retail store services featuring a wide variety of goods. There is no evidence that these terms fail to function as marks in connection with these goods and services, which on their face are quite different from Applicant’s goods. In no sense are these terms or the goods and services for which they are used “contextually identical” to Applicant’s mark and goods.

identical” to the circumstances leading to the allowance of these other registrations.¹⁰

As the Supreme Court pointed out in *Plyler*, upon which Applicant relies, “[t]he Constitution does not require things which are different in fact or opinion to be treated in law as though they were the same.” *Plyler*, 457 U.S. at 216 (quoting *Tigner v. Texas*, 310 U.S. 141, 147 (1940)).¹¹

Perhaps more to the point, the Federal Circuit has made clear that the type of equal protection argument Applicant makes here is untenable. For example, in *In re Shinnecock Smoke Shop*, 91 USPQ2d at 1221, the Court rejected the applicant’s equal-protection argument, explaining that:

[A]llegations of disparate treatment, even if accurate, do not diminish the Board’s and Examining Attorney’s legitimate, nondiscriminatory reasons for denying registration. Even if his allegations were accurate, the

¹⁰ Applicants often refer to the USPTO’s issuance of allegedly similar third-party registrations in arguing that their own applications are similar (or “contextually identical”) and should also be registered. However, it is settled that neither the existence of third-party registrations nor any of the evidence in their prosecution records (when it is of record) compels a specific result in later, allegedly analogous cases. *See, e.g., Real Foods Pty Ltd. v. Frito-Lay N. Am., Inc.*, 906 F.3d 965, 128 USPQ2d 1370, 1377 (Fed. Cir. 2018) (“these prior registrations do not compel registration of [Applicant’s] proposed mar[k]”) (citing *In re Cordua Rests., Inc.*, 823 F.3d 594, 600 (Fed. Cir. 2016)) (“The [US]PTO is required to examine all trademark applications for compliance with each and every eligibility requirement, . . . even if the [US]PTO earlier mistakenly registered a similar or identical mark suffering the same defect.”); *In re Shinnecock Smoke Shop*, 571 F.3d 1171, 91 USPQ2d 1218, 1221 (Fed. Cir. 2009) (“Even if all of the third-party registrations should have been refused registration under section 1052(a), such errors do not bind the USPTO to improperly register Applicant’s marks.”); *In re Cooper*, 254 F.2d 611, 117 USPQ 396, 401 (CCPA 1958) (“the decision of this case in accordance with sound law is not governed by possibly erroneous past decisions by the Patent Office”). As we recently stated in an analogous situation, “[w]e do not believe that our decision here is inconsistent with the registration of the third-party marks cited by Applicant, but to the extent that it is, it is the decision required under the statute on the record before us.” *In re Ala. Tourism Dept.*, 2020 USPQ2d 10485 at *11 (TTAB 2020).

¹¹ Applicant acknowledges that allowance of one mark for registration does not mean that the USPTO must register a different mark. 4 TTABVUE 19. For purposes of its equal protection argument, Applicant states: “That is not the issue here.” *Id.*

most Applicant could establish is that the USPTO should have rejected the other marks. It does not follow that the proper remedy for such mischief is to grant Applicant's marks in contravention of section 1052(a).

See also Int'l Flavors & Fragrances Inc., 183 F.3d 1361, 51 USPQ2d 1513, 1518 (Fed. Cir. 1999) ("Furthermore, IFF was not denied equal protection. Each application for trademark registration must be considered on its own merits.").

III. Conclusion

Because the evidence of record shows that TEXAS LOVE only serves as an expression of a concept or sentiment, and is widely used by third-parties, it would not be perceived as an indicator of source in the context of Applicant's identified goods. TEXAS LOVE thus fails to function as a trademark under Sections 1, 2 and 45 of the Trademark Act. 15 U.S.C. §§ 1051-1052, 1127. The Office's registration of allegedly analogous third-party marks is irrelevant, and the Constitution's equal protection clause does not support a different result.

Decision: The refusal to register the phrase TEXAS LOVE because it does not function as a mark is affirmed.