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## Iancu v. Brunetti

No. 18-302, 2019 WL 2570622, 588 U.S. \_\_\_\_ (June 24, 2019)

Justice KAGAN delivered the opinion of the Court.

Two Terms ago, in *Matal v. Tam*, 582 U.S. \_\_\_\_ (2017), this Court invalidated the Lanham Act's bar on the registration of "disparag[ing]" trademarks. 15 U.S.C. § 1052(a). Although split between two non-majority opinions, all Members of the Court agreed that the provision violated the First Amendment because it discriminated on the basis of viewpoint. Today we consider a First Amendment challenge to a neighboring provision of the Act, prohibiting the registration of

“immoral[ ] or scandalous” trademarks. *Ibid.* We hold that this provision infringes the First Amendment for the same reason: It too disfavors certain ideas.

### I.

Respondent Erik Brunetti is an artist and entrepreneur who founded a clothing line that uses the trademark FUCTION. According to Brunetti, the mark (which functions as the clothing’s brand name) is pronounced as four letters, one after the other: F-U-C-T. But you might read it differently and, if so, you would hardly be alone. See Tr. of Oral Arg. 5 (describing the brand name as “the equivalent of [the] past participle form of a well-known word of profanity”). That common perception caused difficulties for Brunetti when he tried to register his mark with the U.S. Patent and Trademark Office (PTO).

Under the Lanham Act, the PTO administers a federal registration system for trademarks. See 15 U.S.C. §§ 1051, 1052. Registration of a mark is not mandatory. The owner of an unregistered mark may still use it in commerce and enforce it against infringers. But registration gives trademark owners valuable benefits. For example, registration constitutes “prima facie evidence” of the mark’s validity. § 1115(a). And registration serves as “constructive notice of the registrant’s claim of ownership,” which forecloses some defenses in infringement actions. § 1072. Generally, a trademark is eligible for registration, and receipt of such benefits, if it is “used in commerce.” § 1051(a)(1). But the Act directs the PTO to “refuse[ ] registration” of certain marks. § 1052. For instance, the PTO cannot register a mark that “so resembles” another mark as to create a likelihood of confusion. § 1052(d). It cannot register a mark that is “merely descriptive” of the goods on which it is used. § 1052(e). It cannot register a mark containing the flag or insignia of any nation or State. See § 1052(b). There are five or ten more (depending on how you count). And until we invalidated the criterion two years ago, the PTO could not register a mark that “disparage[d]” a “person[ ], living or dead.” § 1052(a); see *Tam*, 582 U.S. \_\_\_\_.

This case involves another of the Lanham Act’s prohibitions on registration—one applying to marks that “[c]onsist[ ] of or comprise[ ] immoral[ ] or scandalous matter.” § 1052(a). The PTO applies that bar as a “unitary provision,” rather than treating the two adjectives in it separately. *In re Brunetti*, 877 F.3d 1330, 1336 (CA Fed. 2017). To determine whether a mark fits in the category, the PTO asks whether a “substantial composite of the general public” would find the mark “shocking to the sense of truth, decency, or propriety”; “giving offense to the conscience or moral feelings”; “calling out for condemnation”; “disgraceful”; “offensive”; “disreputable”; or “vulgar.” 877 F.3d, at 1336 (internal quotation marks omitted).

Both a PTO examining attorney and the PTO’s Trademark Trial and Appeal Board decided that Brunetti’s mark flunked that test. The attorney determined that FUCTION was “a total vulgar” and “therefore[ ] unregistrable.” On review, the Board

stated that the mark was “highly offensive” and “vulgar,” and that it had “decidedly negative sexual connotations.” As part of its review, the Board also considered evidence of how Brunetti used the mark. It found that Brunetti’s website and products contained imagery, near the mark, of “extreme nihilism” and “anti-social” behavior. In that context, the Board thought, the mark communicated “misogyny, depravity, [and] violence.” The Board concluded: “Whether one considers [the mark] as a sexual term, or finds that [Brunetti] has used [the mark] in the context of extreme misogyny, nihilism or violence, we have no question but that [the term is] extremely offensive.”

Brunetti then brought a facial challenge to the “immoral or scandalous” bar in the Court of Appeals for the Federal Circuit. That court found the prohibition to violate the First Amendment. As usual when a lower court has invalidated a federal statute, we granted certiorari.

## II

This Court first considered a First Amendment challenge to a trademark registration restriction in *Tam*, just two Terms ago. There, the Court declared unconstitutional the Lanham Act’s ban on registering marks that “disparage” any “person[ ], living or dead.” § 1052(a). The eight-Justice Court divided evenly between two opinions and could not agree on the overall framework for deciding the case. (In particular, no majority emerged to resolve whether a Lanham Act bar is a condition on a government benefit or a simple restriction on speech.) But all the Justices agreed on two propositions. First, if a trademark registration bar is viewpoint-based, it is unconstitutional. And second, the disparagement bar was viewpoint-based.

The Justices thus found common ground in a core postulate of free speech law: The government may not discriminate against speech based on the ideas or opinions it conveys. See *Rosenberger v. Rector and Visitors of Univ. of Va.*, 515 U.S. 819, 829–830 (1995) (explaining that viewpoint discrimination is an “egregious form of content discrimination” and is “presumptively unconstitutional”). In Justice Kennedy’s explanation, the disparagement bar allowed a trademark owner to register a mark if it was “positive” about a person, but not if it was “derogatory.” *Tam* (slip op., at 2). That was the “essence of viewpoint discrimination,” he continued, because “[t]he law thus reflects the Government’s disapproval of a subset of messages it finds offensive.” *Id.* (slip op., at 2–3). JUSTICE ALITO emphasized that the statute “denie[d] registration to any mark” whose disparaging message was “offensive to a substantial percentage of the members of any group.” *Id.* (slip op., at 22). The bar thus violated the “bedrock First Amendment principle” that the government cannot discriminate against “ideas that offend.” *Id.* (slip op., at 1–2). Slightly different explanations, then, but a shared conclusion: Viewpoint discrimination doomed the disparagement bar.

If the “immoral or scandalous” bar similarly discriminates on the basis of viewpoint, it must also collide with our First Amendment doctrine. The Government does not argue otherwise. In briefs and oral argument, the Government offers a theory for upholding the bar if it is viewpoint-neutral (essentially, that the bar would then be a reasonable condition on a government benefit). But the Government agrees that under *Tam* it may not “deny registration based on the views expressed” by a mark. “As the Court’s *Tam* decision establishes,” the Government says, “the criteria for federal trademark registration” must be “viewpoint-neutral to survive Free Speech Clause review.” Pet. for Cert. 19. So the key question becomes: Is the “immoral or scandalous” criterion in the Lanham Act viewpoint-neutral or viewpoint-based?

It is viewpoint-based. The meanings of “immoral” and “scandalous” are not mysterious, but resort to some dictionaries still helps to lay bare the problem. When is expressive material “immoral”? According to a standard definition, when it is “inconsistent with rectitude, purity, or good morals”; “wicked”; or “vicious.” Webster’s New International Dictionary 1246 (2d ed. 1949). Or again, when it is “opposed to or violating morality”; or “morally evil.” Shorter Oxford English Dictionary 961 (3d ed. 1947). So the Lanham Act permits registration of marks that champion society’s sense of rectitude and morality, but not marks that denigrate those concepts. And when is such material “scandalous”? Says a typical definition, when it “giv[es] offense to the conscience or moral feelings”; “excite[s] reprobation”; or “call[s] out condemnation.” Webster’s New International Dictionary, at 2229. Or again, when it is “shocking to the sense of truth, decency, or propriety”; “disgraceful”; “offensive”; or “disreputable.” Funk & Wagnalls New Standard Dictionary 2186 (1944). So the Lanham Act allows registration of marks when their messages accord with, but not when their messages defy, society’s sense of decency or propriety. Put the pair of overlapping terms together and the statute, on its face, distinguishes between two opposed sets of ideas: those aligned with conventional moral standards and those hostile to them; those inducing societal nods of approval and those provoking offense and condemnation. The statute favors the former, and disfavors the latter. “Love rules”? “Always be good”? Registration follows. “Hate rules”? “Always be cruel”? Not according to the Lanham Act’s “immoral or scandalous” bar.

The facial viewpoint bias in the law results in viewpoint-discriminatory application. Recall that the PTO itself describes the “immoral or scandalous” criterion using much the same language as in the dictionary definitions recited above. The PTO, for example, asks whether the public would view the mark as “shocking to the sense of truth, decency, or propriety”; “calling out for condemnation”; “offensive”; or “disreputable.” Using those guideposts, the PTO has refused to register marks communicating “immoral” or “scandalous” views about (among other things) drug use, religion, and terrorism. But all the while, it

has approved registration of marks expressing more accepted views on the same topics. See generally Gilson & LaLonde, Trademarks Laid Bare, 101 Trademark Reporter 1476, 1510–1513, 1518–1522 (2011); Brief for Barton Beebe et al. as *Amici Curiae* 28–29.

Here are some samples. The PTO rejected marks conveying approval of drug use (YOU CAN’T SPELL HEALTHCARE WITHOUT THC for pain-relief medication, MARIJUANA COLA and KO KANE for beverages) because it is scandalous to “inappropriately glamoriz[e] drug abuse.” PTO, Office Action of Aug. 28, 2010, Serial No. 85038867; see Office Action of Dec. 24, 2009, Serial No. 77833964; Office Action of Nov. 17, 2009, Serial No. 77671304. But at the same time, the PTO registered marks with such sayings as D.A.R.E. TO RESIST DRUGS AND VIOLENCE and SAY NO TO DRUGS—REALITY IS THE BEST TRIP IN LIFE. See PTO, Reg. No. 2975163 (July 26, 2005); Reg. No. 2966019 (July 12, 2005). Similarly, the PTO disapproved registration for the mark BONG HITS 4 JESUS because it “suggests that people should engage in an illegal activity [in connection with] worship” and because “Christians would be morally outraged by a statement that connects Jesus Christ with illegal drug use.” Office Action of Mar. 15, 2008, Serial No. 77305946. And the PTO refused to register trademarks associating religious references with products (AGNUS DEI for safes and MADONNA for wine) because they would be “offensive to most individuals of the Christian faith” and “shocking to the sense of propriety.” *Ex parte Summit Brass & Bronze Works*, 59 USPQ 22, 23 (Dec. Com. Pat. 1943); *In re Riverbank Canning Co.*, 95 F. 2d 327, 329 (CCPA 1938). But once again, the PTO approved marks—PRAISE THE LORD for a game and JESUS DIED FOR YOU on clothing—whose message suggested religious faith rather than blasphemy or irreverence. See Reg. No. 5265121 (Aug. 15, 2017); Reg. No. 3187985 (Dec. 19, 2006). Finally, the PTO rejected marks reflecting support for al-Qaeda (BABY AL QAEDA and AL-QAEDA on t-shirts) “because the bombing of civilians and other terrorist acts are shocking to the sense of decency and call out for condemnation.” Office Action of Nov. 22, 2004, Serial No. 78444968; see Office Action of Feb. 23, 2005, Serial No. 78400213. Yet it approved registration of a mark with the words WAR ON TERROR MEMORIAL. Reg. No. 5495362 (Jun. 19, 2018). Of course, all these decisions are understandable. The rejected marks express opinions that are, at the least, offensive to many Americans. But as the Court made clear in *Tam*, a law disfavoring “ideas that offend” discriminates based on viewpoint, in violation of the First Amendment. *Tam* (opinion of ALITO, J.) (slip op., at 2); see *id.* (slip op., at 22–23); *id.* (opinion of Kennedy, J.) (slip op., at 2–3).

How, then, can the Government claim that the “immoral or scandalous” bar is viewpoint-neutral? The Government basically asks us to treat decisions like those described above as PTO examiners’ mistakes. Still more, the Government tells us to ignore how the Lanham Act’s language, on its face, disfavors some ideas. In

urging that course, the Government does not dispute that the statutory language—and words used to define it—have just that effect. At oral argument, the Government conceded: “[I]f you just looked at the words like ‘shocking’ and ‘offensive’ on their face and gave them their ordinary meanings[,] they could easily encompass material that was shocking [or offensive] because it expressed an outrageous point of view or a point of view that most members” of society reject. Tr. of Oral Arg. 6. But no matter, says the Government, because the statute is “susceptible of” a limiting construction that would remove this viewpoint bias. *Id.*, at 7 (arguing that the Court should “attempt to construe [the] statute in a way that would render it constitutional”). The Government’s idea, abstractly phrased, is to narrow the statutory bar to “marks that are offensive [or] shocking to a substantial segment of the public because of their *mode* of expression, independent of any views that they may express.” *Id.*, at 11 (emphasis added). More concretely, the Government explains that this reinterpretation would mostly restrict the PTO to refusing marks that are “vulgar”—meaning “lewd,” “sexually explicit or profane.” *Id.*, at 27, 30. Such a reconfigured bar, the Government says, would not turn on viewpoint, and so we could uphold it.

But we cannot accept the Government’s proposal, because the statute says something markedly different. This Court, of course, may interpret “ambiguous statutory language” to “avoid serious constitutional doubts.” *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 516 (2009). But that canon of construction applies only when ambiguity exists. “We will not rewrite a law to conform it to constitutional requirements.” *United States v. Stevens*, 559 U.S. 460, 481 (2010) (internal quotation marks and alteration omitted). So even assuming the Government’s reading would eliminate First Amendment problems, we may adopt it only if we can see it in the statutory language. And we cannot. The “immoral or scandalous” bar stretches far beyond the Government’s proposed construction. The statute as written does not draw the line at lewd, sexually explicit, or profane marks. Nor does it refer only to marks whose “mode of expression,” independent of viewpoint, is particularly offensive. It covers the universe of immoral or scandalous—or (to use some PTO synonyms) offensive or disreputable—material. Whether or not lewd or profane. Whether the scandal and immorality comes from mode or instead from viewpoint. To cut the statute off where the Government urges is not to interpret the statute Congress enacted, but to fashion a new one.\*

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\* We reject the dissent’s statutory surgery for the same reason. Although conceding that the term “immoral” cannot be saved, the dissent thinks that the term “scandalous” can be read as the Government proposes. See *post*, at 1–2 (SOTOMAYOR, J., concurring in part and dissenting in part). But that term is not “ambiguous,” as the dissent argues, *post*, at 3; it is just broad. Remember that the dictionaries define it to mean offensive, disreputable, exciting reprobation, and so forth. See *supra*, at 5–6; *post*, at 3 (accepting those definitions). Even if hived off from “immoral” marks, the category of scandalous marks

And once the “immoral or scandalous” bar is interpreted fairly, it must be invalidated. The Government just barely argues otherwise. In the last paragraph of its brief, the Government gestures toward the idea that the provision is salvageable by virtue of its constitutionally permissible applications (in the Government’s view, its applications to lewd, sexually explicit, or profane marks). In other words, the Government invokes our First Amendment overbreadth doctrine, and asks us to uphold the statute against facial attack because its unconstitutional applications are not “substantial” relative to “the statute’s plainly legitimate sweep.” *Stevens*, 559 U.S., at 473. But to begin with, this Court has never applied that kind of analysis to a viewpoint-discriminatory law. In *Tam*, for example, we did not pause to consider whether the disparagement clause might admit some permissible applications (say, to certain libelous speech) before striking it down. The Court’s finding of viewpoint bias ended the matter. And similarly, it seems unlikely we would compare permissible and impermissible applications if Congress outright banned “offensive” (or to use some other examples, “divisive” or “subversive”) speech. Once we have found that a law “aim[s] at the suppression of “ views, why would it matter that Congress could have captured some of the same speech through a viewpoint-neutral statute? *Tam* (opinion of Kennedy, J.) (slip op., at 2). But in any event, the “immoral or scandalous” bar is substantially overbroad. There are a great many immoral and scandalous ideas in the world (even more than there are swearwords), and the Lanham Act covers them all. It therefore violates the First Amendment.

We accordingly affirm the judgment of the Court of Appeals.

It is so ordered.

Justice ALITO, concurring.

For the reasons explained in the opinion of the Court, the provision of the Lanham Act at issue in this case violates the Free Speech Clause of the First Amendment because it discriminates on the basis of viewpoint and cannot be fixed without rewriting the statute. Viewpoint discrimination is poison to a free society. But in many countries with constitutions or legal traditions that claim to protect freedom of speech, serious viewpoint discrimination is now tolerated, and such discrimination has become increasingly prevalent in this country. At a time when

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thus includes *both* marks that offend by the ideas they convey *and* marks that offend by their mode of expression. And its coverage of the former means that it discriminates based on viewpoint. We say nothing at all about a statute that covers only the latter—or, in the Government’s more concrete description, a statute limited to lewd, sexually explicit, and profane marks. Nor do we say anything about how to evaluate viewpoint-neutral restrictions on trademark registration, see *post*, at 14–17—because the “scandalous” bar (whether or not attached to the “immoral” bar) is not one.

free speech is under attack, it is especially important for this Court to remain firm on the principle that the First Amendment does not tolerate viewpoint discrimination. We reaffirm that principle today.

Our decision is not based on moral relativism but on the recognition that a law banning speech deemed by government officials to be “immoral” or “scandalous” can easily be exploited for illegitimate ends. Our decision does not prevent Congress from adopting a more carefully focused statute that precludes the registration of marks containing vulgar terms that play no real part in the expression of ideas. The particular mark in question in this case could be denied registration under such a statute. The term suggested by that mark is not needed to express any idea and, in fact, as commonly used today, generally signifies nothing except emotion and a severely limited vocabulary. The registration of such marks serves only to further coarsen our popular culture. But we are not legislators and cannot substitute a new statute for the one now in force.

Chief Justice ROBERTS, concurring in part and dissenting in part.

The Lanham Act directs the Patent and Trademark Office to refuse registration to marks that consist of or comprise “immoral, deceptive, or scandalous matter.” 15 U.S. C. § 1052(a). Although the statute lists “immoral” and “scandalous” separately, the PTO has long read those terms together to constitute a unitary bar on “immoral or scandalous” marks.

The Government concedes that the provision so read is broad enough to reach not only marks that offend because of their mode of expression (such as vulgarity and profanity) but also marks that offend because of the ideas they convey. The Government urges, however, that the provision can be given a narrowing construction—it can be understood to cover only marks that offend because of their mode of expression.

The Court rejects that proposal on the ground that it would in effect rewrite the statute. I agree with the majority that the “immoral” portion of the provision is not susceptible of a narrowing construction that would eliminate its viewpoint bias. As JUSTICE SOTOMAYOR explains, however, the “scandalous” portion of the provision is susceptible of such a narrowing construction. Standing alone, the term “scandalous” need not be understood to reach marks that offend because of the ideas they convey; it can be read more narrowly to bar only marks that offend because of their mode of expression—marks that are obscene, vulgar, or profane. That is how the PTO now understands the term, in light of our decision in *Matal v. Tam*, 582 U.S. \_\_\_\_ (2017). I agree with JUSTICE SOTOMAYOR that such a narrowing construction is appropriate in this context.

I also agree that, regardless of how exactly the trademark registration system is best conceived under our precedents—a question we left open in *Tam*—refusing registration to obscene, vulgar, or profane marks does not offend the First



Amendment. Whether such marks can be registered does not affect the extent to which their owners may use them in commerce to identify goods. No speech is being restricted; no one is being punished. The owners of such marks are merely denied certain additional benefits associated with federal trademark registration. The Government, meanwhile, has an interest in not associating itself with trademarks whose content is obscene, vulgar, or profane. The First Amendment protects the freedom of speech; it does not require the Government to give aid and comfort to those using obscene, vulgar, and profane modes of expression. For those reasons, I concur in part and dissent in part.

Justice BREYER, concurring in part and dissenting in part.

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I would conclude that the prohibition on registering “scandalous” marks does not “wor[k] harm to First Amendment interests that is disproportionate in light of the relevant regulatory objectives.” *Reed*, 576 U.S., at \_\_\_\_ (opinion of BREYER, J.) (slip op., at 4). I would therefore uphold this part of the statute. I agree with the Court, however, that the bar on registering “immoral” marks violates the First Amendment. Because JUSTICE SOTOMAYOR reaches the same conclusions, using roughly similar reasoning, I join her opinion insofar as it is consistent with the views set forth here.

Justice SOTOMAYOR, with whom Justice BREYER joins, concurring in part and dissenting in part.

The Court’s decision today will beget unfortunate results. With the Lanham Act’s scandalous-marks provision, 15 U.S. C. § 1052(a), struck down as unconstitutional viewpoint discrimination, the Government will have no statutory basis to refuse (and thus no choice but to begin) registering marks containing the most vulgar, profane, or obscene words and images imaginable.

The coming rush to register such trademarks—and the Government’s immediate powerlessness to say no—is eminently avoidable. Rather than read the relevant text as the majority does, it is equally possible to read that provision’s bar on the registration of “scandalous” marks to address only obscenity, vulgarity, and profanity. Such a narrowing construction would save that duly enacted legislative text by rendering it a reasonable, viewpoint-neutral restriction on speech that is permissible in the context of a beneficial governmental initiative like the trademark-registration system. I would apply that narrowing construction to the term “scandalous” and accordingly reject petitioner Erik Brunetti’s facial challenge.

*I*

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Here, Congress used not only the word “scandalous,” but also the words “immoral” and “disparage,” in the same block of statutory text—each as a separate

feature that could render a mark unregistrable. See § 1052(a). *Tam* already decided that “disparage” served to prohibit marks that were offensive because they derided a particular person or group. See 582 U.S., at \_\_\_\_ (opinion of ALITO, J.) (slip op., at 22) (“It denies registration to any mark that is offensive to a substantial percentage of the members of any group”); *id.*, at \_\_\_\_ (opinion of Kennedy, J.) (slip op., at 2) (“[A]n applicant may register a positive or benign mark but not a derogatory one”). That defines one of the three words. Meanwhile, as the majority explains, the word “immoral” prohibits marks that are offensive because they transgress widely held moral beliefs. See *ante*, at 5. That defines a second of the three words.

With marks that are offensive because they are disparaging and marks that are offensive because they are immoral already covered, what work did Congress intend for “scandalous” to do? A logical answer is that Congress meant for “scandalous” to target a third and distinct type of offensiveness: offensiveness in the mode of communication rather than the idea. The other two words cover marks that are offensive because of the ideas they express; the “scandalous” clause covers marks that are offensive because of the mode of expression, apart from any particular message or idea.

To be sure, there are situations in which it makes sense to treat adjoining words as expressing the same or highly similar concepts (even at the risk of some redundancy). Cf. *Swearingen v. United States*, 161 U.S. 446, 450 (1896) (construing “‘obscene, lewd or lascivious’” to have a unified meaning). That is essentially the approach that the majority takes. See *ante*, at 6.<sup>2</sup> But that is not the approach that Congress appears to have intended here. For example, “scandalous” does not serve as a broader catchall at the end of a list of similar words that all point in one direction. *E.g.*, *Washington State Dept. of Social and Health Servs. v. Guardianship Estate of Keffeler*, 537 U.S. 371, 384 (2003). Nor is “scandalous” simply grouped among a number of closely related terms that help define its meaning. *E.g.*, *Gustafson v. Alloyd Co.*, 513 U.S. 561, 575 (1995).

The text of § 1052, instead, is a grab bag: It bars the registration of marks featuring “immoral, deceptive, or scandalous matter,” as well as, *inter alia*, disparaging marks, flags, insignias, mislabeled wines, and deceased Presidents. See §§ 1052(a)–(e). This is not, in other words, a situation in which Congress was simply being “verbos[e] and proli[x],” *Bruesewitz v. Wyeth LLC*, 562 U.S. 223, 236 (2011), using two synonyms in rapid-fire succession when one would have done

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<sup>2</sup> That interpretive move appears to accord with the Federal Circuit and the PTO’s past practice. *Ante*, at 2–3. Nevertheless, it is by no means the only reasonable way to read this text, and indeed some courts have suggested that “scandalous” can and should be applied independently of “immoral,” see, *e.g.*, *In re McGinley*, 660 F. 2d 481, 485, n. 6 (CCPA 1981).

fine. Instead, “scandalous” and “immoral” are separated by an unrelated word (“deceptive”) and mixed in with a lengthy series of other, unrelated concepts. The two therefore need not be interpreted as mutually reinforcing under the Court’s precedents. See *Graham County Soil and Water Conservation Dist. v. United States ex rel. Wilson*, 559 U.S. 280, 288 (2010).

For that reason, while the majority offers a reasonable reading of “scandalous,” it also unnecessarily and ill-advisedly collapses the words “scandalous” and “immoral.” Instead, it should treat them as each holding a distinct, nonredundant meaning, with “immoral” covering marks that are offensive because they transgress social norms, and “scandalous” covering marks that are offensive because of the mode in which they are expressed.

What would it mean for “scandalous” in § 1052(a) to cover only offensive modes of expression? The most obvious ways—indeed, perhaps the only conceivable ways—in which a trademark can be expressed in a shocking or offensive manner are when the speaker employs obscenity, vulgarity, or profanity. Obscenity has long been defined by this Court’s decision in *Miller v. California*, 413 U.S. 15 (1973). See *id.*, at 24–26. As for what constitutes “scandalous” vulgarity or profanity, I do not offer a list, but I do interpret the term to allow the PTO to restrict (and potentially promulgate guidance to clarify) the small group of lewd words or “swear” words that cause a visceral reaction, that are not commonly used around children, and that are prohibited in comparable settings.<sup>4</sup> Cf. 18 U.S. C. § 1464 (prohibiting “obscene, indecent, or profane language” in radio communications); *FCC v. Pacifica Foundation*, 438 U.S. 726, 746, and n. 22 (1978) (opinion of Stevens, J.) (regulator’s objection to a monologue containing various “four-letter words” was not to its “point of view, but to the way in which it [wa]s expressed”); 46 CFR § 67.117(b)(3) (2018) (Coast Guard regulation prohibiting vessel names that “contain” or are “phonetically identical to obscene, indecent, or profane language, or to racial or ethnic epithets”); see also Jacobs, *The Public Sensibilities Forum*, 95 Nw. U. L. Rev. 1357, 1416–1417, and n. 432 (2001) (noting that “swear words” are “perhaps more than any other categor[y] capable of specific

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<sup>4</sup> Although the Government represents, and case law and scholarship appear to confirm, that “scandalous” in § 1052(a) has often been applied to cover this kind of content, see Brief for United States 27; *In re Boulevard Entertainment, Inc.*, 334 F. 3d 1336, 1340 (CA Fed. 2003); Snow, *Denying Trademark for Scandalous Speech*, 51 U. C. D. L. Rev. 2331, 2339 (2018) (Snow), the majority notes that the PTO has hardly amassed a perfect track record of consistency, see *ante*, at 6–8. Be that as it may, the Government undeniably receives a large volume of trademark applications that easily would fit under this rubric (examples of which I will spare the reader). See *In re Brunetti*, 877 F. 3d 1330, 1355 (CA Fed. 2017) (noting an appendix containing marks denied registration “whose offensiveness cannot be reasonably questioned”). As a result of today’s ruling, all of those marks will now presumably have to be registered.

articulation” and citing one state agency’s list). Of course, “scandalous” offers its own limiting principle: if a word, though not exactly polite, cannot be said to be “scandalous”—*e.g.*, “shocking” or “extremely offensive,” 8 Century Dictionary 5374—it is clearly not the kind of vulgarity or profanity that Congress intended to target. Everyone can think of a small number of words (including the apparent homonym of Brunetti’s mark) that would, however, plainly qualify.<sup>5</sup>

## B

A limiting construction like the one just discussed is both appropriate in this context and consistent with past precedent. First, while a limiting construction must always be at least reasonable, there are contexts in which imposing such a construction is more appropriate than others. The most obvious example of a setting where more caution is required is in the realm of criminal statutes, where considerations such as the prohibition against vagueness and the rule of lenity come into play . . . . Here, however, the question is only whether the Government must be forced to provide the ancillary benefit of trademark registration to pre-existing trademarks that use even the most extreme obscenity, vulgarity, or profanity. The stakes are far removed from a situation in which, say, Brunetti was facing a threat to his liberty, or even his right to use and enforce his trademark in commerce.

. . . .

Taking the word “scandalous” to target only those marks that employ an offensive mode of expression follows a similar practice. To be sure, the word could be read more broadly, thereby sweeping unconstitutionally into viewpoint discrimination. And imposing a limiting construction is, of course, “not a license for the judiciary to rewrite language enacted by the legislature.” *United States v. Albertini*, 472 U.S. 675, 680 (1985). But where the Court can reasonably read a statute like this one to save it, the Court should do so. See *Stern v. Marshall*, 564 U.S. 462, 477–478 (2011); *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 30 (1937).

## II

Adopting a narrow construction for the word “scandalous”—interpreting it to regulate only obscenity, vulgarity, and profanity—would save it from unconstitutionality. Properly narrowed, “scandalous” is a viewpoint-neutral form

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<sup>5</sup> There is at least one particularly egregious racial epithet that would fit this description as well. While *Matal v. Tam*, 582 U. S. \_\_\_\_ (2017), removed a statutory basis to deny the registration of racial epithets in general, the Government represented at oral argument that it is holding in abeyance trademark applications that use that particular epithet. See Tr. of Oral Arg. 61. As a result of today’s ruling, the Government will now presumably be compelled to register marks containing that epithet as well rather than treating it as a “scandalous” form of profanity under § 1052(a).

of content discrimination that is permissible in the kind of discretionary governmental program or limited forum typified by the trademark-registration system.

....

### III

“The cardinal principle of statutory construction is to save and not to destroy.” *Jones & Laughlin Steel Corp.*, 301 U.S., at 30; see also *Hooper v. California*, 155 U.S. 648, 657 (1895) (“The elementary rule is that every reasonable construction must be resorted to, in order to save a statute from unconstitutionality”). In directing the PTO to deny the ancillary benefit of registration to trademarks featuring “scandalous” content, Congress used a word that is susceptible of different meanings. The majority’s reading would render the provision unconstitutional; mine would save it. Under these circumstances, the Court ought to adopt the narrower construction, rather than permit a rush to register trademarks for even the most viscerally offensive words and images that one can imagine.<sup>13</sup>

That said, I emphasize that Brunetti’s challenge is a facial one. That means that he must show that “a substantial number of [the scandalous-marks provision’s] applications are unconstitutional, judged in relation to the [provision’s] plainly legitimate sweep.” *United States v. Stevens*, 559 U.S. 460, 473 (2010). With “scandalous” narrowed to reach only obscene, profane, and vulgar content, the provision would not be overly broad. Cf. *Frisby*, 487 U.S., at 488 (rejecting a facial challenge after adopting a limiting construction); *Boos*, 485 U.S., at 331 (same). Even so, hard cases would remain, and I would expect courts to take seriously as-applied challenges demonstrating a danger that the provision had been used to restrict speech based on the views expressed rather than the mode of expression.<sup>14</sup> Cf. *Finley*, 524 U.S., at 587 (reserving the possibility of as-applied challenges).

Freedom of speech is a cornerstone of our society, and the First Amendment protects Brunetti’s right to use words like the one at issue here. The Government

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<sup>13</sup> As noted above, I agree with the majority that § 1052(a)’s bar on the registration of “immoral” marks is unconstitutional viewpoint discrimination. See *supra*, at 2. I would simply sever that provision and uphold the bar on “scandalous” marks. See *Reno v. American Civil Liberties Union*, 521 U. S. 844, 882–883 (1997); *Brockett v. Spokane Arcades, Inc.*, 472 U. S. 491, 504–507 (1985); see also *Tam*, 582 U. S., at \_\_\_\_ (slip op., at 26) (striking down only the disparagement clause).

<sup>14</sup> The majority adverts to details in the record that could call into question whether the PTO engaged in viewpoint discrimination in this very case. See *ante*, at 3. Because a facial challenge is the only challenge before the Court, I do not address whether an as-applied challenge could have merit here.

need not, however, be forced to confer on Brunetti's trademark (and some more extreme) the ancillary benefit of trademark registration, when "scandalous" in § 1052(a) can reasonably be read to bar the registration of only those marks that are obscene, vulgar, or profane. Though I concur as to the unconstitutionality of the term "immoral" in § 1052(a), I respectfully dissent as to the term "scandalous" in the same statute and would instead uphold it under the narrow construction discussed here.