

THIS OPINION IS NOT A
PRECEDENT OF THE TTAB

Mailed: July 10, 2024

UNITED STATES PATENT AND TRADEMARK OFFICE

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Trademark Trial and Appeal Board
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In re VOTEAPP, Inc.
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Serial No. 90774555
—

J. Harrison Colter of ColterJennings,
for VOTEAPP, Inc.

Andrea R. Hack, Trademark Examining Attorney, Law Office 108,
Kathryn Coward, Managing Attorney.

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Before Heasley, Allard, and Cohen,
Administrative Trademark Judges.

Opinion by Allard, Administrative Trademark Judge:¹

VOTEAPP, Inc. (“Applicant”) seeks registration on the Principal Register of the
mark VOTEAPP (in standard characters) for services ultimately identified as:

Infrastructure as a service (IAAS) services, namely,
hosting software for use as a service to allow secure voting
services for government, corporate, and consumers;

¹ This decision cites decisions of the U.S. Court of Appeals for the Federal Circuit and the U.S. Court of Customs and Patent Appeals by the page(s) on which they appear in the Federal Reporter (e.g., F.2d, F.3d, or F.4th). For decisions of the Board and the Director, this decision cites to the LEXIS legal database. TRADEMARK TRIAL AND APPEAL BOARD MANUAL OF PROCEDURE (TBMP) § 101.03 (2024). The proceeding or application number for cited Board decisions is provided, if available. Practitioners are encouraged to adhere to the citation form recommended in TBMP § 101.03.

Software as a service (SAAS) services featuring software in the field of voting for government, corporate, and consumer use, namely, software that enables users securely, transparently, quickly, and accurately to record ballots and track election results; Providing an interactive website featuring technology that allows users to vote electronically, in International Class 42.²

The Trademark Examining Attorney refused registration of the proposed mark under Section 2(e)(1) of the Trademark Act, 15 U.S.C. § 1052(e)(1), on the ground that the proposed mark is merely descriptive of Applicant's identified services.

When the refusal was made final, Applicant requested reconsideration and appealed. After the Examining Attorney denied the request for reconsideration, the appeal resumed. The appeal is fully briefed.³ We affirm the refusal to register.

I. Evidentiary Issue

Applicant attached to its brief certain evidence, all of which was properly made of record during examination.⁴ We discourage the practice of attaching materials in the record to briefs for the reasons discussed in *In re Michalko*, Ser. No. 85584271, 2014

² Application Serial No. 90774555 was filed on June 15, 2021, under Section 1(a) of the Trademark Act, 15 U.S.C. § 1051(a), based on Applicant's claim of first use anywhere and use in commerce since at least as early as November 27, 2018.

³ Applicant's brief appears at 8 TTABVUE and the Examining Attorney's brief appears at 10 TTABVUE.

Citations to the prosecution file refer to the USPTO's Trademark Status & Document Retrieval ("TSDR") system. Citations to the record throughout the decision include references to TTABVUE, the Board's online docketing system. The number preceding "TTABVUE" corresponds to the docket entry number; the number(s) following "TTABVUE" refer to the page number(s) of that particular docket entry. *See Made in Nature, LLC v. Pharmavite LLC*, Opp. No. 91223352, 2022 TTAB LEXIS 251, at *2 n.1 (TTAB 2022). All citations to documents contained in the TTABVUE database are to the downloadable .pdf versions of the documents in the USPTO TTABVUE Case Viewer.

⁴ 8 TTABVUE 21-74; August 10, 2023 Request for Reconsideration at TSDR 59-67, 73-124.

TTAB LEXIS 215, at *2-3 (TTAB 2014) (“Parties to Board cases occasionally seem to be under the impression that attaching previously-filed evidence to a brief and citing to the attachments, rather than to the original submission is a courtesy or a convenience to the Board. It is neither.”).⁵

II. Mere Descriptiveness – Applicable Law

“A term is merely descriptive if it immediately conveys knowledge of a quality, feature, function, or characteristic of the goods or services with which it is used.” *In re Chamber of Commerce of the U.S.*, 675 F.3d 1297, 1300 (Fed. Cir. 2012) (quoting *In re Bayer Aktiengesellschaft*, 488 F.3d 960, 963 (Fed. Cir. 2007)); *In re Gyulay*, 820 F.2d 1216, 1217 (Fed. Cir. 1987).⁶ Whether a particular term is merely descriptive is determined in relation to the goods or services for which registration is sought and the context in which the term is used, not in the abstract or on the basis of guesswork. *In re Abcor Dev. Corp.*, 588 F.2d 811, 814 (CCPA 1978); *In re Omniome, Inc.*, Ser. No. 87661190, 2019 TTAB LEXIS 414, at *11 (TTAB 2019). In other words, the question is whether someone who knows what the goods or services are will understand the mark to convey information about them. *In re TriVita, Inc.*, 783 F.3d 872, 874 (Fed. Cir. 2015); *DuoProSS Meditech Corp. v. Inviro Med. Devices, Ltd.*, 695 F.3d 1247,

⁵ The Examining Attorney also attached certain dictionary definitions to her brief. 10 TTABVUE 20-26. As the definitions (for “good night” and “johnny”) have nothing to do with Applicant’s mark, their attachment appears inadvertent and we give it no consideration.

⁶ A term that is merely descriptive of the identified goods and services may not be registered on the Principal Register without a showing of acquired distinctiveness. Sections 2(e)(1), 2(f) of the Trademark Act, 15 U.S.C. §§ 1052(e)(1), 1052(f). Applicant does not claim that its proposed mark (or any of its individual terms) has acquired distinctiveness; we therefore do not consider the issue.

1254 (Fed. Cir. 2012). Conversely, a mark is suggestive if it requires imagination, thought, and perception to arrive at the qualities or characteristics of the goods or services. *In re Omniome*, 2019 TTAB LEXIS 414, at *10-11 (citing *Earnhardt v. Kerry Earnhardt, Inc.*, 864 F.3d 1374, 1378 (Fed. Cir. 2017) (contrasting merely descriptive from suggestive marks) and citing *In re Franklin Cty. Historical Soc’y*, Ser. No. 77699113, 2012 TTAB LEXIS 326, at *3-4 (TTAB 2012) (same)).

Where a mark consists of multiple terms, the mere combination of descriptive terms does not necessarily create a non-descriptive word or phrase. *See e.g., In re Petroglyph Games, Inc.*, Ser. No. 78806413, 2009 TTAB LEXIS 465, at *32-35 (TTAB 2009) (BATTLECAM merely descriptive of computer game software); *In re Carlson*, Ser. No. 78752616, 2009 TTAB LEXIS 438, at *18-19 (TTAB 2009) (URBANHOUSING merely descriptive of real estate brokerage, real estate consultation, and real estate listing services). A mark comprising a combination of merely descriptive components is registrable if “the combination of the component words of Applicant’s mark ‘conveys any distinctive source-identifying impression contrary to the descriptiveness of the individual parts.’” *In re Fat Boys Water Sports LLC*, Ser. No. 86490930, 2016 TTAB LEXIS 150, at *14-15 (TTAB 2016) (quoting *In re Oppedahl & Larson LLP*, 373 F.3d 1171, 1174-75 (Fed. Cir. 2004)). Thus, our determination as to whether the proposed mark VOTEAPP is merely descriptive is based on an analysis of the proposed mark as a whole. *DuoProSS*, 695 F.3d at 1252.

Evidence that a term is merely descriptive to the relevant purchasing public “may be obtained from any competent source, such as dictionaries,” *In re Bayer*, 488 F.3d

at 964, as well as “advertising material directed to the goods[.]” *In re Abcor Dev.*, 588 F.2d at 814. It also may be obtained from websites and publications. *In re N.C. Lottery*, 866 F.3d 1363, 1368 (Fed. Cir. 2017); *In re Nett Designs, Inc.*, 236 F.3d 1339, 1341-42 (Fed. Cir. 2001). Evidence that a term is merely descriptive similarly may come from an applicant’s own usage. *See, e.g., In re Chamber of Commerce*, 675 F.3d at 1301 (content of applicant’s website, along with articles discussing the activities of chambers of commerce, constituted substantial evidence supporting the Board’s mere descriptiveness finding). Additionally, evidence that a term is descriptive may be found in its third-party usage in connection with products or services similar or related to those at issue. *Coach Servs., Inc. v. Triumph Learning LLC*, 668 F.3d 1356, 1378 (Fed. Cir. 2012).

“Whether a mark is merely descriptive or not is ‘determined from the viewpoint of the relevant purchasing public.’” *In re Stereotaxis, Inc.*, 429 F.3d 1039, 1043 (Fed. Cir. 2005) (quoting *In re Bed & Breakfast Registry*, 791 F.2d 157, 160 (Fed. Cir. 1986)). The relevant purchasing public in this matter comprises members of the general public who are of voting age.

III. Discussion

In assessing the possible descriptiveness of the proposed mark as a whole, we begin with an examination of the meaning of each component individually before considering whether the mark as a whole is merely descriptive. *DuoProSS*, 695 F.3d at 1255. The proposed mark is a single term made up of two recognizable components: VOTE and APP, each of which we address in turn.

We begin with the term VOTE. The dictionary evidence of record shows that the term “vote” is defined as “to cast or conduct a vote,” “an expression of opinion or preference that resembles a vote,” and “the act or process of voting.”⁷ Applicant’s own marketing materials, submitted as a substitute specimen,⁸ explain that Applicant’s services solve the problem that “[v]oting does not instill confidence in Americans after contentions elections[;]” that “[c]urrent electronic **voting** solutions are unreliable and lack security[;]” and that Applicant seeks to “[p]rotect OUR RIGHT to **vote**.”⁹ Thus, Applicant’s own marketing materials use the term “vote” and the related term “voting” in a manner consist with the dictionary definition, i.e., to describe the act voting and/or the process of voting.

Indeed, Applicant’s own identification of services identifies (1) software “to allow secure **voting** services” and “in the field of **voting**” and (2) providing a website that “allows users to **vote** electronically” (emphasis added). Applicant’s use of the term “vote” and formatives thereof further underscore the descriptive nature of the term. *See In re Taylor & Francis (Publ’rs), Inc.*, Ser. No. 75229157, 2000 TTAB LEXIS 380, at *5 (TTAB 2000) (use of the word “psychology” in the identification of goods demonstrates that the word is merely descriptive). Based on this evidence of record,

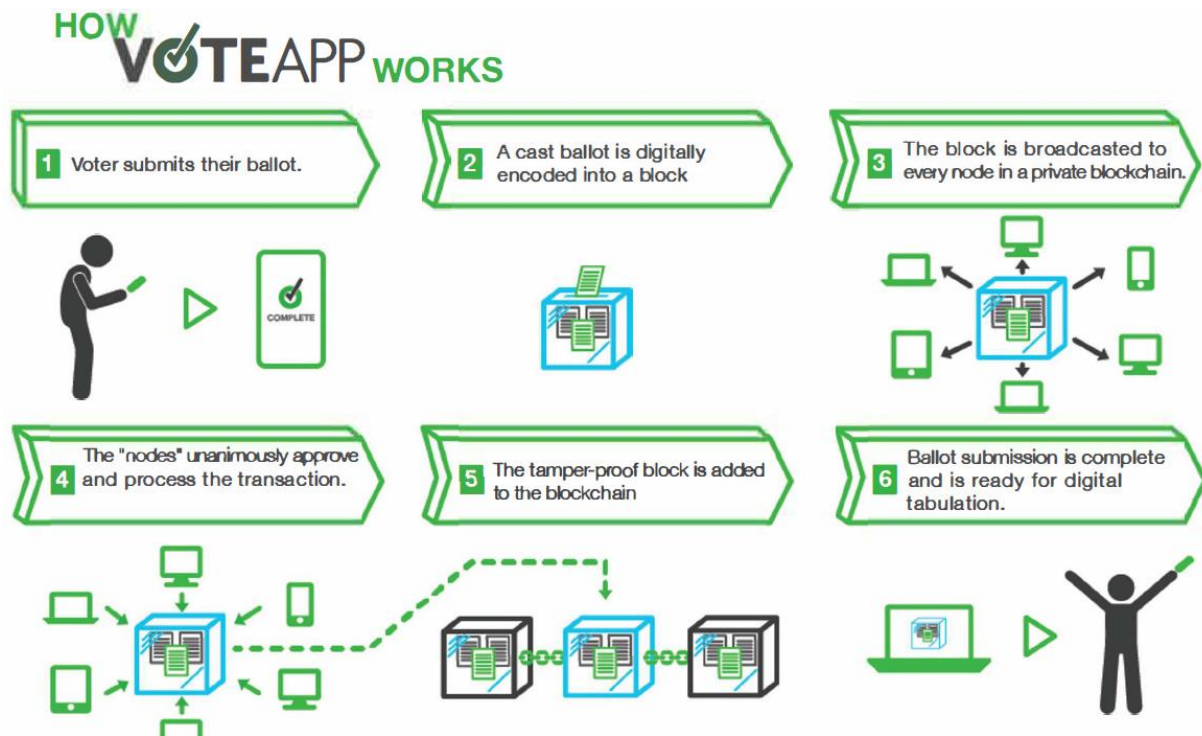
⁷ March 7, 2022, Office action at TSDR 6-9 (printout from the MERRIAM-WEBSTER DICTIONARY).

⁸ February 27, 2023 Response to Office action at TSDR 15-29. The Examining Attorney deemed Applicant’s substitute specimen acceptable and the specimen requirement was satisfied. March 1, 2023 Office action at TSDR 3.

⁹ February 27, 2023 Response to Office action at TSDR 15-29 (emphasis added).

we find that the term VOTE is merely descriptive when considered in light of Applicant's identified services.

We turn next to the APP component of the proposed mark. "App" is defined as "[a] computer application,"¹⁰ which is itself described as a "computer program designed to carry out a specific task other than relating to the operation of the computer itself, typically to be used by end-users."¹¹ Applicant's marketing materials illustrate Applicant's software services:



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As shown above, Applicant touts the tamper-proof advantage of its software services. Specifically, the term APP denotes that it uses computer application

¹⁰ March 7, 2022 Office action at TSDR 10 (printout from THE AMERICAN HERITAGE DICTIONARY).

¹¹ *Id.* at 11-16.

¹² February 27, 2023 Response to Office Action at TSDR 21.

software to facilitate voting. Thus, Applicant uses the term “app” consistent with its dictionary definition. Accordingly, we find that the term APP is merely descriptive of Applicant’s identified services.

Having found that the individual terms VOTE and APP each are merely descriptive of Applicant’s services, this leaves us to decide whether the proposed mark VOTEAPP as a whole is merely descriptive. *See, In re Oppedahl & Larson*, 373 F.3d at 1174-75; *see also In re Phoseon Tech., Inc.*, Ser. No. 77963815, 2012 TTAB LEXIS 306, at *3 (TTAB 2012)(“When two or more merely descriptive terms are combined, ... [i]f each component retains its merely descriptive significance in relation to the goods or services, the combination results in a composite that is itself merely descriptive.”).

The Examining Attorney made of record evidence from over thirty-five third-parties showing widespread usage of the composite “voteapp” and “vote app,” or nearly identical combinations, such as “voting application” and “voting app,” to describe computer applications that allow a user to cast a vote and that provide a secure voting process.¹³ Representative samples of third-party usage includes:

- Capterra (www.capterra.com) lists the “Best **Voting Apps** for Android,” which includes the following apps: Association**Voting**, **Voting** 4 Schools, ez**Vote**, and the Vox**Vote** apps. The Association**Voting** app touts “Online **Voting** Made Simple[,] and offers a “web-based election solution” with “software [that] offers personalized ballots.” Another app, Vox**Vote**, offers a “[f]ree mobile **voting** platform with unlimited audience.” Similarly, **Voting** 4 Schools offers “online **voting** software for any school wide elections or nominations[.]”

¹³ March 7, 2022 Office action at TSDR 17-25; August 30, 2022 Office action at TSDR 7-56; March 1, 2023 Office action at TSDR 9-272.

Additionally, ez**V**ote offers a “[w]eb-based election management, voting, and survey solution[.]”¹⁴

- Mashtips (www.mashtips.com) identifies the “6 Best **Voting Apps** for Android and iPhone to Make a Decision,” and states “**Voting apps** are good for collecting feedback and opinions of individuals on any matter.... **Voting apps** for Android and iPhone phones can help make a decision and collect feedback[.]” The article then reviews each app’s pros and cons, using the words “voting” and/or “vote” throughout.¹⁵
- Guardmyvote.com provides an overview of its “Guard My **Vote App**,” which is offered to “[e]nsure justice in our elections with the Guard My **Vote App**.” “Guard My **Vote** is designed to improve **voter** health. The mobile **app** is a comprehensive toolbox for all your voting resources[.]”¹⁶
- Slack App Directory (www.slack.com) offers the “**Vote**” **app**. “The **Vote app** for Slack allows your teams to embrace workplace democracy Users can call for anonymous **votes** at any time and on any issue.”¹⁷
- The Apple App Store preview for the “My People **Vote**” app states: “The non-partisan My People **Vote app** manages campaign databases from beginning to end.”¹⁸
- “Geaux **Vote App**” is a mobile app offered by the Louisiana Secretary of State, which provides **voter** registration information, **voting** locations, and **voter** district information.¹⁹
- An article from the Massachusetts Institute of Technology (MIT) campus newspaper is titled “MIT researchers identify security vulnerabilities in **voting app**” and is subtitled: “Mobile **voting application** could allow hackers to alter individual votes and may pose privacy issues for users.”²⁰

¹⁴ August 30, 2022, Office action at TSDR 7-12 (emphasis added).

¹⁵ *Id.* at 13-25 (emphasis added).

¹⁶ *Id.* at 26-34 (emphasis added).

¹⁷ March 1, 2023 Office action at TSDR 9-10 (emphasis added).

¹⁸ *Id.* at 11-13 (emphasis added).

¹⁹ *Id.* at 15-16 (emphasis added).

²⁰ *Id.* at 60-67 (emphasis added).

- CNN (cnn.com) published an article titled, “Security experts raise concerns about **voting app** used by military **voters**.”²¹
- Laracasts (www.laracasts.com) teaches the reader to “Build a **Voting App**.” “[W]e’ll build a **voting app** ... that allows you to ... **vote** and comment on [ideas], sort and filter the results[.]”²²
- Jotform (www.jotform.com) advertises its “**Voting App**.”²³
- VidaLoop (www.vidaloop.com) advertises its “**Voting App**,” which is “[a] secure and verifiable mobile **voting** system.”²⁴

Based on the evidence discussed above and other third-party usage also of record, we find that, when used in connection with Applicant’s services, each of the VOTE and APP elements of Applicant’s proposed mark retains its merely descriptive significance in relation to the identified services. Thus, the proposed mark, even when considered as a whole, merely describes a feature or purpose of the identified services, i.e., a computer application that allows a user cast a vote and that provides a secure voting process. The fact that there is no space between the terms VOTE and APP does not alter the descriptive meaning of the combination. *See In re Carlson*, 2009 TTAB LEXIS 438, at *8-10.

Applicant argues that consumers will not view the VOTEAPP mark as descriptive but rather suggestive and will view it as a unitary term, i.e., one having no meaning in the English language (or any language known to Applicant).²⁵ As a result,

²¹ *Id.* at 150-58 (emphasis added).

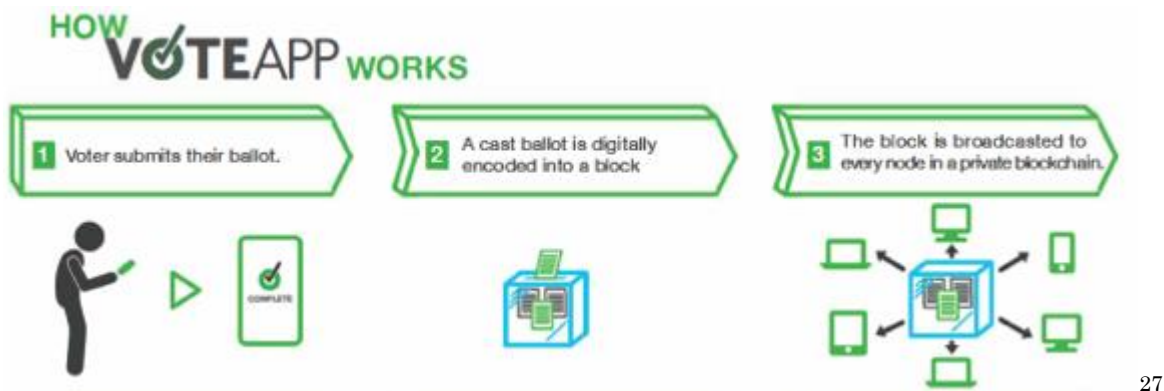
²² *Id.* at 135-49 (emphasis added).

²³ *Id.* at 169 (emphasis added).

²⁴ *Id.* at 170-76 (emphasis added).

²⁵ 8 TTABVUE 8, 11, 20; February 27, 2023 Response to Office Action at TSDR 14.

Applicant contends that consumers will be forced to exercise a few mental steps to arrive at an understanding of the mark in light of the identified services, which renders the mark suggestive, not merely descriptive.²⁶ We are not persuaded. Applicant displays its mark as one word, but the term “vote” is displayed in a much heavier font than the term “app,” creating the impression that the proposed mark is two separate and distinct terms, and not a single term with a unique commercial impression:



Applicant also argues that the proposed mark cannot be deemed merely descriptive because “[s]eeing or hearing ‘VOTEAPP’ hardly establishes an immediate understanding of the complex blockchain cryptography IAAS services offered by applicant (for secure, transparent and accurate balloting in government, corporate and consumer settings).”²⁸ While this may be true, this argument is misguided because “a mark need not recite each feature of the relevant ... services in detail to be descriptive, it need only describe a single feature or attribute.” *In re Chamber of*

²⁶ 8 TTABVUE 8, 11, 20; February 27, 2023 Response to Office Action at TSDR 14.

²⁷ February 27, 2023 Response to Office Action at TSDR 21.

²⁸ 8 TTABVUE 8-9.

Commerce, 675 F.3d at 1300 (quoting *In re Dial-A-Mattress Operating Corp.*, 240 F.3d 1341, 1346 (Fed. Cir. 2001)). See also *In re Oppedahl & Larson*, 373 F.3d at 1173 (“A mark may be merely descriptive even if it does not describe the ‘full scope and extent’ of the applicant’s goods or services.”) (citing *In re Dial-A-Mattress*, 240 F.3d at 1346).

Applicant argues that this is not a case where competitors need the terms of the proposed mark to advertise their own goods and services.²⁹ That is, Applicant contends, there are “innumerable other terms competitors can and do use to describe their own similar services.”³⁰ We disagree. Competitors and others should be free to use descriptive language when describing their own goods and services and, as shown above, the terms “vote” and “app,” and formatives thereof, are not uncommon choices. *In re Abcor Dev.*, 588 F.2d at 814 (One of the major reasons for not protecting descriptive marks is to avoid “the possibility of harassing infringement suits by the registrant against others who use the mark when advertising or describing their own products.”).

During the course of examination, to support her position that the terms VOTE and APP are merely descriptive, the Examining Attorney made of record third-party registrations of marks containing the term VOTE or APP (or formatives thereof), where the marks were registered (1) on the Principal Register with disclaimers of the terms VOTE or APP, or (2) on the Supplemental Register.³¹ To counter this argument,

²⁹ 8 TTABVUE 10.

³⁰ *Id.*

³¹ 10 TTABVUE 10-14 (citing March 1, 2023 Office action at TSDR 273-312; Denial of Request for Reconsideration at TSDR 10-48).

Applicant offered evidence in the form of third-party registrations where the term VOTE or APP (or formatives thereof) were allowed to register on the Principal Register without a disclaimer of either term.³² However, many of these registered marks present dissimilar circumstances, such as unitary marks, where a disclaimer is not required, such as FINAPP (Reg. Nos. 4176202, 5954272).³³ See TRADEMARK MANUAL OF EXAMINING PROCEDURE (TMEP) §1213.05(a) (and cases cited therein). Regardless, the fact that third-party registrations exist for marks allegedly similar to Applicant's proposed mark is not conclusive on the issue of descriptiveness. See *In re Nett Designs*, 236 F.3d at 1342 ("Even if some prior registrations had some characteristics similar to ... [Applicant's mark], the [US]PTO's allowance of such prior registrations does not bind the Board or ... [the Federal Circuit]."). Marks that are merely descriptive do not become registrable simply because other seemingly similar marks appear on the register. *In re Scholastic Testing Serv., Inc.*, [no serial number available], 1977 TTAB LEXIS 97, at *4-5 (TTAB 1977).

In conclusion, we find that consumers and prospective consumers of Applicant's identified services will have no need to pause or cogitate on the possible meaning of Applicant's proposed mark when considered in conjunction therewith. The evidence is clear that consumers and prospective consumers would, upon seeing the proposed mark VOTEAPP, understand that the services describe a feature or purpose of the

³² 8 TTABVUE 11-19.

³³ 8 TTABVUE 12, 16 (citing August 10, 2023 Request for Reconsideration at TSDR 73, 95).

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services, which is to allow persons to vote by use of a computer application and to provide a secure voting process.

Decision:

The refusal to register Applicant's proposed mark VOTEAPP (Serial No. 90774555) on the ground of mere descriptiveness under Section 2(e)(1) of the Trademark Act, 15 U.S.C. § 1052(e)(1), is affirmed.