

1 IN THE SUPREME COURT OF THE UNITED STATES
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3 ANDREI IANCU, UNDER SECRETARY OF)
4 COMMERCE FOR INTELLECTUAL PROPERTY)
5 AND DIRECTOR, PATENT AND)
6 TRADEMARK OFFICE,)
7 Petitioner,)
8 v.) No. 18-302
9 ERIK BRUNETTI,)
10 Respondent.)

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12
13 Washington, D.C.
14 Monday, April 15, 2019

15
16 The above-entitled matter came on for
17 oral argument before the Supreme Court of the
18 United States at 10:07 a.m.

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20 APPEARANCES:
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22 Department of Justice, Washington, D.C. ;
23 on behalf of the Petitioner.
24 JOHN R. SOMMER, ESQ., Irvine, California ;
25 on behalf of the Respondent.

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1 P R O C E E D I N G S

2 (10:07 a.m.)

3 CHIEF JUSTICE ROBERTS: We'll hear
4 argument first this morning in Case 18-302,
5 Iancu versus Brunetti.

6 Mr. Stewart.

7 ORAL ARGUMENT OF MALCOLM L. STEWART

8 ON BEHALF OF THE PETITIONER

9 MR. STEWART: Thank you, Mr. Chief
10 Justice, and may it please the Court:

11 The Lanham Act's ban on federal
12 registration of scandalous trademarks is not a
13 restriction on speech but a valid condition on
14 participation in a federal program. On its
15 face, and as applied here, the provision is --
16 is viewpoint-neutral.

17 The scandalous marks provision is one
18 of many content-based criteria for federal
19 trademark registration, and consideration of a
20 mark's content is essential --

21 JUSTICE SOTOMAYOR: Could you please
22 tell me how you're defining "scandalous mark"?
23 From your brief, I thought you were giving it a
24 different definition than has been used by the
25 agency for a while.

1 MR. STEWART: Well, the -- the term --
2 the adjectives that have sometimes been used as
3 synonyms for "scandalous" by the agency are
4 terms like "shocking," "disgraceful,"
5 "offensive," and "disreputable." I think one
6 --

7 JUSTICE SOTOMAYOR: Well, if you use
8 all those adjectives, you run head-on to Tam.

9 MR. STEWART: I think one sense in
10 which we have -- the -- I think this has always
11 been at the core of the prohibition, but I
12 think Tam has led us to focus more on limiting
13 the scope of those adjectives. That is, on
14 their face, those adjectives could encompass
15 material that is offensive or shocking because
16 of the outrageous views that it expresses. And
17 we know from Tam that that's --

18 JUSTICE SOTOMAYOR: But that's
19 viewpoint discrimination.

20 MR. STEWART: That's viewpoint
21 discrimination. It's not a valid basis for
22 denial of federal registration of a trademark.
23 So I think it has always been the PTO's focus,
24 but, from here on, I believe it will be the
25 exclusive focus on marks that are shocking,

1 offensive -- or offensive because of the mode
2 of expression, not because of the ideas --

3 JUSTICE GINSBURG: How is -- how is
4 that determined, that a substantial composite
5 of the general public would find the -- the
6 mark shocking or offensive? I mean, if --
7 considering what's involved in this case, if
8 you were to take a -- a composite of, say,
9 20-year-olds, do you think that that answer
10 would be they would find it shocking?

11 MR. STEWART: I -- I think not -- I
12 think there are certainly some segments of
13 society that are more likely to find particular
14 marks shocking than others. I -- the -- the
15 PTO, it -- its initial determination was that
16 this mark would be perceived by a substantial
17 segment of the public as the equivalent of the
18 profane past participle form of a well-known
19 word of profanity and perhaps the paradigmatic
20 word of profanity in our language.

21 JUSTICE SOTOMAYOR: So why are you
22 using a subjective standard? Why not just
23 something like obscene, vulgar, even profane?
24 But, once you get to shockingly offensive, you
25 get to viewpoint. One way or another, it's

1 always subjective. I -- I -- I -- I can deal
2 with a limiting principle that has its own
3 substance, like obscenity.

4 MR. STEWART: I -- I would agree that
5 if you just looked at the words like "shocking"
6 and "offensive" on their face and gave them
7 their ordinary meanings, that they could easily
8 encompass material that was shocking because it
9 expressed an outrageous point of view or a
10 point of view that most members --

11 JUSTICE KAGAN: Well, Mr. Stewart, if
12 -- if you agree with that, I mean, what are we
13 supposed to be doing here? Are we supposed to
14 be looking at the statutory words? Are we
15 supposed to be looking at the fuller standard
16 that the Federal Circuit gave to explain those
17 words? Or are we supposed to be looking just
18 at your commitments as to what you're doing
19 going forward?

20 I mean, if you take the statutory
21 words, they're very broad. They do include
22 things that are offensive because of the ideas
23 they express. So why isn't that just the end
24 of the matter? And if -- if -- if Congress
25 wants to pass a statute that's narrower, that's

1 focused on vulgarity or profanity, then
2 Congress can do that.

3 MR. STEWART: Well, I think typically
4 the Court would attempt to construe a federal
5 statute in a way that would render it
6 constitutional rather than unconstitutional.
7 And I think the scandalous marks provision is,
8 at the very least, susceptible of a reading
9 that would render it constitutional.

10 If the focus is on profanity,
11 vulgarity -- and we're not just talking about
12 words; we're also talking about images, that
13 trademarks can include images as well as
14 words -- and if the scandalous marks provision
15 were struck down, then applicants would be free
16 to obtain registration of sexually explicit
17 images.

18 CHIEF JUSTICE ROBERTS: Is it -- your
19 -- this is a facial challenge, right?

20 MR. STEWART: That's correct.

21 CHIEF JUSTICE ROBERTS: So it's not
22 simply enough to determine that this particular
23 trademark is scandalous, right?

24 MR. STEWART: That's -- that's
25 correct.

1 CHIEF JUSTICE ROBERTS: Well, I didn't
2 understand you in your brief to make much of an
3 argument about that.

4 MR. STEWART: Well, in part -- in part
5 because, once you -- if you accept the PTO's
6 initial determination that this mark would be
7 perceived as the equivalent of the past
8 participle form of the -- the paradigmatic
9 profane word in our culture, once you accept
10 that, it's hard to see what would be covered if
11 this is not.

12 But I certainly -- we certainly agree
13 with your point that it's a facial challenge.
14 The question is whether it is susceptible of
15 constitutional application. We think that
16 Mr. Brunetti's mark was --

17 CHIEF JUSTICE ROBERTS: Whether the --
18 whether the provision itself is susceptible?

19 MR. STEWART: Of constitutional
20 application.

21 CHIEF JUSTICE ROBERTS: Right. And
22 this provision covers obscenity?

23 MR. STEWART: It would cover
24 obscenity. Now --

25 CHIEF JUSTICE ROBERTS: So if it's --

1 what would happen if we agreed with the
2 Respondents? Would the whole provision be
3 struck down?

4 MR. STEWART: I -- the Respondents --
5 I -- the Respondents might say that the
6 provision on its face is so substantial -- that
7 if the only legitimate applications were to
8 obscene materials, the Respondent might say it
9 is so substantially broad, overbroad on its
10 face, covers so much more than that, that it
11 can't be sustained even --

12 CHIEF JUSTICE ROBERTS: So if this is
13 -- the entire provision is struck down, the
14 government would not be able to restrict
15 trademarks that are obscene?

16 MR. STEWART: We -- I mean, the
17 government could restrict -- without regard to
18 federal registration, the government could
19 restrict the sale of goods in commerce that --
20 that -- on which were emblazoned obscene
21 trademarks or the -- the mailing of such goods.
22 I think, for that reason, to limit it in that
23 fashion wouldn't really accomplish much.

24 We -- we agree that it should be
25 limited so that it isn't viewpoint

1 discriminatory, but to limit it to obscene
2 words, both would render it a virtual nullity,
3 and there's also no good reason that the
4 standard for determining whether a particular
5 mark can be placed on goods that are out in the
6 public marketplace should be the same as --

7 CHIEF JUSTICE ROBERTS: Let me --

8 MR. STEWART: -- the standard for
9 determining whether the goods can be sent
10 through the mail to a willing buyer.

11 CHIEF JUSTICE ROBERTS: Let me just be
12 a little more precise. If -- if you lose this
13 case, do you think the trademark office would
14 be able to deny registration to marks on the
15 grounds that they're obscene?

16 MR. STEWART: Well, I -- I -- I think
17 there are certainly ways -- if the Court struck
18 down the statute on its face on the ground that
19 it was substantially overbroad, then, no, I
20 don't think that there is any other provision
21 that the -- of the Trademark Act. It -- it
22 seems --

23 CHIEF JUSTICE ROBERTS: Well, and this
24 is -- as we established, this is a facial
25 challenge?

1 MR. STEWART: Right.

2 CHIEF JUSTICE ROBERTS: Okay. So, if
3 you lose, then you would not be able to
4 restrict trademarks on the ground that they're
5 obscene?

6 MR. STEWART: I -- I think that's -- I
7 think that's correct.

8 JUSTICE KAGAN: And -- and just so I
9 could understand, you're asking us to narrow
10 this statute to exactly what?

11 MR. STEWART: To marks that are
12 offensive, shocking to a substantial segment of
13 the public because of their mode of expression,
14 independent of any views that they may express.
15 And --

16 JUSTICE GINSBURG: Suppose -- suppose
17 in the niche market that these goods are
18 targeting, the -- the name is -- the word is
19 mainstream. These -- these goods, as I
20 understand it, are meant to attract a
21 particular market, and if we concentrate on
22 that market, from their perception, the word is
23 mainstream.

24 MR. STEWART: I don't think that would
25 be an appropriate means of proceeding, and --

1 and let me explain why if I may.

2 If you look, for instance, at George
3 Carlin's filthy words monologue, the monologue
4 that was at issue in Pacifica, that's a
5 paradigmatic example of profane copyrightable
6 expression.

7 Now our society has reached a good
8 accommodation where people who find the Carlin
9 monologue funny or thought-provoking can buy
10 the CDs, they can buy the DVDs; when Carlin was
11 alive, they could watch live performances. All
12 that can be done without forcing the profanity
13 upon anybody who finds it offensive.

14 JUSTICE ALITO: But what is the
15 standard that you're looking to, at bottom, and
16 this is framed by Justice Ginsburg's question,
17 is -- what is Congress's interest?

18 Is it -- does it have an independent
19 interest in not having the federal government
20 associated with certain words? Or is it just
21 an interest in following whatever the
22 population thinks is offensive or scandalous or
23 immoral at a particular point in time?

24 MR. STEWART: It is some of --

25 JUSTICE ALITO: Those are not

1 necessarily the same.

2 MR. STEWART: It is some of both, but,
3 with respect to -- to the second interest, we
4 would emphasize the interest is in protecting
5 unwilling viewers from material that they find
6 offensive. And the point I was making about
7 the Carlin monologue is we -- there are ways in
8 which that can be made readily available to
9 people who want to see it or who want to listen
10 to it without forcing it upon others.

11 Trademarks can't work that way because
12 the whole point of a trademark is to serve as a
13 source identifier. It is --

14 JUSTICE ALITO: Well, I -- I don't see
15 how the second interest is implicated much at
16 all, because this -- this word and all sorts of
17 other words can be used in connection with the
18 sale of goods. Even if you're right, they just
19 can't be registered trademarks. So why isn't
20 it exclusively the first interest?

21 MR. STEWART: Well, it's -- it -- it's
22 partly the first interest, but it's partly the
23 second because, even though the government
24 cannot prohibit the use of a mark like this on
25 the clothing, it can attempt to disincentivize

1 it or it can attempt to remove the creation --
2 to avoid the creation of artificial incentives
3 to its use by providing the benefits that are
4 associated with federal trademark registration.

5 And the point I --

6 JUSTICE SOTOMAYOR: Why are you
7 resisting Justice Alito? Why can't the
8 government's interest in not being associated
9 with sexually explicit activity or words be
10 enough?

11 MR. STEWART: We think that it is
12 enough, but we don't want to abandon the -- the
13 first interest either because we do think --

14 JUSTICE SOTOMAYOR: Why?

15 MR. STEWART: Because we --

16 JUSTICE SOTOMAYOR: I'm -- I'm -- I'm
17 curious because Justice Alito is right,
18 trademarks can be used with or without
19 registration. You get certain statutory
20 benefits, which is part of your government
21 program argument.

22 MR. STEWART: Right.

23 JUSTICE SOTOMAYOR: All right. But --
24 but I'm -- I'm just not quite sure why that's
25 more compelling for you.

1 MR. STEWART: I -- I --

2 JUSTICE SOTOMAYOR: You're defending
3 it in a way that suggests that I'm missing
4 something.

5 MR. STEWART: I wouldn't say that it's
6 more compelling, but I would say that the
7 government has an independent interest in
8 protecting unwilling viewers to the extent
9 possible from materials that they find --

10 JUSTICE SOTOMAYOR: But that falls --
11 that falls prey to what Justice Alito said,
12 which is now the government is moving with
13 public morals rather than with freedom of
14 speech and the idea that morals can and should
15 change.

16 MR. STEWART: Well, we -- I mean, we
17 do have -- in a traditional subsidy program,
18 for instance, if the government was handing out
19 grants for aspiring artists, grants to help
20 them -- them create art, the government
21 obviously couldn't prohibit artists from
22 creating vulgar, profane art, art that a
23 substantial segment of the population would
24 find offensive, but it might still have an
25 interest in encouraging the creation of art

1 that would be accessible and welcome to all
2 segments of the community, including to -- to
3 children.

4 And, again, the point I was making
5 about source identifiers is the reason that
6 it's not feasible to restrict source I --
7 inspection of source identifiers to people who
8 want the product is source identifiers are --
9 they're not the expression that you get once
10 you have decided to buy the product. They are
11 one of the clues that you look at in deciding
12 whether to buy the product.

13 And so a trademark that you only saw
14 after you'd bought the package and opened it
15 would fail entirely to serve its intended
16 purpose. The federal registration program is
17 intended to encourage and incentivize the use
18 of distinctive words and symbols that will be
19 made available for inspection by prospective
20 buyers --

21 JUSTICE KAVANAUGH: How -- how do you
22 --

23 MR. STEWART: -- by members --

24 JUSTICE KAVANAUGH: Excuse me. How do
25 you deal with the problem of erratic or

1 inconsistent enforcement, which seems
2 inevitable with a test of the kind you're
3 articulating?

4 MR. STEWART: Well, I think some of it
5 is -- some of it will be resolved by Tam; that
6 is, to the extent that the PTO had previously
7 taken into account whether the views expressed
8 were shocking or offensive, that won't be done
9 any longer.

10 The second thing I would say is
11 more -- more leeway is given in situations --
12 in terms of vagueness, in situations where the
13 government is not prohibiting speech but is
14 simply declining to provide a benefit.

15 Here -- here, the consequence of the
16 determination that Mr. Brunetti's mark was
17 scandalous was not that he was subjected to any
18 penalty, he could continue to market his goods
19 in commerce with the -- the trademark he had
20 been using.

21 JUSTICE KAGAN: But, if I understand
22 what you're saying, Mr. Stewart, you're
23 essentially saying we should uphold this
24 statute on the basis of various commitments
25 that the government is now making to apply this

1 statute to only a small subset of the things
2 that it could apply to, if you look at it on
3 its face as to just the words used.

4 And -- and that's a strange thing for
5 us to do, isn't it, to basically, you know,
6 take your commitment that, look, these are very
7 broad words, but we're going to pretend that
8 they say something much narrower than they do?

9 MR. STEWART: Well, I think even up to
10 this point, the core of the provision as the
11 PTO has applied it has been profane, vulgar,
12 vulgar words, sexually explicit images,
13 offensive excretory references, things that
14 were regarded as offensive.

15 JUSTICE GINSBURG: How can -- how can
16 one say that when many of these marks have been
17 refused registration on dual grounds, and one
18 ground is that they're scandalous and the other
19 ground is that they resemble a mark that is
20 already registered, so, if the mark is already
21 registered, then it's not scandalous.

22 MR. STEWART: I -- I think it's
23 anomalous at first glance, but I don't think
24 that there's a logical contradiction because
25 the Lanham Act doesn't simply prohibit

1 registration of marks that are identical to
2 a -- an existing mark. As you say, it
3 prohibits registration of marks that are
4 confusingly similar to existing marks.

5 And it's -- it's logically possible to
6 have two marks, one of which falls -- both of
7 which fall very close to the line --

8 JUSTICE GORSUCH: Well, but, Mister --

9 MR. STEWART: -- one of which is
10 barely scandalous --

11 JUSTICE GORSUCH: -- but, Mister --

12 JUSTICE ALITO: But this is -- if this

13 --

14 MR. STEWART: -- the other --

15 JUSTICE GORSUCH: Mr. Stewart, though

16 --

17 JUSTICE ALITO: Go ahead.

18 JUSTICE GORSUCH: Justice Ginsburg's
19 point takes us back to Justice Kavanaugh's, I
20 think, which is you look at the -- the seven
21 words at the end of the red brief and there are
22 shocking numbers of ones granted and ones
23 refused that -- that do look remarkably
24 similar.

25 How is a reasonable citizen supposed

1 to know? What notice do they have about how
2 the government's going to treat their mark?

3 MR. STEWART: Well, I -- I think one
4 of the -- I think the notice is in -- in part
5 the -- based on the PTO decisions, but,
6 obviously, whatever the Court says, if it
7 upheld the provision, the Court can say what it
8 wants to say about the permissible --

9 JUSTICE GORSUCH: No, no, but let
10 me -- we -- we can fix your problem for you, I
11 got that. But -- but -- but the government,
12 presumably, the PTO is supposed to be doing
13 this itself and without our interference.

14 And it's allowed a lot of marks with
15 these words, and it's refused a lot of marks
16 without these words. I could not myself see a
17 rational line through that chart at the end of
18 the red brief.

19 Is there one that the government's
20 aware of or --

21 MR. STEWART: Well, I think, in part,
22 the PTO looks to context. And a -- a lot of
23 the examples that are given of confusing -- of
24 similar marks, one of which is refused
25 registration, one of which is granted

1 registration, are marks in which people will
2 use a slightly different combination of letters
3 that phonetically evokes an existing profane
4 word.

5 So you have marks that use the letters
6 P-H-U-C -- and the PTO will, in part, examine
7 context in order to determine is that mark
8 intended -- will it be --

9 JUSTICE GORSUCH: I don't want to -- I
10 don't want to go through the examples. I
11 really don't want to do that.

12 (Laughter.)

13 JUSTICE GORSUCH: But I can come up
14 with several that are granted that -- that
15 have -- have phonetics along the lines you've
16 described and a couple that have been denied.
17 And what's the rational line? How is a
18 person -- a person who wants to get a mark
19 supposed to tell what the PTO is going to do?
20 Is it a flip of the coin?

21 MR. STEWART: I guess the two things I
22 would say are, first, the PTO looks to context.
23 And so, if a phonetic word like the one I
24 described appears in a sentence or in a phrase
25 in which the profane word would commonly

1 appear, the PTO is more likely to conclude that
2 a substantial segment of the public will regard
3 that as the equivalent of the profane mark
4 because it is being used in the way that the
5 profane mark is often used.

6 JUSTICE ALITO: What's going to -- if
7 this is held to be unconstitutional, what is
8 going to happen with whatever list of really
9 dirty words still exist and all of their
10 variations?

11 There's going to be a mad scramble by
12 people to register these marks. And the ones
13 who get there first are going to have
14 exclusive -- they're not unlimited. What's
15 going to -- there's going to be -- those who
16 get there first are going to be the ones who
17 have these.

18 MR. STEWART: I mean, there -- there
19 are other barriers to trademark registration.
20 That is, it's not the case that any
21 non-scandalous word could be trademarked. It
22 has to be the -- the sort of word or the sort
23 of phrase, if it's -- if it's verbal, that
24 consumers would perceive as identifying the
25 source.

1 And so short phrases or slogans are
2 often refused registration on the grounds that
3 they would be seen by consumers as
4 communicating a thought, not as identifying the
5 source of goods.

6 And there is also the requirement that
7 people who want to register their trademarks be
8 using the mark in commerce; a person can't
9 simply register a mark and sit back and wait
10 for people to pay license fees in order to --
11 people who want to actually use it in commerce,
12 to pay license fees. It is a prerequisite that
13 they be using the mark in commerce.

14 So there are some limitations, but,
15 yes, you would think the natural result of
16 allowing these marks to be registered is that
17 there would be an increased flow of
18 registration applications. And, again, this is
19 not just for words, this is for visual
20 depictions that are intended to signify the
21 source of a product.

22 JUSTICE BREYER: What about racial
23 slurs?

24 MR. STEWART: I think, in general,
25 racial slurs are taken off the table by Tam,

1 because it is the --

2 JUSTICE BREYER: Because I -- I've
3 looked into a little, and there are certain
4 ones that have exactly the same physiological
5 effect on a person, if any, as the word we're
6 using here, and there is a physiological
7 effect.

8 MR. STEWART: I --

9 JUSTICE BREYER: There is a -- it's
10 stored in a different place in the brain. It
11 leads to retention of the word. There are lots
12 of physiological effect with very few words.

13 It's not too hard --

14 MR. STEWART: I --

15 JUSTICE BREYER: -- to think of a
16 racial slur that has exactly the same effect.

17 MR. STEWART: Agreed. I think there
18 is one racial slur in particular that would be
19 a close call even under our basic framework of
20 you can't deny registration based on the views
21 expressed, but you can deny it based on the
22 mode of expression.

23 You could say this particular racial
24 slur is considered uniquely offensive, even as
25 compared to other racist speech, and,

1 therefore, it could be denied registration on
2 the ground that it was an impermissible mode of
3 expressing a racist -- racist thought.

4 On the other hand, you could argue, at
5 bottom, the reason that this slur is regarded
6 as so offensive is that it is -- has
7 historically been linked to virulent racist
8 attitudes, and for that reason, it all comes
9 down to viewpoint. We think that would be an
10 -- an authentically close case even under the
11 -- the framework that we've established.

12 But, again, there's -- there's no
13 sense in which the mark that is at issue here
14 could be considered offensive because of any
15 view it has expressed, that really -- really
16 the argument on the other side is more it isn't
17 offensive at all, not it is offensive because
18 it is perceived as communicating a particular
19 message.

20 CHIEF JUSTICE ROBERTS: What about
21 Mr. Brunetti's argument that the use of the
22 word expresses a viewpoint precisely because of
23 its offensiveness? You know, it's edgy, it
24 expresses a non-conformist attitude, all of
25 that?

1 MR. STEWART: I -- I don't deny that
2 that might be a reason that people would use
3 profanity in certain circumstances, but I think
4 if that were treated as a form of viewpoint
5 discrimination, it would really cast doubt on a
6 lot of other practices.

7 For example, we've -- we've indicated
8 in -- in our brief that, under Mr. Brunetti's
9 theory, if the government had -- if -- if a
10 municipal government operated buses and rented
11 out advertising on the buses but precluded the
12 use of profanity on the advertisements, if the
13 use -- if -- an applicant could say, as
14 Mr. Brunetti is saying, I want to use profanity
15 because it communicates an edgy message, and I
16 think the government legitimately should be
17 able to say that may or may not be so, but we
18 don't want profanity on our buses where they're
19 visible to unconsenting adults and children, we
20 don't want that word on our buses regardless of
21 the message that you intend to convey.

22 And we think that would be sufficient
23 to make the -- the provision viewpoint-neutral.

24 JUSTICE SOTOMAYOR: Well, you keep
25 talking about this as a government program.

1 MR. STEWART: Uh-huh.

2 JUSTICE SOTOMAYOR: And Tam addresses
3 this and says it's an odd government program
4 because people are paying you to give the
5 service; you're not giving them much of
6 anything except legal rights, which are not
7 unimportant. But I'm not sure how to
8 differentiate this from a limited public forum,
9 as we recognized in *Cornelius*, because, as in
10 *Cornelius*, registrants can go out and use the
11 trademark, they could have sought donations
12 from whomever they wanted in *Cornelius*, and yet
13 we talked and we held that the list of -- of --
14 of organizations was the forum.

15 You haven't argued very forcefully
16 that this is a limited public forum. Why?

17 MR. STEWART: I mean, I think -- I do
18 think we don't regard it as a limited public
19 forum because the registration program gives
20 significant commercial benefits to registrants,
21 but getting the mark on the PTO's principal or
22 supplemental register is not the way in which
23 Mr. Brunetti would want to communicate with his
24 potential customers.

25 The -- the way in which he would

1 communicate with his potential customers is by
2 advertisements, promotional materials, placing
3 the goods on shelves --

4 JUSTICE SOTOMAYOR: Oh, but that's not
5 true. It puts the world on notice of his mark.

6 MR. STEWART: It does and it --

7 JUSTICE SOTOMAYOR: And -- and it
8 gives him the legal protections that come from
9 that notice. Without it, he can't enforce any
10 federal rights. So he needs registration to be
11 able to do what he wants to do.

12 MR. STEWART: And we think essentially
13 the same legal standard should apply to the
14 restrictions at issue here as would apply to a
15 limited public forum. Our only point -- the
16 reason we haven't argued that it actually is a
17 limited public forum is that the -- the
18 register communicates not so much with
19 Mr. Brunetti's customers but with potential
20 infringers, people who might otherwise be
21 tempted to -- to use the same mark on their
22 goods.

23 Now a couple of other things that I'd
24 like to -- to say about the registration
25 program. You're right that people pay a fee to

1 register, but the PTO still devotes substantial
2 resources to examining the trademarks, to
3 publishing them. There are periodic -- there's
4 a periodic reexamination to see whether the --
5 the applicant is still using the mark in
6 commerce. And the advantages -- the commercial
7 advantages that registrants get are directly
8 attributable to the efforts that PTO has put
9 in.

10 For example, the reason that it makes
11 sense to treat trademark registration as prima
12 facie evidence of the trademark's validity and
13 the registrant's ownership is that the PTO has
14 examined the materials and has made that
15 determination.

16 The reason it makes sense for the
17 trademark to become incontestable after five
18 years is that the PTO has published the
19 trademark, anyone who thinks that there might
20 be a problem with it has an opportunity to see
21 that the mark has been claimed and to raise an
22 objection, and so, if a person doesn't so --
23 doesn't do so within five years, it's fair to
24 -- to treat the mark as incontestable.

25 If I may, I'd like to reserve the

1 balance of my time.

2 CHIEF JUSTICE ROBERTS: Thank you,
3 counsel.

4 Mr. Sommer.

5 ORAL ARGUMENT OF JOHN R. SOMMER

6 ON BEHALF OF THE RESPONDENT

7 MR. SOMMER: Mr. -- Mr. Chief Justice,
8 and may it please the Court:

9 There's two important points to be
10 made. First, the government does not defend
11 the plain language of the statute, nor does it
12 defend how it's been consistently interpreted
13 for the last 70 years. Rather, it asks this
14 Court to validate a hypothetical statute not
15 enacted.

16 The second point is that a substantial
17 number of Americans think that gambling,
18 drinking, eating some types of meat, eating
19 meat at all is immoral. A substantial number
20 of Americans, as to abortion, gun control,
21 immigration, our two political parties, a
22 substantial number think that those are -- the
23 con is immoral, and a substantial number think
24 that the pro is immoral. There's no -- simply
25 no way to make a -- a sensible determination

1 between those that come in and those must stay
2 out.

3 JUSTICE BREYER: But there are books
4 and scientists' reports and so forth, I don't
5 know how -- I haven't seen them contested, that
6 say take six or seven words, and today -- in
7 the past, they might have been religious, but
8 today they do include the word at issue and
9 they do include racial slurs. Of certain
10 words.

11 And they have a different
12 physiological effect on the brain. They're
13 stored in a different place. They make a
14 difference in the conductivity of your skin,
15 which shows emotion, and above all, they are
16 remembered.

17 And, therefore, take that set. Now,
18 as -- if it's in a context where it has that
19 effect, for most people, why isn't that a
20 pretty clear distinction from what you're
21 talking about and why doesn't the government
22 have a right to say, this is a commercial
23 matter, purely commercial, it is totally free
24 to use any word you want right next to this
25 registered trademark; we just don't want to be

1 associated with it?

2 MR. SOMMER: Well, if you're asking
3 about the government association, the Tam Court
4 dealt with that already.

5 JUSTICE BREYER: I wasn't. I was
6 asking --

7 MR. SOMMER: Okay. Well --

8 JUSTICE BREYER: -- primarily about,
9 there is a way of distinguishing these matters,
10 I think.

11 MR. SOMMER: Well --

12 JUSTICE BREYER: And I wouldn't ask
13 you if I were certain of the answer.

14 MR. SOMMER: Well, if you're
15 suggesting that there's a content-neutral way
16 of deciding which marks are too scandalous to
17 register by doing a test of -- the test on the
18 body --

19 JUSTICE BREYER: You don't have to do
20 -- it's not too tough, you know. I mean, most
21 people know what words we're talking about.
22 And, of course, you could come in and show
23 they're all wrong on this, but they probably
24 aren't.

25 MR. SOMMER: But that -- that avoids

1 the issue about whether this is viewpoint. And
2 even if it's not viewpoint, it's still content.

3 So if this statute clearly covers --
4 the government does not seem to dispute that at
5 least many or some of the marks that are both
6 granted and refused express viewpoint. Then
7 the statute is overbroad.

8 JUSTICE KAGAN: Well, suppose the
9 statute didn't say what it said, but suppose
10 the statute, in fact, said what Mr. Stewart
11 says the PTO is going to do going forward. In
12 other words, the PTO is not going to touch
13 ideas that are offensive or scandalous or
14 immoral or anything like that; it's just going
15 to focus on modes of speech and, essentially,
16 what that means, let's just -- is it won't
17 allow trademarks that are profane.

18 MR. SOMMER: Well, the first quest --

19 JUSTICE KAGAN: Is that
20 viewpoint-based?

21 MR. SOMMER: Yes, because, if you want
22 to have a statute that prohibits profanity,
23 obscenity, that would be constitutional. In
24 fact, I'd like to sort of answer one of the
25 previous questions, is -- is even if this

1 statute is struck down, the PTO still can
2 refuse obscene trademarks because Section 1
3 requires that the trademark needs to be used in
4 commerce. And that's always been determined to
5 be legally used in commerce.

6 JUSTICE KAGAN: Well, our -- our
7 standard for obscenity is so high, I can't
8 believe that many trademarks would really
9 qualify as -- as obscene, but I -- but let's
10 say that the government has a real interest in
11 preventing a certain kind of just profanity,
12 vulgarity, nothing to do with the viewpoints of
13 speakers but something to do with the way they
14 express those viewpoints.

15 I guess that that a little bit stacks
16 the deck in terms of the question, but why --
17 why would that be viewpoint-based?

18 MR. SOMMER: Well, if you're talking
19 about the mode of expression argument, that is
20 a misreading of Cohen, because Cohen could have
21 said foey on the draft, and that's what the
22 government says he should have done, and if he
23 said something else, he should have been
24 arrested and his conviction should have been
25 affirmed, but we know his conviction was

1 reversed. So the mode of expression argument
2 is incorrect.

3 JUSTICE ALITO: Well, it's -- it's --
4 Cohen rejected it in that context, where
5 somebody was being punished for -- for saying
6 the words, but is it a little -- isn't it -- is
7 it exactly the same here?

8 MR. SOMMER: I think so.

9 JUSTICE ALITO: That the government is
10 not saying, you can't use this phrase, this
11 word, you -- we just won't register it.

12 MR. SOMMER: Well, there -- if
13 you're -- if -- basically, the question seems
14 to be is can we prohibit the seven dirty words.
15 You know, if the government had a list of seven
16 dirty words, would that be constitutional?

17 And the answer is it would be not for
18 two reasons. First, because you have seen in
19 the briefs some marks that have the F word and
20 racism and cancer. Those clearly express
21 viewpoints.

22 And the second thing is, even if you
23 had a list of five words, that wouldn't
24 preclude Mr. Brunetti's mark because it isn't
25 exactly one of the seven dirty words.

1 JUSTICE ALITO: Oh, come on. You
2 know, come on.

3 MR. SOMMER: Well, I agree with --

4 JUSTICE ALITO: Be serious. We know
5 what -- you know, what he's trying to say.

6 MR. SOMMER: That's --

7 JUSTICE ALITO: So it's -- you have
8 the seven dirty words and anything that -- you
9 know, any clever way of trying to say it in a
10 different way, using different letters.

11 MR. SOMMER: But that's my point,
12 because F-C-U-K is granted and F-V-C-K is
13 granted --

14 JUSTICE ALITO: Okay. It's been --

15 MR. SOMMER: -- and the only reason --

16 JUSTICE ALITO: -- it's been
17 inconsistently applied, but let's say we're
18 going forward and there's a list of words and
19 you just can't use those.

20 MR. SOMMER: If Congress --

21 JUSTICE ALITO: Your position is that
22 would be unconstitutional?

23 MR. SOMMER: I think so. If Congress
24 were to pass that, we'd be here again in a few
25 years to determine whether that's true.

1 JUSTICE BREYER: Well, but you --
2 you -- your -- your -- your basic point -- and
3 this is where I'm having a harder time, I think
4 we're in a period where swear words -- and
5 that's what they are, swear words -- where
6 their content is changing so that younger
7 people feel that these racial slurs are just as
8 bad, if not worse.

9 So suppose that you can pick that out.
10 Sometimes it will be used to convey a message.
11 I grant you that. But this is business. And
12 it's not only business, it is business that has
13 a function of identifying the manufacturer and
14 it is the kind of use that doesn't forbid
15 anybody from using that word, except to get
16 registration, and you can put it right next to
17 it.

18 So it's very different than Carlin.
19 It's very different. Now I want your response
20 to as much of this question as you can give me.

21 MR. SOMMER: Of -- I'm sorry, I don't
22 really know where to start. It --

23 JUSTICE BREYER: I didn't think you
24 necessarily would --

25 MR. SOMMER: Yeah.

1 JUSTICE BREYER: -- because there are
2 several things mixed up there.

3 MR. SOMMER: Yeah.

4 JUSTICE BREYER: And I want in my mind
5 this straightened out.

6 MR. SOMMER: Well, I -- I -- as I
7 think you agree, that it's viewpoint, because
8 I'm not looking at it from the viewpoint --

9 JUSTICE BREYER: No, I don't agree
10 with it's viewpoint. I think that very often
11 the word involved in your case and the racial
12 slur is not viewpoint. It is used to insult
13 somebody, rather like fighting words, or it's
14 used to call attention to yourself. That's the
15 purpose of the slur. That isn't viewpoint.

16 Fighting words isn't viewpoint. Or,
17 if it is, it's overcome.

18 MR. SOMMER: Well, Mr. Brunetti's
19 viewpoint is, as already pointed out, I can be
20 offensive, I don't have to obey the authority.
21 And that's viewpoint.

22 CHIEF JUSTICE ROBERTS: I don't want
23 to distract you in that, but that's completely
24 circular. It's like saying my protest is that
25 I want to use words prohibited by, you know,

1 not given trademark protection, and because I
2 have that viewpoint, you have to give them
3 trademark protection. That -- that's totally
4 circular.

5 MR. SOMMER: Well, if we look -- we're
6 doing -- have a facial challenge here, so the
7 question is, is it overbroad? And it doesn't
8 matter if Mr. Brunetti's mark should be granted
9 or not. It's the statute as written and as
10 applied, without exception, covers a fair
11 amount of clearly core speech, of high-value
12 speech. And you're saying that this one --

13 JUSTICE BREYER: Do -- that's a
14 different argument. And I -- I -- I see that
15 argument. I'm not asking about that because I
16 think I understand the argument.

17 But I am -- what I am worried about is
18 the viewpoint, as you say, but I'm also worried
19 about -- the -- the racial slur we all know
20 about, okay, suddenly, in certain places in the
21 United States, appearing as a product name,
22 appearing on every bus where it's advertised,
23 appearing on newsstands in Times Square where
24 it wouldn't be, but it might be in some other
25 city, and where children and others see it.

1 Now that's the interest that they're
2 talking about at the same time as they point
3 out this doesn't stop anybody from saying, it
4 does stop them from claiming it's a registered
5 trademark, i.e., product source recognized by
6 the government.

7 Now that's what I'd like you to deal
8 with directly.

9 MR. SOMMER: Well, just granting
10 federal registration doesn't require that
11 anyone use a trademark. And my client's goods
12 are not going to be a target at Wal-Mart.

13 JUSTICE GORSUCH: Well, I'm not sure
14 that's an answer to Justice Breyer's question.
15 Why isn't it a government benefit and why can't
16 the people choose to withhold the benefit on
17 the basis that there are certain words that are
18 profane and that we, as a matter of civility in
19 our culture, would like to see less of rather
20 than more of, and you can use -- you're free to
21 use them.

22 Cohen can have his T-shirt, but we are
23 not going to trademark them, and we've held
24 just last year that a patent is a public
25 benefit that can be withdrawn without a judge.

1 Why isn't this also similarly a public benefit
2 rather than a private right?

3 MR. SOMMER: Well, I would respond
4 with 44 Liquormart, because the government
5 doesn't have to grant the benefit. For
6 example, the government doesn't have to have a
7 fire department, but it can't go to a church
8 and say, we're not going to protect your church
9 unless you drop your Santeria beliefs because
10 we find that offensive, and I think that's a
11 good analogy.

12 JUSTICE SOTOMAYOR: That's viewpoint.
13 Why is it that the government can't say, as it
14 does with every registration system, you can
15 register your marriage, but we don't permit
16 people to declare their love in their marriage
17 license. We just ask for their name, their
18 address, who were the witnesses, and where the
19 marriage happened.

20 The same things with a deed to a
21 house. We don't permit you to have commercial
22 advertisements in that deed telling people how
23 wonderful your house is. We -- metes and
24 bounds. The day of the purchase price and
25 that's it.

1 So why can't the government, just like
2 with a patent, say, we will give you this
3 benefit to these things but not to others?

4 MR. SOMMER: Well --

5 JUSTICE SOTOMAYOR: And we don't want
6 profane words, no matter how you use them.

7 MR. SOMMER: Well, I think there's two
8 --

9 JUSTICE SOTOMAYOR: Whether it's pro
10 or con, any idea, we don't want vulgar,
11 profane, sexually explicit, or other words.

12 Now we've got a separate problem with
13 the lack of consistent application by the
14 government. We'll put that aside. But let's
15 deal with the basic question.

16 Why can't the government say, no,
17 we're not going to give you space on our public
18 registry for words that we find are not
19 acceptable?

20 MR. SOMMER: Well, I think you've
21 explained why it's not a public forum. It's
22 not a forum at all. And, in fact, would the
23 government be allowed to refuse registration of
24 ownership of property because it's bought by a
25 church with a name that's considered offensive?

1 Could the Coast Guard refuse to register a boat
2 because they think the name of the boat is a
3 little bit salacious?

4 JUSTICE SOTOMAYOR: Actually, you're
5 right.

6 CHIEF JUSTICE ROBERTS: Maybe, but, I
7 mean, the government's interests, you --

8 JUSTICE SOTOMAYOR: I think they do.

9 CHIEF JUSTICE ROBERTS: -- you say
10 that, you know, this product's not going to be
11 in Wal-Mart, right?

12 MR. SOMMER: Correct.

13 CHIEF JUSTICE ROBERTS: But it is
14 going to be on people walking down through the
15 mall. And, you know, for parents who are
16 trying to teach their children not to use those
17 kinds of words, they're going to look at that
18 and say, well, look at that, and then, you
19 know, they're going to see the little trademark
20 thing and say, well, it's registered trademark.
21 Well, they won't say that, but --

22 (Laughter.)

23 CHIEF JUSTICE ROBERTS: -- but you --
24 but you -- you understand my point, is that the
25 government's registration of it will facilitate

1 its use in commerce, not necessarily as speech,
2 but as a commercial product, and that has
3 consequences beyond -- regardless of where the
4 product is sold?

5 MR. SOMMER: Well, I think that's
6 where the government has a -- a conundrum,
7 because the government can -- has a -- assuming
8 even if it's only intermediate scrutiny,
9 doesn't have a compelling interest if it can't
10 stop people from using it.

11 And so people -- Mr. Brunetti can
12 still use his mark regardless of whether it's
13 registered or not.

14 CHIEF JUSTICE ROBERTS: Yeah, I know,
15 but the whole point is that the federal
16 registration increases the exposure. You're
17 going to have more commercial -- the theory
18 anyway is you're going to have more commercial
19 opportunities and markets and -- if you do use
20 -- if you are under the federal registration
21 system.

22 I mean, that's the government's
23 argument. You can do whatever you want with
24 it; you're just not going to get the benefit of
25 the government's participation in promotion of

1 vulgarity.

2 MR. SOMMER: Well, that gets back to
3 why the statute was unconstitutional from the
4 beginning, because the legislative intent shows
5 that we -- the Congress recognized it couldn't
6 prohibit use of vulgar marks, but its -- the
7 legislative history says that, well, we can
8 deny registration and that will prevent them
9 from using it.

10 JUSTICE KAVANAUGH: What -- what is
11 your answer to Justice Breyer's comment that
12 insult -- insulting someone is not a viewpoint?

13 MR. SOMMER: Well, I would agree that
14 all the traditional exceptions to the free
15 speech, such as fighting words, is not
16 expressing a viewpoint, but, as to insulting
17 someone being viewpoint, you decided that
18 unanimously in Tam.

19 JUSTICE BREYER: Tam was a word --
20 Tam, they were using a word that doesn't
21 have -- for whatever reasons, it doesn't have
22 this tremendous retentive power that would lead
23 someone to try as quickly as possible to get
24 his brand registered with that name in order to
25 grab attention. And there are such people.

1 And that is not a word in Tam. That is not
2 that kind of a word. It was used ironically.
3 It was used ironically for, perhaps, a
4 politically oriented purpose.

5 Now I don't know that I just
6 articulated much of a distinction --

7 MR. SOMMER: Well, the trademark --

8 JUSTICE BREYER: -- but there may be
9 something there. And I, again, want to hear
10 your response.

11 MR. SOMMER: Well, since Tam, the
12 trademark office has taken the position that it
13 cannot refuse any racial slur. And, in fact,
14 it is approving them. But even before Tam,
15 there were variations on that racial slur
16 registered.

17 JUSTICE KAVANAUGH: What about
18 Mr. Stewart's comment about public buses' ad
19 space that he says would not be able to be
20 regulated if you were to prevail here?

21 MR. SOMMER: Well, I guess sort of --
22 I hope this isn't too flippant, but you -- you
23 have considered whether to grant cert on that
24 question.

25 But I don't think the profanity always

1 expresses viewpoint. View -- in a trademark
2 context --

3 JUSTICE KAVANAUGH: When does it not?

4 MR. SOMMER: Well, fleeting expletives
5 and I think when it's used without any
6 relevance to the subject matter, such as in
7 high school speech, and, of course, there still
8 can be --

9 JUSTICE SOTOMAYOR: Some -- some of us
10 would say that a vulgar word with relationship
11 to selling clothes is sort of irrelevant?

12 MR. SOMMER: Well, it's not irrelevant
13 because, as Justice Ginsburg pointed out, the
14 audience that Mr. Brunetti is appealing to is
15 young men who want to be rebels. And this is
16 how they do it.

17 CHIEF JUSTICE ROBERTS: Well, that may
18 be the audience he's targeting, but that's not
19 the only audience he reaches.

20 MR. SOMMER: Agreed.

21 CHIEF JUSTICE ROBERTS: Well, I mean,
22 but that sort of gets to the government
23 interest in whether or not it wants to be
24 association -- associated with facilitating
25 this type of vulgarity with -- which reaches --

1 and the whole -- I mean, I guess you would say
2 the whole point is to reach beyond the targeted
3 audience to offend people.

4 MR. SOMMER: Well, as under your
5 jurisprudence, under the Court's jurisprudence,
6 if this is strict scrutiny or even if it's
7 content regulation, that's not a compelling
8 government interest. And that sort of falls
9 afoul of Reno versus ACLU, that says we can't
10 take our level of discussion in our diverse
11 society that includes, for example, a rapper --

12 CHIEF JUSTICE ROBERTS: Well, but
13 everything -- the whole --

14 MR. SOMMER: -- to the --

15 CHIEF JUSTICE ROBERTS: I'm sorry, go
16 ahead.

17 MR. SOMMER: To -- to, you know, the
18 lowest common denominator, the most squeamish
19 among us.

20 CHIEF JUSTICE ROBERTS: Yeah, but the
21 point -- this is a different type of program.
22 The whole point of this program is to regulate
23 content. You have to look at it and decide, is
24 it, for example, functional or descriptive, in
25 which case it doesn't get protection. Is it

1 something that's been granted before, so it
2 doesn't get protection?

3 MR. SOMMER: Well --

4 CHIEF JUSTICE ROBERTS: The fact that
5 it's -- it is -- I'll -- I'll concede, it's
6 completely content-based, but it's the nature
7 of the program.

8 MR. SOMMER: Well, it's not a program;
9 it's a registration scheme, and it is not
10 content-based on most grounds. Likelihood of
11 confusion deals -- and the deception clause
12 deals with confusion and fraud, basically,
13 which is --

14 JUSTICE KAGAN: You would agree that
15 there are other content restrictions, wouldn't
16 you? You know, the flag one or -- you know,
17 there are a number, yes?

18 MR. SOMMER: Well, I think that 2(b),
19 which deals with flag -- flags and symbols, and
20 2(c), with using people's names, could under
21 certain circumstances raise constitutional
22 issues. I think 2(e), which deals with things
23 that aren't trademarks because they're generic
24 or functional, I don't think that's called into
25 question.

1 JUSTICE ALITO: You think likelihood
2 of confusion is not content-based?

3 MR. SOMMER: I think --

4 JUSTICE ALITO: How do you determine
5 whether something is likely to confuse without
6 looking at the content of it?

7 MR. SOMMER: Well, I would say not
8 only content-based, but I'd also say that that
9 is the traditional exception of preventing
10 confusion, because the whole point of refusing
11 a new application is it's likely to be confused
12 with the other one.

13 But you're actually not -- it's almost
14 like a secondary meaning case like City of
15 Renton, because you're looking at applied mark
16 A and registered mark B, and you're not looking
17 at the content. That's really irrelevant.
18 You're only looking at the likelihood of
19 confusion, the similarity.

20 JUSTICE KAVANAUGH: With respect to
21 words and letters, as opposed to images, is
22 there any combination of words or letters that
23 you think can be barred --

24 MR. SOMMER: Well, I think it only --

25 JUSTICE KAVANAUGH: -- under the

1 scandalous/immoral provision?

2 MR. SOMMER: Well, I think,
3 constitutionally, only obscenity can be barred.
4 And it would be --

5 JUSTICE KAVANAUGH: And what -- what
6 would you -- with respect to words and letters,
7 how would you define obscenity in this context?

8 MR. SOMMER: Well, I would just use
9 Miller versus California, because the
10 government basically is arguing here we should
11 ignore Miller versus California or modify it or
12 create a new exception to the First Amendment
13 for vulgar.

14 So a picture I can see can be obscene.
15 And I can see if you had a long sentence that
16 said some things, which I don't need to give
17 you an example, but you could imagine a
18 sentence or two that could be prurient interest
19 and --

20 JUSTICE KAVANAUGH: But that gets to
21 the question of how do you draw a line between
22 this and that.

23 MR. SOMMER: Well, the Court has been
24 satisfied with the obscenity standard since
25 1970 whatever for Miller versus California, and

1 I think that's a good standard. I think that's
2 settled jurisprudence.

3 JUSTICE GORSUCH: But what do we do
4 about the fact this is a -- a facial challenge,
5 and so at least some of this material would
6 presumably be okay even under your test for the
7 -- for the trademark office to refuse?

8 MR. SOMMER: Only -- I'm -- I'm
9 contending that only obscenity could be refused
10 properly.

11 JUSTICE GORSUCH: Well, but isn't --
12 in a facial challenge, your -- your obligation
13 is to prove that the -- that the statute's
14 unconstitutional in all of its application or
15 almost all of it.

16 MR. SOMMER: Well, for vagueness, but
17 for overbreadth, I believe it's only necessary
18 to show that it covers a substantial amount of
19 speech.

20 JUSTICE GORSUCH: Well, but a very
21 substantial amount of speech. Where is the
22 line here?

23 MR. SOMMER: Well, that's why it's
24 unconstitutional, because it covers religious
25 speech -- I've given you an example of

1 religious controversial marks that were
2 refused. I've given you an example of
3 political marks that has been refused, as well
4 as -- as profanity. And the government can't
5 even get that right because --

6 JUSTICE GORSUCH: Well, but assuming
7 profanity is borderline, right, and some of it
8 might be okay for the -- for the government to
9 regulate and some of it might not be. Just --
10 just assume that. Have you met your burden?

11 MR. SOMMER: I believe so, because I
12 have shown that there's a substantial amount of
13 speech that is improperly refused under this
14 provision.

15 And the provision is so incredibly
16 overbroad, because if it's taken at its word --
17 at its -- on its face, Steak 'n Shake can't be
18 registered because some people believe you
19 can't -- a substantial portion of Americans
20 believe that eating beef is immoral. And so
21 now that's unconstitutional -- that's invalid,
22 that registration.

23 JUSTICE KAVANAUGH: I'm not sure you
24 answered my bus question, so I want to get it
25 one more time. If we rule for you in this

1 case, is there a principled ground on which we
2 could distinguish public bus ad space?

3 MR. SOMMER: Definitely, because that
4 is a public forum. And I think that the --
5 probably the clearest way is as public
6 disruption, but I do see --

7 JUSTICE KAVANAUGH: Public?

8 MR. SOMMER: Disruption.

9 JUSTICE KAVANAUGH: Because people see
10 a word and all of a sudden --

11 MR. SOMMER: And then there's --

12 JUSTICE KAVANAUGH: -- can't handle
13 themselves?

14 MR. SOMMER: And then there's --

15 JUSTICE KAVANAUGH: I don't understand
16 that.

17 MR. SOMMER: And there's also a case
18 that involves where bus -- affirming standards
19 for taking ads because the purpose of the bus
20 program is revenue. And I -- I think it's from
21 Massachusetts, but I can't remember the name of
22 the case.

23 JUSTICE KAVANAUGH: Can you explain
24 the disruption point more?

25 MR. SOMMER: Well, I'm not sure -- at

1 least in the high school context, like Bethel
2 School, I think that there is disruption.

3 JUSTICE KAVANAUGH: On a public -- on
4 a public bus, how would this --

5 MR. SOMMER: Okay. I -- I -- I'll
6 withdraw that. I think that might be --

7 JUSTICE KAVANAUGH: Okay.

8 MR. SOMMER: -- hard to -- to draw a
9 line there. Well, if there's no further
10 questions, I would simply say --

11 JUSTICE ALITO: Well, what about where
12 -- if -- there may be words that are almost
13 never used, actually, to express what the word
14 literally means. They -- and the word your
15 client wants to use is number one on the list.
16 Like, 99 percent of the time or 95 percent of
17 the time, it's not used to express what the
18 word literally means. It's just used to say,
19 I'm mad, I want to get attention. It's like
20 shouting.

21 Can it be -- can that be distinguished
22 on that ground, that -- that it doesn't express
23 any sort of viewpoint? All it expresses is an
24 emotion, a way of -- of expressing something.

25 MR. SOMMER: Well, I think two -- two

1 responses. One, I think you've already decided
2 that issue in Tam by unanimously holding the
3 giving offense's viewpoint.

4 JUSTICE ALITO: No. Well, Tam
5 involved the expression of an idea, and -- and
6 so there was viewpoint discrimination.

7 MR. SOMMER: Well, because of your
8 decision in Tam, the -- the provision in the
9 whole is invalid. And so all those racial
10 slurs are coming in.

11 JUSTICE BREYER: So what exactly is
12 the harm to the First Amendment speech interest
13 here? I mean, this is, after all, simply not
14 forbidding use of any word in any place, but
15 you can't put a little R next to it.

16 It doesn't stop you. The
17 registration, non-registration makes it more
18 difficult for you later to prove a trademark
19 case, a trademark case being about the source
20 of a product, not about speech.

21 So what precisely is the harm? I'm
22 not saying there isn't one. I just want to get
23 your words of what the harm to the interests,
24 the First Amendment interests, is.

25 MR. SOMMER: Because people who want

1 to -- like Mr. Brunetti, who want to have a
2 somewhat undefined viewpoint, or people with a
3 more defined viewpoint, like in the cancer and
4 the racism case, they have a viewpoint that
5 they want to make.

6 And as the Court already held in Tam,
7 denial of registration -- if denial of
8 registration in Tam is a sufficient burden to
9 raise constitutional --

10 JUSTICE BREYER: I -- I understand
11 your Tam.

12 MR. SOMMER: Okay.

13 JUSTICE BREYER: That's why I wanted
14 to get your articulation in best words, since
15 the statute books of the federal government, as
16 well as every state, are filled with
17 prohibitions against saying all kinds of things
18 in areas of commerce, securities, you name it.
19 I mean, all kinds of things.

20 So what I want your words for is to
21 distinguish this case in terms of harm to First
22 Amendment interests. All I want is your phrase
23 on that.

24 MR. SOMMER: I would say --

25 JUSTICE BREYER: And I'm -- and I'm --

1 I'm not saying you don't have one. I just want
2 to get it in my head.

3 MR. SOMMER: I would say Brunetti
4 cannot express his viewpoint --

5 JUSTICE BREYER: Okay.

6 MR. SOMMER: -- without an
7 unconstitutional burden.

8 CHIEF JUSTICE ROBERTS: See, I take it
9 that the -- a correct spelling of the vulgar
10 word at the heart of the case, that can't be
11 trademarked, right?

12 MR. SOMMER: The -- the word -- bad
13 word itself?

14 CHIEF JUSTICE ROBERTS: Yeah.

15 MR. SOMMER: It could be. Someone
16 could register that if they used it as a source
17 identifier, like as a label in the neck. That
18 would be a source identifier because the one
19 thing I think maybe is being confused is as the
20 use on the front isn't a trademark use. That's
21 considered ornamental.

22 Trademark use is as a use on a neck
23 label or, as the government likes to ignore, on
24 blogs, like, say, if you want to say dump the
25 governor, except we can have other examples

1 that would fall under this.

2 CHIEF JUSTICE ROBERTS: Right, but I
3 guess I don't understand. A mark on the neck?

4 MR. SOMMER: The trademark is on the
5 neck label. And the statute says any word or
6 symbol can be a trademark, unless there's a
7 disqualifying condition.

8 But trademarks also are more than just
9 the neck label. Because people use it for
10 political parties, for charitable groups, for
11 providing information about candidates for
12 public offices, this is not -- trademarks and
13 service marks are not purely commercial
14 anymore.

15 They were back when Paul Revere put
16 his name on silverware, but if it was nowadays,
17 Paul Revere would say, I ride for freedom, and
18 that would be viewpoint.

19 Well, if the Court has no further
20 questions, the government doesn't dispute, I
21 think, that some marks are viewpoint. It
22 doesn't dispute that it's content regulation.
23 And the government does not dispute that
24 statute doesn't survive strict scrutiny.

25 And, therefore, I submit, the statute

1 is facially unconstitutional.

2 JUSTICE SOTOMAYOR: You're -- you're
3 conceding to the Chief Justice that anyone who
4 uses the words on goods to sell them can use
5 any profane word and register it?

6 MR. SOMMER: Well, there's two
7 questions there. Can they use it? Because all
8 the words about descriptive use, non-trademark
9 use, apply.

10 So people can use -- let's say someone
11 has the word apple registered for clothing, but
12 they still -- someone else could use an apple
13 on the front of the clothing. And so that's
14 non-trademark use. And so all those rules that
15 are --

16 JUSTICE SOTOMAYOR: But the word that
17 the Chief asked you about you say can be
18 registered --

19 MR. SOMMER: I believe it can be --

20 JUSTICE SOTOMAYOR: -- if it's on the
21 neck?

22 MR. SOMMER: Yes, I believe so.

23 JUSTICE SOTOMAYOR: I think I
24 understand your difference, but --

25 MR. SOMMER: All right. Thank you.

1 CHIEF JUSTICE ROBERTS: Thank you,
2 counsel.

3 Four minutes, Mr. Stewart.

4 REBUTTAL ARGUMENT OF MALCOLM L. STEWART

5 ON BEHALF OF THE PETITIONER

6 MR. STEWART: Thank you, Mr. Chief
7 Justice.

8 I'd like to make one factual
9 clarification and then three quick legal
10 points.

11 First, as to the PTO's current
12 practice with respect to racial slurs, in
13 general, the PTO views Tam as prohibiting a
14 denial of registration for racial slurs, but,
15 with respect to the single-most offensive
16 racial slur, the PTO is currently holding in
17 abeyance applications that incorporate that
18 word, pending this Court's decision on -- leave
19 open the possibility that that word might be
20 viewed as scandalous.

21 Second, with respect to Cohen, Cohen
22 simply illustrates the difference between a
23 prohibition on speech and on content-based
24 restrictions on speech that are used to
25 prohibit and content-based criteria for

1 government benefits.

2 The reason that the law in Cohen was
3 held to be invalid was that it entirely
4 prohibited the use of the word in a public
5 space. Here, we're not doing that.

6 The -- the second thing I wanted to
7 say -- and this follows up on questions from
8 the Chief Justice and Justice Alito -- that
9 content-based distinctions are really
10 ubiquitous in the registration program.

11 We look to see whether marks are
12 descriptive, whether they're generic, whether
13 they're confusingly similar to existing marks,
14 and often the words that we find to be
15 descriptive, generic, confusingly similar, are
16 incorporated into what could be viewed as
17 messages.

18 And in response to any allegation of
19 viewpoint discrimination, we would say we're
20 not denying registration because it is being
21 used to convey this message. We're denying
22 registration to -- because it is descriptive,
23 generic, et cetera.

24 And we simply want to be able to
25 follow the same approach with respect to

1 profanity. Profane words can be used as part
2 of a larger message, but we're not denying
3 registration because of the message, it's
4 because of the profanity.

5 And the last thing I'd say about
6 whether it matters, obviously, the reason
7 Mr. Brunetti cares about this enough to apply
8 for federal -- for trademark registration and
9 appeal to the Federal Circuit is that he
10 believes that federal registration will convey
11 commercial advantages.

12 And within the context of a program
13 that is intended to facilitate and strengthen
14 trademarks, Congress can legitimately decide
15 that it wants to disincentivize the use of
16 trademarks that substantial numbers of people
17 would find offensive and to disassociate the
18 government from those trademarks. Thank you.

19 CHIEF JUSTICE ROBERTS: Thank you,
20 counsel. The case is submitted.

21 (Whereupon, at 11:03 a.m., the case
22 was submitted.)

23

24

25