

# Great Day for Free Speech. Supreme Court Decides FUCT Trademark Case

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Today is a good day for Americans. The U.S. Supreme Court has taken the federal government out of the business of deciding questions of morality.

The U.S. Supreme Court decided the case of *Iancu v. Brunetti*. The specific issue is whether Brunetti is entitled to register his trademark FUCT with the U.S. Patent & Trademark Office. However, the real issue is whether the U.S. Government can decide for the public what is moral and penalize those opinions it somehow determines to be immoral.

Brunetti is an artist who created the FUCT – FRIENDS U CAN'T TRUST brand in 1991. Since then, he has used the brand to comment on a variety of social and political issues, expressing skepticism of authority figures—a viewpoint repeatedly vindicated by the actions of figures in entertainment, politics and religion.

Prior to this decision, the Trademark Office refused registration if it determined that some small minority viewed the trademark as immoral. This means that what a minority thinks is immoral on a wide range of political religious and social issues precludes others from using trademarks that have another viewpoint. That clearly is not right.

Americans have wildly divergent views on many moral issues: abortion, gambling, religion and politics. Even about eating meat there are differing views on what types of meat should be eaten, or even if eating meat at all is moral. Substantial numbers say the Democratic Party is immoral and substantial numbers say the Republican Party is immoral. The Trademark Office grants registrations favorable to President Trump. MAKE AMERICA GREAT AGAIN is registered. But it refuses those unfavorable, such as DUMP TRUMP. The government simply cannot and should not decide which viewpoint is correct.

The case is not about Brunetti's trademark FUCT – FRIENDS U CAN'T TRUST, but it is about his viewpoint being skeptical of authority figures in government and society, and whether the government can impose burdens on his viewpoint. Brunetti feels events have shown over and over again that his skepticism is justified.

The Supreme Court, and many Americans are uncomfortable with Brunetti's trademark. But that is not the question. The question is whether any government gets to impose its views about what is moral and suppress those it finds distasteful. That is a road that we, as Americans, should not go down. If we do then Local or state governments could deny

business licenses or building permits on the ground that such local leaders find such views offensive. This is not a hypothetical concern. It is easy to foresee, given the recent actions of the Alabama, Georgia and Louisiana legislatures, that they could prohibit Planned Parenthood from doing any business at all by denying licenses or permits. And in California and Massachusetts, the same thing would happen, except to groups on the other end of the political spectrum. The National Rifle Association and conservative political groups could be prevented from doing business by denying business licenses because those groups are deemed by local leaders to be offensive. Such outcome is completely contrary to the purpose of the First Amendment and undermines a basic tenant of American democracy. Even disfavored political viewpoints could be prohibited if some consider them to be scandalous.

If the Supreme Court affirms the refusal to register the trademark due to immorality, then persons with viewpoints about any of these subjects, or any other deemed immoral by a minority, could effectively be prevented from doing business.

The decision today was joined by both liberal and conservative justices because they recognize the broader principle at stake: the freedom to express one's viewpoint even if considered immoral by some. Justice Alito summed up the issue in his concurrence "a law banning speech deemed by government officials to be 'immoral' or 'scandalous' can easily be exploited for illegitimate ends."

#### Background on Sommer

The Supreme Court hears about 80 cases a year. Only about a hundred attorneys get to argue before the nation's highest court in a year. Accordingly, it is quite an honor for Fort Wayne native Sommer to be allowed to do that. Sommer graduated from Northrop a few years after it opened. While at Northrop, his main activity was the orchestra. He started college at IUPUI-Fort Wayne with his major in violin. He switched his major to anthropology and then economics, graduating from IU Bloomington in 1979. "I'm a much better lawyer than I would have been as a violinist" he says. He studied the Maya civilization with Professors Alan Sandstrom and Paul Provost at IUPUI-Ft. Wayne. "Anthropology was very interesting, but economics had more relevance"

#### Indiana Native

In junior high, Sommer and his friend decided they would move to California. So Sommer was pleased to be accepted to the UCLA School of Law in California. There he studied with Professor Melville Nimmer, who literally work the book on copyright law, called, "Nimmer on Copyright." He always remembered Nimmer discussing a Supreme Court case he argued, called *Cohen v. California*, involving a man who was arrested for wearing a jacket stating F\*\*\* THE DRAFT (the word was spelled out in full on the jacket). That was held to be protected speech.

Sommer jokes that he was genetically destined to be a trademark attorney. His father, Robert D. Sommer, had been a patent attorney at Fort Wayne-based Essex Wire.

Sommer remembers that the second written document he held (a Bible being the first) was a patent, years before he could read. He still has the baby chair he was sitting in when it happened.

### Has Client with Bad Word as Trademark

Years later, Sommer is an established trademark attorney in California. He has many clients in the streetwear industry such as ANTI SOCIAL SOCIAL CLUB, BEEN TRILL and OLUKAI. He handled trademark matters for LEVI STRAUS, QUIKSILVER, APPLE, STUSSY and many interesting companies.

One of Sommer's clients was Erik Brunetti, a Los Angeles artist. Erik founded the FUCT brand in 1991. His brand has been the longest surviving brand with bad word as the brand and an anti-establishment viewpoint. Sommer told Brunetti it was not worth filing for his trademark because it had been refused 8 times previously. The law was clear that it would be refused.

In 2012, Sommer was surprised to learn that someone filed for FUCT and it had been approved by the trademark office. Accordingly, he had the application assigned to Brunetti. Even though the trademark application had been approved by the trademark office examiner and his supervisor, some unnamed official decided the application should be refused. Sommer thought there might be some small chance, 1% or 5% that he could get the application approved based upon some technicality. Although he was aware of there could be a constitutional argument, the courts had always rejected that claim for more than thirty years.

### Preparation for Supreme Court

Getting to the Supreme Court was a real adventure according to Sommer. He thinks that most of the cases get to the Supreme Court more by accident than plan. Certainly, he had no expectation of getting there. Although once the government filed its appeal (technically called a petition for *certiorari*) that was more likely. He learned that the Court officially took the case on January 4 when he was in Havana, Cuba, on vacation with his family.

“The amount of work to prepare a case for the Supreme Court is overwhelming” Sommer says. He wrote eleven briefs (two in the trademark office, two in the trademark appeals board, four in the court of appeals, one *amicus* brief in another Supreme Court case decided two years ago, and two in the Supreme Court). He argued the case twice in the court of appeals. The first time the argument was 30 minutes. Because the Free Speech issues were so significant, the court of appeals required the usual step of having a re-argument, this time for a full hour. The government attorney took up 45 minutes, but Sommer did not mind because he felt that the attorney “wasn't getting anywhere with his argument.”

In order to be prepared, Sommer did what he calls a “practice run” in February, two months before his argument. He visited the Supreme Court in February to see the Court

close-up and to listen to the government attorney who was going to argue *Brunetti* another case. That day, there was an inch or two of snow, and all the federal government was shut down except the Supreme Court.

Among other preparation Sommer read biographies of the justices, met the government attorney who drafted its briefs, met other attorneys who argued before the Supreme Court. Drafting the brief was a six-month process. Sommer was glad that he started well ahead of time, since he only had one month after the government's brief to file his brief. But he predicted what the government would say in its brief. Despite that head-start, Sommer had to pay overtime to the printer in order to get the brief filed on time.

Sommer also did four practice arguments called "moot courts." The first was at his *alma mater* UCLA School of Law. Sommer says, "It didn't go as bad as it could have, but it wasn't good." The next one was with the ACLU. The ACLU attorneys did not like Sommer's answer to the first question. When the practice argument was finished and Sommer asked the ACLU's attorneys how they would respond to the question. The attorneys said they did not have a better answer. However, after much work, Sommer came up with what he thought was a good answer, which he used in the actual argument. Georgetown Law School does moots for every Supreme Court case if the attorneys want it. Sommer says "I was sweating. The room was hot but the questioning was brutal. But that makes it worthwhile. Making mistakes ahead of time."

The biggest effort was learning constitutional law, according to Sommer. He is well-versed in trademark law, but the case was really a Free Speech case and the trademark aspects were secondary. Sommer was so glad that the argument was over because he described the preparation "like studying for all your final exams and the bar exam, all in one." He just could not stop saying "I'm so glad it's over. I'm so glad it's over"

### Supreme Court Argument

The argument was on Tax Day, April 15. All nine justices were there since Ruth Bader Ginsburg had returned after her medical problems. "The arguing attorney is closer to the justices than they are to each other." Sommer says he was not scared. He felt he knew the subject better than any of the justices. He did not tell his co-counsel that he got little sleep the night before, not because of stress, but because his daughter was sick. But he jokes that "being a parent is the best training for functioning without sleep."

Sommer's goal was limited to not messing up. Since the court of appeals had ruled in his favor, he did not have the burden, unlike the government, to overcome the lower court ruling. "The justices don't give you time to talk because they interrupt with questions. So it is important to put everything into the written brief." As a result, Sommer says he did not have much that he felt he needed to say during oral argument. He had a few sentences that he wanted to get out before interrupted with questions. The hardest questions were for the government's attorney.

However, he did get some hard questions. When Sommer said that one has to look at the trademark to determine whether it was profanity, Justice Alito said, “oh come on.” But Sommer gave a good answer referring to other trademarks FVCK and FCUK, and that one has to decide if they are in fact profanity.

Justice Kavanaugh asked about whether profanity could be used on the sides of buses. Sommer pointed out that the Supreme Court is deciding whether to hear a case involving the Washington DC bus system. In other words, that is a different but tough question and Sommer did not have the answer to it.

Sommer did something extremely rare. He ended the argument early. But he felt he said everything he needed to say.

### Photographs

Attached are some photographs which you are authorized to use.

Erik Brunetti is the owner of the FUCT brand and the trademark applicant (the requested photo credit is Alessandro Baltrow).

John R. Sommer is his attorney who argued the case in the U.S. Supreme Court; the photographs are from April 15, 2019, the day the case was argued. Photo credit: Katrina Sommer.

Photographs of FUCT products. Note: please do not use photographs for FUCT product from the internet because you might select photographs that show counterfeit products. Photo credit: Alessandro Baltrow.

For more information:

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