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This *Report* summarizes opinions issued on June 24, 2019 (Part I).

I. Opinions

● *Iancu v. Brunetti*, 18-302. By a 6-3 vote, the Court held that §2(a) of the Lanham Act—which authorizes the Patent and Trademark Office to refuse to register "immoral" or "scandalous" trademarks—is viewpoint based and therefore violates the First Amendment. "Under the Lanham Act, the PTO administers a federal registration system for trademarks." An owner of an unregistered mark may still use it and sue infringers. "But registration gives trademark owners valuable benefits." Registration is "prima facie evidence" of a mark's validity; and registration serves as "constructive notice of the registrant's claim of ownership," which "forecloses some defenses in infringement actions." A trademark is ordinarily eligible for registration if it is "used in commerce." 15 U.S.C. §1051(a)(1). But the Lanham Act directs the PTO to "refuse[] registration" of certain types of marks, such as marks that would create confusion with another mark and marks that are "merely descriptive" of the goods on which they are used. Section 1052(a) prohibits registration of marks that "[c]onsist[] of or comprise[] immoral[] or scandalous material." The PTO has applied that bar as a "unitary provision," as opposed to treating the two adjectives ("immoral" and "scandalous") separately. In applying that provision, the PTO has asked "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.'" Applying that test, the PTO refused to register the trademark F-U-C-T, which respondent Erik Brunetti sought to use for a clothing line. Brunetti filed a facial challenge to the "immoral and scandalous" bar in the Federal Circuit, which held that the bar violates the First Amendment. In an opinion by Justice Kagan, the Court affirmed.

The Court began by reviewing the opinions members of the Court issued in *Matal v. Tam*, 582 U.S. ___ (2017), which struck down the Lanham Act's bar on the registration of "disparag[ing]" trademarks. Four Justices viewed the Lanham Act bar as "a simple restriction on speech"; four Justices viewed the bar as "a condition on a government benefit." But all eight Justices agreed that the government may not engage in viewpoint discrimination, *i.e.*, "discriminate against speech based on the ideas or opinions it conveys." And all eight Justices agreed that the disparagement bar was viewpoint based. The Court had little difficulty concluding that the "immoral and scandalous" bar is likewise viewpoint based. After reviewing dictionary definitions of the two terms, the Court explained that the statute "distinguishes between two opposed set 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." The Court then walked through examples of the PTO "refus[ing] to register marks communicating 'immoral' or 'scandalous' views about (among other things) drug use, religion, and terrorism," while "approv[ing] registration of marks expressing more accepted views on the same topics."

The government sought to preserve the ban by offering a limiting construction: it covers only "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." That is, it allows the PTO to refuse

marks that are "vulgar"—meaning "lewd," "sexually explicit or profane." The Court rejected that limiting construction: "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 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." Finally, the Court rejected the government's contention that the facial challenge should fail because Brunetti has not shown, as required by the overbreadth doctrine, that the provision's unconstitutional applications are "substantial" relative to its "plainly legitimate sweep." The Court stated that it "has never applied that kind of analysis to a viewpoint-discriminatory law." And for good reason. "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?" The Court added that, "in any event, the 'immoral or scandalous' bar is substantially overbroad."

Justice Alito filed a brief concurring opinion that noted how much "viewpoint discrimination is now tolerated" in our nation. He added that the Court's "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." Justice Sotomayor filed an opinion concurring in part and dissenting in part, which Justice Breyer joined. She would "read th[e] provision's bar on the registration of 'scandalous' marks to address only obscenity, vulgarity, and profanity." And "[a]dopting a narrow construction for the word 'scandalous' . . . would save it from unconstitutionality. Properly narrowed, 'scandalous' is a viewpoint-neutral form of content discrimination that is permissible in the kind of discretionary governmental program or limited forum typified by the trademark-registration system." Chief Justice Roberts concurred in part and dissented in part. He agreed with the majority that the "immoral" portion of the bar "is not susceptible of a narrowing construction that would eliminate its viewpoint bias." But he agreed with Justice Sotomayor that the term "scandalous" can and should be "read more narrowly to bar only marks that offend because of their mode of expression—marks that are obscene, vulgar, or profane." He added that such a bar would be consistent with the First Amendment. Justice Breyer filed a separate opinion concurring in part and dissenting in part. He explained why the provision, once narrowed, is constitutional based not "on rigid First Amendment categories" but because the provision does not "'work[] speech-related harm that is out of proportion to its justifications.'"

● *United States v. Davis*, 18-431. By a 5-4 vote, the Court held that the residual clause in 18 U.S.C. §924(c) is unconstitutionally vague. Federal law imposes additional mandatory penalties if a person uses a firearm in connection with certain crimes, including a "crime of violence." 18 U.S.C. §924(c)(1)(A). The statute defines a crime of violence as "an offense that is a felony" and

> (A) has as an element the use, attempted use, or threatened use of physical force against the person or property of another, or
>
> (B) that by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense.

§924(c)(3). Subsection (A) is known as the "elements clause"; subsection (b) is known as the "residual clause." Petitioners Maurice Davis and Andre Glover were charged with multiple counts of robbery and conspiracy to commit robbery, as well as two separate §924(c) violations for brandishing a shotgun in connection with the crimes. A jury convicted them, and the judge imposed the mandatory

minimum sentences required by §924(c). Davis and Glover appealed their §924(c) convictions. The Fifth Circuit sustained their convictions on one of the §924(c) counts, which relied on the elements clause. But it vacated the conviction on the other count (which charged conspiracy as a predicate crime of violence) because it relied on the residual clause, which it held was unconstitutionally vague. In an opinion by Justice Gorsuch, the Court affirmed that holding.

The Court explained that it had twice recently held similarly worded residual clauses to be unconstitutionally vague. See *Johnson v. United States*, 576 U.S. ___ (2015) (Armed Career Criminal Act); *Sessions v. Dimaya*, 584 U.S. ___ (2018) (18 U.S.C. §16(b), which defines "crime of violence" for many federal statutes). In both cases, the Court—consistent with its precedent—ruled that the residual clauses were applied through the "categorical approach," which asks whether, in the "ordinary case" of the underlying crime, there is a serious (or substantial) risk of physical injury to another during its commission. So applied, the residual clauses were unconstitutionally vague because they "required courts 'to picture the kind of conduct that the crime involves in the ordinary case, and to judge whether that abstraction presents some not-well-specified-yet-sufficiently-large degree of risk.'" The government did not dispute that, if the categorical approach applies to §924(c)'s residual clause, it too is unconstitutionally vague. And for many years, the government and the lower courts had understood §924(c)(3)(B) as requiring the categorical approach. But the government now argued that, in contrast to ACCA and §16(b), §924(c)(3)(B) can be applied through a case-specific method that looks to the defendant's actual conduct when committing the predicate offense. The Court concluded, however, that "the statute's text, context, and history" reveal that "the statute simply cannot support the government's newly minted case-specific theory."

The Court noted that in *Leocal v. Ashcroft*, 543 U.S. 1 (2004), it had interpreted the nearly identical language in 18 U.S.C. §16 as requiring the categorical approach "based entirely on the text." Reviewing that text here, the Court found the issue "not even close." First, the term "offense" carries a generic meaning, not a specific-act meaning, in the elements clause; and a word usually retains the same meaning within a statutory phrase. Second, §924(c)(3)(B) "speaks of an offense that, 'by its nature,' involves a certain type of risk. And that would be an exceedingly strange way of referring to the circumstances of a specific offender's conduct." The Court found its reading supported by context. First, the Court "normally presume[s] that the same language in related statutes carries a consistent meaning." Second, dozens of federal statutes use the phrase "crime of violence"; some cross-reference the definition in §924(c)(3) while others cross-reference §16(b). Reading §924(c)(3) and §16(b) differently, as the government suggests, "would produce a series of seemingly inexplicable results." The Court found further support in §924(c)(3)(B)'s history. Originally, §924(c) borrowed §16(b)'s definition; when §924(c) added its own definition, it "copied and pasted" §16(b)'s definition of "crime of violence." Said the Court, "importing the residual clause from §16 into §924(c)(3) almost word for word would have been a bizarre way of suggesting that the two clauses should bear drastically different meanings."

The Court rejected the dissent's resort to the doctrine of constitutional avoidance, stating that "no one before us has identified a case in which this Court has invoked the canon to *expand* the reach of a criminal statute in order to save it." And doing so "would risk offending the very same due process and separation-of-powers principles on which the vagueness doctrine itself rests"—namely,

giving criminal defendants "fair warning that §924(c)'s mandatory penalties would apply to their conduct." Plus, employing the constitutional doubt doctrine would "sit uneasily with the rule of lenity's teaching that ambiguities about the breadth of a criminal statute should be resolved in the defendant's favor."

Justice Kavanaugh filed a lengthy dissent, which Justices Thomas and Alito joined in full and Chief Justice Roberts joined in part. After discussing the dangers of "[c]rime and firearms," Justice Kavanaugh stated that "[a] decision to strike down a 33-year-old, often-prosecuted federal criminal law because it is all of a sudden unconstitutionally vague is an extraordinary event in this Court." He noted that it is common for Congress and the states to define crimes based on risks created on specific occasions; juries make substantial-risk determinations all the time. In his view, §924(c)'s residual clause is just such a provision. He argued that the Court adopted the categorical approach when interpreting provisions (such as ACCA and §16(b)) that "imposed penalties based on a defendant's *prior* criminal convictions." In that context, the categorical approach makes sense because it "avoids the difficulties and inequities of relitigating 'past convictions in minitrials conducted long after the fact,'" and avoids "Sixth Amendment concerns." But, Justice Kavanaugh emphasized, §924(c) "operates entirely in the present." The same jury that is assessing the defendant's underlying crime could also assess whether the defendant's conduct involved a substantial risk of physical force—obviating the concerns about "minitrials conducted long after the fact" and the Sixth Amendment. Justice Kavanaugh then walked through §924(c)(3)(B)'s language and found it perfectly consistent with a case-specific (as opposed to categorical) approach. Both the terms "offense" and "by its nature" could be understood to look to the "'offender's actual underlying conduct.'"

Then, in the section of the dissent not joined by Chief Justice Roberts, Justice Kavanaugh argued that if the statute is ambiguous, the constitutional doubt doctrine supported the reading that saves the statute (here, the government's). He disagreed that applying that doctrine conflicts with the rule of lenity: the rule of lenity applies only when "grievous ambiguity" remains after traditional canons of statutory construction are applied—including the constitutional doubt canon. Nor did Justice Kavanaugh find any support in the Court's cases for the proposition (embraced by the majority) that the canon can't be used to broaden the scope of a criminal statute. He closed by saying that "[t]he consequences of the Court's decision today will be severe. By invalidating the substantial-risk prong of §924(c)(3), the Court's decision will thwart Congress' law enforcement policies, destabilize the criminal justice system, and undermine safety in American communities."

● *Dutra Group v. Batterton*, 18-266. By a 6-3 vote, the Court held that "a mariner may [not] recover punitive damages on a claim that he was injured as a result of the unseaworthy conditions of the vessel." Christopher Batterton, a deckhand on a vessel owned and operated by the Dutra Group, was injured when his hand was caught between a bulkhead and a hatch that beow open. He sued Dutra and asserted a variety of claims, including unseaworthiness. Dutra moved to strike Batterton's claim for punitive damages on the ground that they are not available on claims for unseaworthiness. The district court denied the motion, and the Ninth Circuit affirmed. In an opinion by Justice Alito, the Court reversed and remanded.

The Court explained that unseaworthiness became a basis for remedying personal injury only in the late 19th century. Yet recovery was severely limited by common law rules such as the fellow-

servant doctrine. Two key developments changed that. First, Congress enacted the Merchant Marine Act of 1920 (the Jones Act), which "codified the rights of injured mariners and created new statutory claims that were freed from many of the common-law limitations on recovery." More precisely, it "incorporated the rights provided to railway workers under the Federal Employers' Liability Act." Second, "[i]n a pair of decisions in the late 1940s, the Court transformed the old claim of unseaworthiness, which had demanded only due diligence by the vessel owner, into a strict-liability claim." As a result, plaintiffs can choose between a Jones Act claim and a common law unseaworthiness claim. But "a plaintiff still cannot duplicate his recovery by collecting full damages on both claims." With that background, the Court stated that its resolution of the issue is governed by its decisions in *Miles v. Apex Marine Corp.*, 498 U.S. 19 (1990), and *Atlantic Sounding Co. v. Townsend*, 557 U.S. 404 (2009). *Miles* held that the Court "should look primarily to . . . legislative enactments for policy guidance," while recognizing that it "may supplement these statutory remedies where doing so would achieve the uniform vindication" of the policies served by the statutes. *Atlantic Sounding* allowed recovery of punitive damages for claims of maintenance and cure, but justified that "departure from the statutory remedial scheme based on the established history of awarding punitive damages for certain maritime torts, including maintenance and cure." Under those decisions, the Court asked "whether punitive damages have traditionally been awarded for claims of unseaworthiness"; "whether conformity with parallel statutory schemes would require such damages"; and "whether we are compelled on policy grounds to allow punitive damages for unseaworthiness claims." The Court concluded that those considerations all pointed against allowing punitive damages for seaworthiness claims.

First, the Court found no historical examples of punitive damages awarded on a seaworthiness claim. The Court found the "lack of punitive damages in traditional maritime law cases" to be "practically dispositive," for "[b]y the time the claim of unseaworthiness evolved to remedy personal injury, punitive damages were a well-established part of the common law." The Court deduced from that that, "unlike maintenance and cure, unseaworthiness did not traditionally allow recovery of punitive damages." Second, the Court found nothing in congressional policies which required that "novel remedy." The Jones Act itself does not appear to authorize punitive damages (for the federal courts of appeal "have unanimously held that punitive damages are not available under FELA"). Thus, "[a]dopting the rule urged by Batterton would be contrary to *Miles*'s command that federal courts should seek to promote a 'uniform rule applicable to all actions' for the same injury, whether under the Jones Act or the general maritime law." Finally, the Court declined to permit punitive damages on policy grounds. The Court stated that it is "particularly loath to impose more expansive liabilities on a claim governed by strict liability than Congress has imposed for comparable claims based in negligence." The Court added that vessel owners have every incentive to make their ships seaworthy; and that "allowing punitive damages would place American shippers at a significant competitive disadvantage" with foreign competitors.

Justice Ginsburg filed a dissenting opinion, which Justices Breyer and Sotomayor joined. Justice Ginsburg read *Atlantic Sounding* as permitting punitive damages in actions for maintenance and cure for four reasons, all of which apply to unseaworthiness actions. "First, the Court observed, punitive damages had a long common-law pedigree. Second, the 'general rule that punitive damages were available at common law extended to claims arising under federal maritime law.' Third, '[n]othing in maritime law undermine[d] the applicability of this general rule in the maintenance and

cure context,' notwithstanding slim evidence that punitive damages were historically awarded in maintenance and cure actions. Finally, neither the Jones Act nor any other statute indicated that Congress sought to displace the presumption that remedies generally available under the common law are available for maritime claims." (Citations omitted.) The first two reasons were necessarily met here. On the third reason, Justice Ginsburg noted that there was no "evidence that punitive damages were *unavailable* in unseaworthiness actions." And on the fourth factor, she noted that "the Jones Act does not preclude the award of punitive damages in unseaworthiness cases." More generally, she reasoned, "[t]he Jones Act was intended to 'enlarge th[e] protection' afforded to seamen, 'not to narrow it.' . . . [I]t is improbable that, by enacting the Jones Act, Congress meant to limit the remedies available in unseaworthiness cases."

● *Food Marketing Institute v. Argus Leader Media*, 18-481. Exemption 4 of the Freedom of Information Act protects from disclosure all "confidential" private-sector "commercial or financial information" within the government's possession. 5 U.S.C. §552(b)(4). By a 6-3 vote, the Court rejected an Eighth Circuit rule that information counts as confidential only if it is likely to cause "substantial competitive harm" to the information's owner. The Argus Leader, a South Dakota newspaper, filed a FOIA request for data collected by the U.S. Department of Agriculture relating to its food stamp program (known as the Supplemental Nutrition Assistance Program). Argus asked for, among other things, each participating retail store's annual SNAP redemption data from 2005 to 2010. USDA declined to disclose that information on the ground that it falls within Exemption 4 as confidential. Argus sued USDA in federal court to compel the release of that data. The district court was bound by Eighth Circuit precedent, which held that commercial information is not "confidential" unless disclosure is "likely . . . to cause substantial harm to the competitive position of the person from whom the information was obtained." Following a two-day bench trial, the court found no basis to conclude that disclosure would cause *substantial* competitive harm to the stores whose data would be revealed. And so it ordered disclosure. The USDA did not appeal, but the Food Marketing Institute intervened and filed its own appeal. The Eighth Circuit affirmed. In an opinion by Justice Gorsuch, the Court reversed and remanded.

After finding that the Institute had standing, the Court turned to the meaning of Exemption 4. After reviewing dictionaries, the Court said that information can be considered confidential in two ways. "In one sense, information communicated to another remains confidential whenever it is customarily kept private, or at least closely held, by the person imparting it. In another sense, information might be considered confidential only if the party receiving it provides some assurance that it will remain secret." (Citations omitted.) The Court held that the first of those conditions has to be met for information to be considered confidential under Exemption 4. The Court declined to decide whether the second of those conditions has to be met as well, since that condition was clearly met in this case. The Court observed that early courts interpreting the exemption interpreted it "in ways consistent with these understandings." By contrast, "[n]otably lacking from dictionary definitions, early case law, or any other usual source that might shed light on the statute's ordinary meaning is any mention of the 'substantial competitive harm' requirement that the courts below found unsatisfied . . . ." The Court traced the "substantial competitive harm" requirement to a 1974 D.C. Circuit decision that adopted it based on "a selective tour through the legislative history." Other courts then embraced the requirement (or variants of it). The Court said, however, that it "cannot approve such a casual disregard of the rules of statutory interpretation," which "is a relic from a 'bygone era of statutory

construction.'" Finally, the Court rejected Argus' contentions that the words in Exemption 4 mirror a common law term of art that imposed a "substantial competitive harm" requirement; that Congress had ratified the D.C. Circuit's interpretation; and that the requirement should be adopted as a matter of policy. In that last regard, the Court reiterated that "we normally 'have no license to give [statutory] exemption[s] anything but a fair reading.'"

Justice Breyer issued an opinion concurring in part and dissenting in part, which Justices Ginsburg and Sotomayor joined. In their view, Exemption 4 applies only if release of the information would "cause genuine harm to the owner's economic or business interests." Justice Breyer agreed that the "substantial competitive harm" requirement "goes too far" by looking only at competitive harm and asking that it be substantial, a difficult concept to measure. But he disagreed with the majority "that Exemption 4 imposes no 'harm' requirement whatsoever." He noted that in the national security context, "the word 'confidential' sometimes refers . . . to information the disclosure of which would cause harm. And a speaker can more sensibly refer to his Social Security number as 'confidential' than his favorite color, in part because release of the former is more likely to cause harm." In his view, "[r]eading 'confidential' in this more restrictive sense is more faithful to FOIA's purpose and how we have interpreted the Act in the past."

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