

***Iancu v. Brunetti*, No. 18-302**

Today, the Supreme Court held in a 6-3 decision that the Lanham Act's prohibition of "immoral or scandalous" trademarks violates the First Amendment to the Constitution.

Background: In *Matal v. Tam*, 137 S. Ct. 1744 (2017), the Supreme Court held that the Lanham Act's ban on the registration by the U.S. Patent and Trademark Office (USPTO) of trademarks that "disparage" a person violates the First Amendment because that limitation necessarily discriminates on the basis of viewpoint. The question in this case is whether that holding also requires invalidation of the Lanham Act's related provision barring registration of marks that are "immoral or scandalous." Respondent Brunetti sought to register the trademark "FUCT" for his clothing, but the USPTO denied the registration under the immoral or scandalous proviso, finding the proposed mark to be unduly "vulgar" and "highly offensive." On review, the Federal Circuit held this application of the Act to violate the Constitution.

Issue: Whether Section 2(a) of the Lanham Act's prohibition on the federal registration of "immoral" or "scandalous" marks is facially invalid under the free speech clause of the First Amendment.

Court's Holding: In an unusually short opinion written by Justice Kagan and joined in full by Justices Thomas, Ginsburg, Alito, Gorsuch, and Kavanaugh, the Supreme Court held that the prohibition of immoral and scandalous marks is unconstitutional. Looking to the dictionary definitions of "immoral" and "scandalous," the Court held that the provision permits the registration of trademarks that accord with society's sense of decency and propriety, but prohibits registration of marks that defy conventional standards of morality. And this distinction, the majority held, is impermissible: "[A] law disfavoring 'ideas that offend' discriminates based on viewpoint, in violation of the First Amendment." In reaching this conclusion, the Court rejected the government's proposed narrowing construction of the Act, which would have limited the challenged prohibition only to trademarks that are lewd or obscene; such a reading will not work, the Court explained, because "the statute says something markedly different."

In separate opinions, Chief Justice Roberts and Justice Sotomayor, the latter joined by Justice Breyer, concurred in part and dissented in part. They agreed with the majority that the ban on "immoral" marks is not susceptible to a limiting construction and therefore constitutes invalid viewpoint discrimination, but would have held that the prohibition of scandalous marks could be read to reach only language that is obscene, vulgar, or profane, and that such a limit is consistent with the First Amendment.