



This week at Supreme Court: Can clothing firm sell with a trademark resembling the F-word?

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Washington – The founder of a clothing line with the name FUCT says it's pronounced as four letters, one after another. As in "F-U-C-T."

The Justice Department, seeking to block its request for trademark protection, equates it "to the vulgar word for which it is a homonym."

The two sides will debate the clothing line's rhyme or reason at the Supreme Court Monday as the justices return for two weeks of oral arguments, their last of the 2018 term.

The April sitting also will include a showdown over the Trump administration's effort to add a question on citizenship to the 2020 census, which could affect the apportionment of congressional seats and the disbursement of federal funds among the states.

And, over the next two weeks, the justices may decide whether to hear new cases on abortion, gay rights and religious liberty.

The "FUCT" case is the second one in three years contesting trademark registration restrictions. In 2017, they ruled unanimously that trademarks considered to be disparaging nonetheless deserve First Amendment protection.

The new case concerns trademarks deemed to be scandalous or immoral – a characterization the Patent and Trademark Office applied to Erik Brunetti's nearly 30-year-old clothing brand.

No one is trying to stop Brunetti from selling his wares, which the Justice Department pointedly notes are available even in children's and infants' sizes. The issue is whether he deserves to register his trademark – a federal benefit that makes it harder for competitors to challenge.

Two years ago, the court ruled in favor of an Asian-American dance band dubbed The Slants, a name they said they reappropriated as a badge of pride. The ruling also protected the Washington Redskins football team, whose trademarks had been cancelled following complaints from Native Americans.

But that decision only applied to disparaging names, not those deemed scandalous or immoral. In the new case, the trademark office objected to FUCT's "strong and often explicit sexual imagery."

"The provision advances the government's interest in encouraging the use of marks that are appropriate for all audiences, including children," Solicitor General Noel Francisco argues in court papers.

'Relic from an earlier era'

Not so, Brunetti's lawyers say. The brand's meaning, if it has one at all, is "FRIENDS U CAN'T TRUST."

So unrelated is the brand to its homonym, they say in court papers, that it won't be necessary "to refer to vulgar terms during argument. If it should be necessary, the discussion will be purely clinical, analogous to when medical terms are discussed."

Brunetti has a number of supporters, including Simon Tam, band leader of The Slants. His lawyer, Stuart Banner of the UCLA School of Law, calls the federal law "kind of a relic from an earlier era" when books and films were routinely censored.

Two NYU School of Law professors filed a friend-of-the-court brief with a 137-page appendix that includes a list of trademarks turned down as scandalous – and because they were too similar to existing trademarks.

"There are an awful lot of cases in which the agency has said about the same trademark, 'This is too scandalous to register, and this is too similar to a mark we have already registered,'" said their lawyer, William Jay.

The libertarian Cato Institute added its voice to the fray simply to defend vulgarity's positive attributes. The brief is replete with examples.

"Discouraging profanity not only fails to further a legitimate interest," said Ilya Shapiro, director of constitutional studies at the institute, "it also affirmatively harms the progress of science by placing an unnecessary taboo on a rich area of research."

Five other complex cases

The five other cases on the court's docket this week raise important questions about taxation, violent crime, securities fraud and more:

- Did a technology company commit securities fraud by hiding information from shareholders about the terms of a planned merger?
- Do California's labor laws apply to workers on drilling platforms on the Outer Continental Shelf?
- Where can a trust be taxed – in the state where it's established, where the trustee lives, or where the beneficiaries live?
- Is the term "crime of violence" in a federal statute unconstitutionally vague?
- When does the clock start ticking on a claim of fabricated evidence – when the claimant learns about it, or when the first court case is concluded?

Showdown over citizenship

The second week of oral arguments will be more closely watched for one reason: It includes the dispute over Commerce Secretary Wilbur Ross' effort to add a question on citizenship to the 2020 census.

But there's more, ranging from a blood draw conducted by police in Wisconsin on an unconscious suspect, to a Freedom of Information Act dispute that grew out of a South Dakota newsroom's effort to get food stamps data from the Department of Agriculture.

And, every Monday, the court lists cases granted for future consideration and those it won't hear. The first list usually is very short; the justices hear only about 70 cases each term. The second list is hundreds of cases long.

Among those pending before the justices are three that would be blockbusters in the fall:

Abortion. Indiana has asked the justices to reverse a lower court decision blocking the state from outlawing abortions sought because of gender, race or disability. The state also wants to require that fetal remains are buried or cremated. Vice President Mike Pence signed the law when he was governor.

Gay rights. The court could decide the next major legal dispute over gay rights: whether the nation's job discrimination laws apply to sexual orientation or gender identity. Among the cases up for consideration are ones involving gay and transgender workers who alleged they were fired because of their sexuality.

Religious liberty. An Oregon couple who bake cakes for special occasions want the court to reverse lower court rulings that fined them \$135,000 for refusing to serve a lesbian couple's wedding. The court absolved a Colorado baker for a similar religious objection last year but only because of his particular treatment by state regulators.