



1           IN THE SUPREME COURT OF THE UNITED STATES  
2    - - - - -  
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.         )

11    - - - - -

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.

19  
20    APPEARANCES:  
21    MALCOLM L. STEWART, Deputy Solicitor General,  
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 --

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

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

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

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

1 of expression, not because of the ideas --

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

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

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

1 limiting principle that has its own substance,  
2 like obscenity.

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

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

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

1 Congress can do that.

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

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

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

19 MR. STEWART: That's correct.

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

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

25 CHIEF JUSTICE ROBERTS: Well, I didn't

1 understand you in your brief to make much of an  
2 argument about that.

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

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

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

18 MR. STEWART: Of constitutional  
19 application.

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

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

24 CHIEF JUSTICE ROBERTS: So if it's --  
25 what would happen if we agreed with the

1 Respondents? Would the whole provision be  
2 struck down?

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

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

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

23 We -- we agree that it should be  
24 limited so that it isn't viewpoint  
25 discriminatory, but to limit it to obscene

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

6 CHIEF JUSTICE ROBERTS: Let me --

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

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

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

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

25 MR. STEWART: Right.

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

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

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

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

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

23 MR. STEWART: I don't think that would  
24 be an appropriate means of proceeding, and --  
25 and let me explain why if I may.

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

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

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

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

23           MR. STEWART: It is some of --

24           JUSTICE ALITO: Those are not  
25    necessarily the same.

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

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

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

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

1 to avoid the creation of artificial incentives  
2 to its use by providing the benefits that are  
3 associated with federal trademark registration.

4 And the point I --

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

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

13 JUSTICE SOTOMAYOR: Why?

14 MR. STEWART: Because we --

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

21 MR. STEWART: Right.

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

25 MR. STEWART: I -- I --

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

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

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

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

1 segments of the community, including to -- to  
2 children.

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

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

20           JUSTICE KAVANAUGH: How -- how do you  
21 -- excuse me, how do you deal with the problem  
22 of erratic or inconsistent enforcement, which  
23 seems inevitable with a test of the kind you're  
24 articulating?

25           MR. STEWART: Well, I think some of it

1 is -- some of it will be resolved by Tam; that  
2 is, to the extent that the PTO had previously  
3 taken into account whether the views expressed  
4 were shocking or offensive, that won't be done  
5 any longer.

6 The second thing I would say is  
7 more -- more leeway is given in situations --  
8 in terms of vagueness in situations where the  
9 government is not prohibiting speech but is  
10 simply declining to provide a benefit.

11 Here -- here, the consequence of the  
12 determination that Mr. Brunetti's mark was  
13 scandalous was not that he was subjected to any  
14 penalty, he could continue to market his goods  
15 and commerce with the -- the trademark he had  
16 been using.

17 JUSTICE KAGAN: But, if I understand  
18 what you're saying, Mr. Stewart, you're  
19 essentially saying we should uphold the statute  
20 on the basis of various commitments that the  
21 government is now making to apply this statute  
22 to only a small subset of the things that it  
23 could apply to, if you look at it on its face  
24 as to just the words used.

25 And -- and that's a strange thing for

1 us to do, isn't it, to basically, you know,  
2 take your commitment that, look, these are very  
3 broad words, but we're going to pretend that  
4 they say something much narrower than they do?

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

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

18 MR. STEWART: I -- I think it's  
19 anomalous at first glance, but I don't think  
20 that there's a logical contradiction because  
21 the Lanham Act doesn't simply prohibit  
22 registration of marks that are identical to  
23 a -- an existing mark. As you say, it  
24 prohibits registration of marks that are  
25 confusingly similar to existing marks.

1           And it's -- it's logically possible to  
2           have two marks, one of which falls -- both of  
3           which fall very close to the line --

4           JUSTICE GORSUCH: Well, but Mister --

5           MR. STEWART: -- one of which is  
6           barely scandalous --

7           JUSTICE GORSUCH: -- but Mister --

8           JUSTICE ALITO: But this is -- if this  
9           --

10          MR. STEWART: -- the other --

11          JUSTICE GORSUCH: Mr. Stewart, though  
12          --

13          JUSTICE ALITO: Go ahead.

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

21                 How is a reasonable citizen supposed  
22                 to know? What notice do they have about how  
23                 the government's going to treat their mark?

24          MR. STEWART: Well, I -- I think one  
25          of the -- I think the notice is in -- in part

1 the -- based on the PTO decisions, but,  
2 obviously, whatever the Court says, if it  
3 upheld the provision, the Court can say what it  
4 wants to say about the permissible --

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

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

15 Is there one that the government's  
16 aware of or --

17 MR. STEWART: Well, I think, in part,  
18 the PTO looks to context. And a -- a lot of  
19 the examples that are given of confusing -- of  
20 similar marks, one of which is refused  
21 registration, one of which is granted  
22 registration, are marks in which people will  
23 use a slightly different combination of letters  
24 that phonetically evokes an existing profane  
25 word.

1                   So you have marks that use the letters  
2 P-H-U-C -- and the PTO will, in part, examine  
3 context in order to determine is that mark  
4 intended -- will it be --

5                   JUSTICE GORSUCH: I don't want to -- I  
6 don't want to go through the examples. I  
7 really don't want to do that.

8                   (Laughter.)

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

17                   MR. STEWART: I guess the two things I  
18 would say are, first, the PTO looks to context.  
19 And so, if a phonetic word like the one I  
20 described appears in a sentence or in a phrase  
21 in which the profane word would commonly  
22 appear, the PTO is more likely to conclude that  
23 a substantial segment of the public will regard  
24 that as the equivalent of the profane mark  
25 because it is being used in the way that the

1 profane mark is often used.

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

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

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

22 And so short phrases or slogans are  
23 often refused registration on the grounds that  
24 they would be seen by consumers as  
25 communicating a thought, not as identifying the

1 source of goods.

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

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

18           JUSTICE BREYER: What about racial  
19 slurs?

20           MR. STEWART: I think, in general,  
21 racial slurs are taken off the table by Tam,  
22 because it is the --

23           JUSTICE BREYER: Because I -- I've  
24 looked into a little, and there are certain  
25 ones that have exactly the same physiological

1 effect on a person, if any, as the word we're  
2 using here, and there is a physiological  
3 effect.

4 MR. STEWART: I --

5 JUSTICE BREYER: There is a -- it's  
6 stored in a different place in the brain. It  
7 leads to retention of the word. There are lots  
8 of physiological effect with very few words.

9 It's not too hard --

10 MR. STEWART: I --

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

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

19 You could say this particular racial  
20 slur is considered uniquely offensive, even as  
21 compared to other racist speech, and,  
22 therefore, it could be denied registration on  
23 the ground that it was an impermissible mode of  
24 expressing a racist -- racist thought.

25 On the other hand, you could argue, at

1 bottom, the reason that this slur is regarded  
2 as so offensive is that it is -- has  
3 historically been linked to virulent racist  
4 attitudes, and for that reason, it all comes  
5 down to viewpoint. We think that would be an  
6 -- an authentically close case even under the  
7 -- the framework that we've established.

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

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

22 MR. STEWART: I -- I don't deny that  
23 that might be a reason that people would use  
24 profanity in certain circumstances, but I think  
25 if that were treated as a form of viewpoint

1 discrimination, it would really cast doubt on a  
2 lot of other practices.

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

18           And we think that would be sufficient  
19 to make the -- the provision viewpoint-neutral.

20           JUSTICE SOTOMAYOR: Well, you keep  
21 talking about this as a government program --

22           MR. STEWART: Uh-huh.

23           JUSTICE SOTOMAYOR: -- and Tam  
24 addresses this and says it's an odd government  
25 program because people are paying you to give

1 the service; you're not giving them much of  
2 anything except legal rights, which are not  
3 unimportant. But I'm not sure how to  
4 differentiate this from a limited public forum,  
5 as we recognized in *Cornelius*, because, as in  
6 *Cornelius*, registrants can go out and use the  
7 trademark, they could have sought donations  
8 from whomever they wanted in *Cornelius*, and yet  
9 we talked and we held that the list of -- of --  
10 of organizations was the forum.

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

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

21 The -- the way in which he would  
22 communicate with his potential customers is by  
23 advertisements, promotional materials, placing  
24 the goods on shelves --

25 JUSTICE SOTOMAYOR: Oh, but that's not

1 true. It puts the world on notice of his mark.

2 MR. STEWART: It does and it --

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

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

19 Now a couple of other things that I'd  
20 like to -- to say about the registration  
21 program. You're right that people pay a fee to  
22 register, but the PTO still devotes substantial  
23 resources to examining the trademarks, to  
24 publishing them. There are periodic -- there's  
25 a periodic reexamination to see whether the --

1 the applicant is still using the mark in  
2 commerce. And the advantages -- the commercial  
3 advantages that registrants get are directly  
4 attributable to the efforts that PTO has put  
5 in.

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

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

21 If I may, I'd like to reserve the  
22 balance of my time.

23 CHIEF JUSTICE ROBERTS: Thank you,  
24 counsel.

25 Mr. Sommer.

1 ORAL ARGUMENT OF JOHN R. SOMMER

2 ON BEHALF OF THE RESPONDENT

3 MR. SOMMER: Mr. -- Mr. Chief Justice,  
4 and may it please the Court:

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

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

24 JUSTICE BREYER: But there are books  
25 and scientists' reports and so forth, I don't

1 know how -- I haven't seen them contested, that  
2 say take six or seven words, and today -- in  
3 the past, they might have been religious, but  
4 today they do include the word at issue and  
5 they do include racial slurs. Of certain  
6 words.

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

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

23           MR. SOMMER: Well, if you're asking  
24 about the government association, the Tam Court  
25 dealt with that already.

1 JUSTICE BREYER: I wasn't. I was  
2 asking --

3 MR. SOMMER: Okay. Well --

4 JUSTICE BREYER: -- primarily about,  
5 there is a way of distinguishing these matters,  
6 I think.

7 MR. SOMMER: Well --

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

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

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

21 MR. SOMMER: But that -- that avoids  
22 the issue about whether this is viewpoint. And  
23 even if it's not viewpoint, it's still content.

24 So if this statute clearly covers --  
25 the government does not seem to dispute that at

1 least many or some of the marks that are both  
2 granted and refused express viewpoint. Then  
3 the statute is overbroad.

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

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

15 JUSTICE KAGAN: Is that  
16 viewpoint-based?

17 MR. SOMMER: Yes, because, if you want  
18 to have a statute that prohibits profanity,  
19 obscenity, that would be constitutional. In  
20 fact, I'd like to sort of answer one of the  
21 previous questions, is -- is even if this  
22 statute is struck down, the PTO still can  
23 refuse obscene trademarks because Section 1  
24 requires that the trademark needs to be used in  
25 commerce. And that's always been determined to

1 be legally used in commerce.

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

11 I guess that that a little bit stacks  
12 the deck in terms of the question, but why --  
13 why would that be viewpoint-based?

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

24 JUSTICE ALITO: Well, it's -- it's --  
25 Cohen rejected it in that context, where

1 somebody was being punished for -- for saying  
2 the words, but is it a little -- isn't it -- is  
3 it exactly the same here?

4 MR. SOMMER: I think so.

5 JUSTICE ALITO: The government is not  
6 saying, you can't use this phrase, this word,  
7 we just won't register it.

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

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

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

22 JUSTICE ALITO: Oh, come on. You  
23 know, come on.

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

25 JUSTICE ALITO: Be serious. We know

1 what -- you know, what he's trying to say.

2 MR. SOMMER: That's --

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

7 MR. SOMMER: But that's my point,  
8 because FCUK is granted and FVCK is granted --

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

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

11 JUSTICE ALITO: -- it's been  
12 inconsistently applied, but let's say we're  
13 going forward and there's a list of words and  
14 you just can't use those. And your position is  
15 that would be unconstitutional?

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

19 JUSTICE BREYER: Well, but you --  
20 you -- your -- your -- your basic point, and  
21 this is where I'm having a harder time, I think  
22 we're in a period where swear words -- and  
23 that's what they are, swear words -- where  
24 their content is changing so that younger  
25 people feel that these racial slurs are just as

1 bad, if not worse.

2 So suppose that you can pick that out.  
3 Sometimes it will be used to convey a message.  
4 I grant you that. But this is business. And  
5 it's not only business, it is business that has  
6 a function of identifying the manufacturer and  
7 it is the kind of use that doesn't forbid  
8 anybody from using that word, except to get  
9 registration, and you can put it right next to  
10 it.

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

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

16 JUSTICE BREYER: I didn't think you  
17 necessarily would --

18 MR. SOMMER: Yeah.

19 JUSTICE BREYER: -- because there are  
20 several things mixed up there.

21 MR. SOMMER: Yeah.

22 JUSTICE BREYER: And I want in my mind  
23 this straightened out.

24 MR. SOMMER: Well, I -- I -- as I  
25 think you agree, that it's viewpoint because

1 I'm not looking at it from the viewpoint --

2 JUSTICE BREYER: No, I don't agree  
3 with it's viewpoint. I think that very often  
4 the word involved in your case and the racial  
5 slur is not viewpoint. It is used to insult  
6 somebody, rather like fighting words, or it's  
7 used to call attention to yourself. That's the  
8 purpose of the slur. That isn't viewpoint.

9 Fighting words isn't viewpoint. Or,  
10 if it is, it's overcome.

11 MR. SOMMER: Well, Mr. Brunetti's  
12 viewpoint is, as already pointed out, I can be  
13 offensive, I don't have to obey the authority.  
14 And that's viewpoint.

15 CHIEF JUSTICE ROBERTS: I don't want  
16 to distract you in that, but that's completely  
17 circular. It's like saying my protest is that  
18 I want to use words prohibited by, you know,  
19 not given trademark protection, and because I  
20 have that viewpoint, you have to give them  
21 trademark protection. That -- that's totally  
22 circular.

23 MR. SOMMER: Well, if we look -- we're  
24 doing -- have a facial challenge here, so the  
25 question is, is it overbroad? And it doesn't

1 matter if Mr. Brunetti's mark should be granted  
2 or not. It's the statute as written and as  
3 applied, without exception, covers a fair  
4 amount of clearly core speech, of high-value  
5 speech. And you're saying that this one --

6 JUSTICE BREYER: Do -- that's a  
7 different argument. And I -- I -- I see that  
8 argument. I'm not asking about that because I  
9 think I understand the argument.

10 But I am -- what I am worried about is  
11 the viewpoint, as you say, but I'm also worried  
12 about the -- the racial slur we all know about,  
13 okay, suddenly, in certain places in the United  
14 States, appearing as a product name, appearing  
15 on every bus where it's advertised, appearing  
16 on news stands in Times Square where it  
17 wouldn't be, but it might be in some other  
18 city, and where children and others see it.

19 Now that's the interest that they're  
20 talking about at the same time as they point  
21 out this doesn't stop anybody from saying, it  
22 does stop them from claiming it's a registered  
23 trademark, i.e., product source recognized by  
24 the government.

25 Now that's what I'd like you to deal

1 with directly.

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

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

15 Cohen can have his T-shirt, but we are  
16 not going to trademark them, and we've held  
17 just last year that a patent is a public  
18 benefit that can be withdrawn without a judge.  
19 Why isn't this also similarly a public benefit  
20 rather than a private right?

21 MR. SOMMER: Well, I would respond  
22 with 44 Liquormart, because the government  
23 doesn't have to grant the benefit. For  
24 example, the government doesn't have to have a  
25 fire department, but it can't go to a church

1 and say, we're not going to protect your church  
2 unless you drop your Santeria beliefs because  
3 we find that offensive, and I think that's a  
4 good analogy.

5 JUSTICE SOTOMAYOR: That's viewpoint.  
6 Why is it that the government can't say, as it  
7 does with every registration system, you can  
8 register your marriage, but we don't permit  
9 people to declare their love in their marriage  
10 license. We just ask for their name, their  
11 address, who were the witnesses, and where the  
12 marriage happened.

13 The same things with a deed to a  
14 house. We don't permit you to have commercial  
15 advertisements in that deed telling people how  
16 wonderful your house is. We -- metes and  
17 bounds. The day of the purchase price and  
18 that's it.

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

22 MR. SOMMER: Well --

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

25 MR. SOMMER: Well, I think there's two

1 --

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

5 Now we've got a separate problem with  
6 the lack of consistent application by the  
7 government. We'll put that aside. But let's  
8 deal with the basic question.

9 Why can't the government say, no,  
10 we're not going to give you space on our public  
11 registry for words that we find are not  
12 acceptable?

13 MR. SOMMER: Well, I think you've  
14 explained why it's not a public forum. It's  
15 not a forum at all. And, in fact, would the  
16 government be allowed to refuse registration of  
17 ownership of property because it's bought by a  
18 church with a name that's considered offensive?  
19 Could the Coast Guard refuse to register a boat  
20 because they think the name of the boat is a  
21 little bit salacious?

22 JUSTICE SOTOMAYOR: Actually, you're  
23 right.

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

1 JUSTICE SOTOMAYOR: I think they do.

2 CHIEF JUSTICE ROBERTS: -- you say  
3 that, you know, this product's not going to be  
4 in Wal-Mart, right?

5 MR. SOMMER: Correct.

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

15 (Laughter.)

16 CHIEF JUSTICE ROBERTS: -- but you --  
17 but you -- you understand my point, is that the  
18 government's registration of it will facilitate  
19 its use in commerce, not necessarily speech,  
20 but as a commercial product, and that has  
21 consequences beyond -- regardless of where the  
22 product is sold?

23 MR. SOMMER: Well, I think that's  
24 where the government has a -- a conundrum,  
25 because the government can -- has a -- assuming

1 even if it's only intermediate scrutiny,  
2 doesn't have a compelling interest if it can't  
3 stop people from using it.

4 And so people -- Mr. Brunetti can  
5 still use his mark regardless of whether it's  
6 registered or not.

7 CHIEF JUSTICE ROBERTS: Yeah, I know,  
8 but the whole point is that the federal  
9 registration increases the exposure. You're  
10 going to have more commercial -- the theory  
11 anyway is you're going to have more commercial  
12 opportunities and markets and -- if you do use  
13 -- if you are under the federal registration  
14 system.

15 I mean, that's the government's  
16 argument. You can do whatever you want with  
17 it; you're just not going to get the benefit of  
18 the government's participation in promotion of  
19 vulgarity.

20 MR. SOMMER: Well, that gets back to  
21 why the statute was unconstitutional from the  
22 beginning, because the legislative intent shows  
23 that we -- the Congress recognized it couldn't  
24 prohibit use of vulgar marks, but its -- the  
25 legislative history says that, well, we can

1 deny registration and that will prevent them  
2 from using it.

3 JUSTICE KAVANAUGH: What -- what is  
4 your answer to Justice Breyer's comment that  
5 insult -- insulting someone is not a viewpoint?

6 MR. SOMMER: Well, I would agree that  
7 all the traditional exceptions to the free  
8 speech, such as fighting words, is not  
9 expressing a viewpoint, but, as to insulting  
10 someone being viewpoint, you decided that  
11 unanimously in Tam.

12 JUSTICE BREYER: Tam was a word --  
13 Tam, they were using a word that doesn't  
14 have -- for whatever reasons, it doesn't have  
15 this tremendous retentive power that would lead  
16 someone to try as quickly as possible to get  
17 his brand registered with that name in order to  
18 grab attention. And there are such people.  
19 And that is not a word in Tam. That is not  
20 that kind of a word. It was used ironically.  
21 It was used ironically for, perhaps, a  
22 politically oriented purpose.

23 Now I don't know that I've just  
24 articulated much of a distinction --

25 MR. SOMMER: Well, the trademark --

1 JUSTICE BREYER: -- but there may be  
2 something there. And I, again, want to hear  
3 your response.

4 MR. SOMMER: Well, since Tam, the  
5 trademark office has taken the position that it  
6 cannot refuse any racial slur. And, in fact,  
7 it is approving them. But even before Tam,  
8 there were variations on that racial slur  
9 registered.

10 JUSTICE KAVANAUGH: What about  
11 Mr. Stewart's comment about public buses' ad  
12 space that he says would not be able to be  
13 regulated if you were to prevail here?

14 MR. SOMMER: Well, I guess sort of --  
15 I hope this isn't too flippant, but you -- you  
16 have considered whether to grant cert on that  
17 question.

18 But I don't think the profanity always  
19 expresses viewpoint. View -- in a trademark  
20 context --

21 JUSTICE KAVANAUGH: When does it not?

22 MR. SOMMER: Well, fleeting expletives  
23 and I think when it's used without any  
24 relevance to the subject matter, such as in  
25 high school speech, and, of course, there still

1 can be --

2 JUSTICE SOTOMAYOR: Some -- some of us  
3 would say that a vulgar word with relationship  
4 to selling clothes is sort of irrelevant?

5 MR. SOMMER: Well, it's not irrelevant  
6 because, as Justice Ginsburg pointed out, the  
7 audience that Mr. Brunetti is appealing to is  
8 young men who want to be rebels. And this is  
9 how they do it.

10 CHIEF JUSTICE ROBERTS: Well, that may  
11 be the audience he's targeting, but that's not  
12 the only audience he reaches.

13 MR. SOMMER: Agreed.

14 CHIEF JUSTICE ROBERTS: Well, I mean,  
15 but that sort of gets to the government  
16 interest in whether or not it wants to be  
17 association -- associated with facilitating  
18 this type of vulgarity with -- which reaches --  
19 and the whole -- I mean, I guess you would say  
20 the whole point is to reach beyond the targeted  
21 audience to offend people.

22 MR. SOMMER: Well, as under your  
23 jurisprudence, under the Court's jurisprudence,  
24 if this is strict scrutiny or even if it's  
25 content regulation, that's not a compelling

1 government interest. And that sort of falls  
2 afoul of Reno versus ACLU, that says we can't  
3 take our level of discussion in our diverse  
4 society that includes, for example, a rapper --

5 CHIEF JUSTICE ROBERTS: Well, but  
6 everything -- the whole --

7 MR. SOMMER: -- to the --

8 CHIEF JUSTICE ROBERTS: I'm sorry, go  
9 ahead.

10 MR. SOMMER: To -- to, you know, the  
11 lowest common denominator, the most squeamish  
12 among us.

13 CHIEF JUSTICE ROBERTS: Yeah, but the  
14 point -- this is a different type of program.  
15 The whole point of this program is to regulate  
16 content. You have to look at it and decide, is  
17 it, for example, functional or descriptive, in  
18 which case it doesn't get protection. Is it  
19 something that's been granted before, so it  
20 doesn't get protection?

21 MR. SOMMER: Well --

22 CHIEF JUSTICE ROBERTS: The fact that  
23 it's -- it is, I'll -- I'll concede, it's  
24 completely content-based, but it's the nature  
25 of the program.

1           MR. SOMMER: Well, it's not a program;  
2           it's a registration scheme, and it is not  
3           content-based on most grounds. Likelihood of  
4           confusion deals -- and the deception clause  
5           deals with confusion and fraud, basically,  
6           which is --

7           JUSTICE KAGAN: You would agree that  
8           there are other content restrictions, wouldn't  
9           you? You know, the flag one or -- you know,  
10          there are a number, yes?

11          MR. SOMMER: Well, I think that 2(b),  
12          which deals with flag -- flags and symbols, and  
13          2(c), with using people's names, could under  
14          certain circumstances raise constitutional  
15          issues. I think 2(e), which deals with things  
16          that aren't trademarks because they're generic  
17          or functional, I don't think that's called into  
18          question.

19          JUSTICE ALITO: You think likelihood  
20          of confusion is not content-based?

21          MR. SOMMER: I think --

22          JUSTICE ALITO: How do you determine  
23          whether something is likely to confuse without  
24          looking at the content of it?

25          MR. SOMMER: Well, I would say not

1 only content-based, but I'd also say that that  
2 is the traditional exception of preventing  
3 confusion, because the whole point of refusing  
4 a new application is it's likely to be confused  
5 with the other one.

6 But you're actually not -- it's almost  
7 like a secondary meaning case like City of  
8 Renton, because you're looking at applied mark  
9 A and registered mark B, and you're not looking  
10 at the content. That's really irrelevant.  
11 You're only looking at the likelihood of  
12 confusion, the similarity.

13 JUSTICE KAVANAUGH: With respect to  
14 words and letters, as opposed to images, is  
15 there any combination of words or letters that  
16 you think can be barred --

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

18 JUSTICE KAVANAUGH: -- under the  
19 scandalous/immoral provision?

20 MR. SOMMER: Well, I think,  
21 constitutionally, only obscenity can be barred.  
22 And it would be --

23 JUSTICE KAVANAUGH: And what -- what  
24 would you -- with respect to words and letters,  
25 how would you define obscenity in this context?

1           MR. SOMMER: Well, I would just use  
2 Miller versus California because the government  
3 basically is arguing here we should ignore  
4 Miller versus California or modify it or create  
5 a new exception to the First Amendment for  
6 vulgar.

7           So a picture I can see can be obscene.  
8 And I can see if you had a long sentence that  
9 said some things, which I don't need to give  
10 you an example, but you could imagine a  
11 sentence or two that could be prurient interest  
12 and --

13           JUSTICE KAVANAUGH: But that gets to  
14 the question of how do you draw a line between  
15 this and that.

16           MR. SOMMER: Well, the Court has been  
17 satisfied with the obscenity standard since  
18 1970 whatever, Miller versus California, and I  
19 think that's a good standard. I think that's  
20 settled jurisprudence.

21           JUSTICE GORSUCH: But what do we do  
22 about the fact this is a facial challenge, and  
23 so at least some of this material would  
24 presumably be okay even under your test for the  
25 -- for the trademark office to refuse?

1           MR. SOMMER: Only -- I'm -- I'm  
2           contending that only obscenity could be refused  
3           properly.

4           JUSTICE GORSUCH: Well, but isn't --  
5           in a facial challenge, your -- your obligation  
6           is to prove that the -- that the statute's  
7           unconstitutional in all of its application or  
8           almost all of it.

9           MR. SOMMER: Well, for vagueness, but  
10          for overbreadth, I believe it's only necessary  
11          to show that it covers a substantial amount of  
12          speech.

13          JUSTICE GORSUCH: Well, but a very  
14          substantial amount of speech. Where is the  
15          line here?

16          MR. SOMMER: Well, that's why it's  
17          unconstitutional, because it covers religious  
18          speech -- I've given you an example of  
19          religious controversial marks that were  
20          refused. I've given you an example of  
21          political marks that has been refused, as well  
22          as -- as profanity. And the government can't  
23          even get that right because --

24          JUSTICE GORSUCH: Well, but assuming  
25          profanity is borderline, right, and some of it

1 might be okay for the -- for the government to  
2 regulate and some of it might not be. Just --  
3 just assume that. Have you met your burden?

4 MR. SOMMER: I believe so, because I  
5 have shown that there's a substantial amount of  
6 speech that is improperly refused under this  
7 provision.

8 And the provision is so incredibly  
9 overbroad, because if it's taken at its word --  
10 at its -- on its face, Steak 'n Shake can't be  
11 registered because some people believe you -- a  
12 substantial portion of Americans believe that  
13 eating beef is immoral. And so now that's  
14 unconstitutional -- that's invalid, that  
15 registration.

16 JUSTICE KAVANAUGH: I'm not sure you  
17 answered my bus question, so I want to get it  
18 one more time. If we rule for you in this  
19 case, is there a principled ground on which we  
20 could distinguish public bus ad space?

21 MR. SOMMER: Definitely, because that  
22 is a public forum. And I think that the --  
23 probably the clearest way is as public  
24 disruption, but I do see --

25 JUSTICE KAVANAUGH: Public?

1 MR. SOMMER: Disruption.

2 JUSTICE KAVANAUGH: Because people see  
3 a word and all of a sudden --

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

5 JUSTICE KAVANAUGH: -- can't handle  
6 themselves?

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

8 JUSTICE KAVANAUGH: I don't understand  
9 that.

10 MR. SOMMER: And there's also a case  
11 that involves where bus -- affirming standards  
12 for taking ads because the purpose of the bus  
13 program is revenue. And I -- I think it's from  
14 Massachusetts, but I can't remember the name of  
15 the case.

16 JUSTICE KAVANAUGH: Can you explain  
17 the disruption point more?

18 MR. SOMMER: Well, I'm not sure -- at  
19 least in the high school context, like Bethel  
20 School, I think that there is disruption.

21 JUSTICE KAVANAUGH: On a public -- on  
22 a public bus, how would this --

23 MR. SOMMER: Okay. I -- I -- I'll  
24 withdraw that. I think that might be hard to  
25 -- to draw a line there.

1 JUSTICE KAVANAUGH: Okay.

2 MR. SOMMER: Well, if there's no  
3 further questions, I would simply say --

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

14 Can it be -- can that be distinguished  
15 on that ground, that -- that it doesn't express  
16 any sort of viewpoint? All it expresses is an  
17 emotion, a way of -- of expressing something.

18 MR. SOMMER: Well, I think two -- two  
19 responses. One, I think you've already decided  
20 that issue in Tam by unanimously holding the  
21 giving offense's viewpoint.

22 JUSTICE ALITO: No. Well, Tam  
23 involved the expression of an idea, and -- and  
24 so there was viewpoint discrimination.

25 MR. SOMMER: Well, because of your

1 decision in Tam, the -- the provision in the  
2 whole is invalid. And so all those racial  
3 slurs are coming in.

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

9 It doesn't stop you. The  
10 registration, non-registration makes it more  
11 difficult for you later to prove a trademark  
12 case, a trademark case being about the source  
13 of a product, not about speech.

14 So what precisely is the harm? I'm  
15 not saying there isn't one. I just want to get  
16 your words of what the harm to the interests,  
17 the First Amendment interest, is.

18 MR. SOMMER: Because people who want  
19 to -- like Mr. Brunetti, who want to have a  
20 somewhat undefined viewpoint, or people with a  
21 more defined viewpoint, like in the cancer and  
22 the racism case, they have a viewpoint that  
23 they want to make.

24 And as the Court already held in Tam,  
25 denial of registration -- if denial of

1 registration in Tam is a sufficient burden to  
2 raise constitutional --

3 JUSTICE BREYER: I -- I understand  
4 your Tam.

5 MR. SOMMER: Okay.

6 JUSTICE BREYER: That's why I wanted  
7 to get your articulation in best words, since  
8 the statute books of the federal government, as  
9 well as every state, are filled with  
10 prohibitions against saying all kinds of things  
11 in areas of commerce, securities, you name it.  
12 I mean, all kinds of things.

13 So what I want your words for is to  
14 distinguish this case in terms of harm to First  
15 Amendment interests. All I want is your phrase  
16 on that.

17 MR. SOMMER: I would say --

18 JUSTICE BREYER: And I'm -- and I'm --  
19 I'm not saying you don't have one. I just want  
20 to get it in my head.

21 MR. SOMMER: I would say Brunetti  
22 cannot express his viewpoint --

23 JUSTICE BREYER: Okay.

24 MR. SOMMER: -- without an  
25 unconstitutional burden.

1 CHIEF JUSTICE ROBERTS: See, I take it  
2 that the -- a correct spelling of the vulgar  
3 word at the heart of the case, that can't be  
4 trademarked, right?

5 MR. SOMMER: The -- the -- the bad  
6 word itself?

7 CHIEF JUSTICE ROBERTS: Yeah.

8 MR. SOMMER: It could be. Someone  
9 could register that if they used it as a source  
10 identifier, like as a label in the neck. That  
11 would be a source identifier because the one  
12 thing I think maybe is being confused is as the  
13 use on the front isn't a trademark use. That's  
14 considered ornamental.

15 Trademark use is as a use on a neck  
16 label or, as the government likes to ignore, on  
17 blogs, like say if you want to say dump the  
18 governor, except we can have other examples  
19 that would fall under this.

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

22 MR. SOMMER: The trademark is on the  
23 neck label. And the statute says any word or  
24 symbol can be a trademark unless there's a  
25 disqualifying condition. But trademarks also

1 are more than just the neck label.

2 Because people use it for political  
3 parties, for charitable groups, for providing  
4 information about candidates for public  
5 offices, this is not -- trademarks and service  
6 marks are not purely commercial anymore.

7 They were back when Paul Revere put  
8 his name on silverware, but if it was nowadays,  
9 Paul Revere would say, I ride for freedom, and  
10 that would be viewpoint.

11 Well, if the Court has no further  
12 questions, the government doesn't dispute, I  
13 think, that some marks are viewpoint. It  
14 doesn't dispute that it's content regulation.  
15 And the government does not dispute that  
16 statute doesn't survive strict scrutiny.

17 And, therefore, I submit, the statute  
18 is facially unconstitutional.

19 JUSTICE SOTOMAYOR: You're -- you're  
20 conceding to the Chief Justice that anyone who  
21 uses the words on goods to sell them can use  
22 any profane word and register it?

23 MR. SOMMER: Well, there's two  
24 questions there. Can they use it? Because all  
25 the words about descriptive use, non-trademark

1 use, apply.

2 So people can use -- let's say someone  
3 has the word apple registered for clothing, but  
4 they still -- someone else could use an apple  
5 on the front of the clothing. And so that's  
6 non-trademark use. And so all those rules that  
7 are --

8 JUSTICE SOTOMAYOR: But the word that  
9 the Chief asked you about you say can be  
10 registered --

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

12 JUSTICE SOTOMAYOR: -- if it's on the  
13 neck?

14 MR. SOMMER: Yes, I believe so.

15 JUSTICE SOTOMAYOR: I think I  
16 understand your difference, but --

17 MR. SOMMER: All right. Thank you.

18 CHIEF JUSTICE ROBERTS: Thank you,  
19 counsel.

20 Four minutes, Mr. Stewart.

21 REBUTTAL ARGUMENT OF MALCOLM L. STEWART

22 ON BEHALF OF THE PETITIONER

23 MR. STEWART: Thank you, Mr. Chief  
24 Justice.

25 I'd like to make one factual

1 clarification and then three quick legal  
2 points.

3           First, as to the PTO's current  
4 practice with respect to racial slurs, in  
5 general, the PTO views Tam as prohibiting a  
6 denial of registration for racial slurs, but,  
7 with respect to the single-most offensive  
8 racial slur, the PTO is currently holding in  
9 abeyance applications that incorporate that  
10 word, pending this Court's decision on -- leave  
11 open the possibility that that word might be  
12 viewed as scandalous.

13           Second, with respect to Cohen, Cohen  
14 simply illustrates the difference between a  
15 prohibition on speech and on content-based  
16 restrictions on speech that are used to  
17 prohibit and content-based criteria for  
18 government benefits.

19           The reason that the law in Cohen was  
20 held to be invalid was that it entirely  
21 prohibited the use of the word in a public  
22 space. Here, we're not doing that.

23           The -- the second thing I wanted to  
24 say -- and this follows up on questions from  
25 the Chief Justice and Justice Alito -- that

1 content-based distinctions are really  
2 ubiquitous in the registration program.

3           We look to see whether marks are  
4 descriptive, whether they're generic, whether  
5 they are confusingly similar to existing marks,  
6 and often the words that we find to be  
7 descriptive, generic, confusingly similar are  
8 incorporated into what could be viewed as  
9 messages.

10           And in response to any allegation of  
11 viewpoint discrimination, we would say we're  
12 not denying registration because it is being  
13 used to convey this message. We're denying  
14 registration to -- because it is descriptive,  
15 generic, et cetera.

16           And we simply want to be able to  
17 follow the same approach with respect to  
18 profanity. Profane words can be used as part  
19 of a larger message, but we're not denying  
20 registration because of the message, it's  
21 because of the profanity.

22           And the last thing I'd say about  
23 whether it matters, obviously, the reason  
24 Mr. Brunetti cares about this enough to apply  
25 for federal -- for trademark registration and

1 appeal to the Federal Circuit is that he  
2 believes that federal registration will convey  
3 commercial advantages.

4 And within the context of a program  
5 that is intended to facilitate and strengthen  
6 trademarks, Congress can legitimately decide  
7 that it wants to disincentivize the use of  
8 trademarks that substantial numbers of people  
9 would find offensive and to disassociate the  
10 government from those trademarks. Thank you.

11 CHIEF JUSTICE ROBERTS: Thank you,  
12 counsel. The case is submitted.

13 (Whereupon, at 11:03 a.m., the case  
14 was submitted.)

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Official - Subject to Final Review

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