

The Supreme Court - June 24, 2019

The Supreme Court of the United States issued four decisions this morning:

Iancu v. Brunetti, No. 18-302: Respondent Erik Brunetti founded a clothing line that uses as its trademark four letters that though spelled differently, when read aloud would be commonly pronounced the same as a swear word. When Brunetti tried to register his mark with the U.S. Patent and Trademark Office (“PTO”), the application was denied under a provision of the Lanham Act that prohibits the registration of trademarks that “[c]onsist[] of or comprise[] immoral[] or scandalous matter.” 15 U.S.C. §1052(a). The PTO Board stated that the mark was “highly offensive” and “vulgar,” and that it had “decidedly negative sexual connotations.” On appeal, the Federal Circuit invalidated that provision of the Lanham Act as violating the First Amendment. The Court today affirmed, holding that, as was the case with the Court’s invalidation of the Lanham Act’s bar on the registration of “disparage[ing] trademarks two Terms ago in *Matel v. Tam*, 582 U.S. ____ (2017), the Lanham Act’s prohibition on the registration of “immoral[] or scandalous” trademarks infringes the First Amendment because it disfavors certain ideas. Justice Kagan authored the Court’s opinion, joined by Justices Thomas, Ginsburg, Alito, Gorsuch, and Kavanaugh. Justice Alito also filed a concurrence. Chief Justice Roberts, Justice Breyer, and Justice Sotomayor all concurred in part and dissented in part, reasoning that the term “scandalous” could be construed more narrowly to bar only marks that offend because of their mode of expression – marks that are obscene, vulgar, or profane.

The Court’s decision is available [here](#).

Food Marketing Institute v. Argus Leader Media, No. 18-481: Respondent Argus Leader, a newspaper, filed a Freedom of Information Act (“FOIA”) request for data collected by the United States Department of Agriculture as to the names and addresses of all retail stores that participate in the Supplemental Nutrition Assistance Program (“SNAP”), and for all corresponding store-level SNAP data over a multi-year period. The USDA refused to release the store-level SNAP data, invoking FOIA Exemption 4, which

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shields from disclosure “trade secrets and commercial or financial information obtained from a person and privileged or confidential.” 5 U.S.C. §552(b)(4). Argus Leader sued, and the District Court ordered disclosure, applying precedent imposing a “competitive harm” test, whereby commercial information is not “confidential” under the Exemption unless its disclosure is “likely . . . to cause substantial harm to the competitive position of the person from whom the information was obtained.” Petitioner Food Marketing Institute intervened and appealed, but the Eighth Circuit affirmed, applying the same test. Today, the Court reversed and remanded, first finding that the trade association Food Marketing Institute had standing, and then holding that the “competitive harm” requirement was inconsistent with the terms of the statute, and that instead, at least where commercial or financial information is both customarily and actually treated as private by its owner and provided to the government under an assurance of privacy, the information is “confidential” within the meaning of Exemption 4. Justice Gorsuch delivered the Court’s opinion. Justice Breyer concurred in part and dissented in part, joined by Justices Ginsburg and Sotomayor.

The Court’s decision is available [here](#).

United States v. Davis, No. 18-431: Respondents Maurice Davis and Andre Glover were convicted of multiple counts of robbery under the Hobbs Act, and also under 18 U.S.C. §924(c), which imposes heightened criminal penalties for using, carrying, or possessing a firearm in connection with any federal “crime of violence or drug trafficking crime.” Both defendants challenged their convictions on the basis that the residual clause in §924(c)(3)(B) was unconstitutionally vague. That residual clause defines a “crime of violence” as a felony offense “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.” The Fifth Circuit, on remand from the Court to consider in light of *Sessions v. Dimaya*, 584 U.S. ___ (2018), found the residual clause unconstitutionally vague. Today the Court affirmed in part and vacated in part, holding that the residual clause in §924(c)(3)(B) is unconstitutionally vague, and remanding for determination as to what that holding means for respondents’ sentences. Justice Gorsuch authored the Court’s opinion, joined by Justices Ginsburg, Breyer, Sotomayor, and Kagan. Justice Kavanaugh filed a dissenting opinion, which the remaining justices joined in full or in part.

The Court’s decision is available [here](#).

Dutra Group v. Batterton, No. 18-266: Respondent Christopher Batterton was a deckhand on a boat owned and operated by the Dutra Group when his hand was injured after a hatch blew open. Batterton brought a maritime action against Dutra, including a claim for unseaworthiness for which he sought general and punitive damages. The District Court denied Dutra’s motion to strike Batterton’s claim for punitive damages, and the Fifth Circuit affirmed, finding that punitive damages are available for unseaworthiness claims. The Court today reversed, concluding that because there is no historical basis for allowing punitive damages in maritime unseaworthiness actions, and in order to promote uniformity with the way courts have applied parallel statutory causes of action, punitive damages remain unavailable in unseaworthiness actions. Justice Alito issued the Court’s

opinion. Justice Ginsburg dissented, joined by Justices Breyer and Sotomayor.

The Court's decision is available [here](#).

Today, the Supreme Court granted certiorari in the following eight cases:

Maine Community Health Options v. United States, No. 18-1023; **Moda Health Plan, Inc. v. United States**, No. 18-1028; **Land of Lincoln Mutual Health v. United States**, No. 18-1038: These three consolidated cases concerning Congress's blocking of funding for the Affordable Care Act's "risk corridors" program, present the following questions: 1) Given the "cardinal rule" disfavoring implied repeals—which applies with "especial force" to appropriations acts and requires that repeal not be found unless the later enactment is "irreconcilable" with the former—can an appropriations rider whose text bars the agency's use of certain funds to pay a statutory obligation, but does not repeal or amend the statutory obligation, and is thus not inconsistent with it, nonetheless be held to impliedly repeal the obligation by elevating the perceived "intent" of the rider (drawn from unilluminating legislative history) above its text, and the text of the underlying statute? 2) Where the federal government has an unambiguous statutory payment obligation, under a program involving reciprocal commitments by the government and a private company participating in the program, does the presumption against retroactivity apply to the interpretation of an appropriations rider that is claimed to have impliedly repealed the government's obligation? 3) Whether Congress can evade its unambiguous statutory promise to pay health insurers for losses already incurred simply by enacting appropriations riders restricting the sources of funds available to satisfy the government's obligation. 4) Whether a temporary cap on appropriations availability from certain specified funding sources may be construed, based on its legislative history, to abrogate retroactively the Government's payment obligations under a money-mandating statute, for parties that have already performed their part of the bargain under the statute.

Georgia v. Public.Resource.Org, Inc., No. 18-1150: Whether the government edicts doctrine extends to — and thus renders uncopyrightable — works that lack the force of law, such as the annotations in the Official Code of Georgia Annotated.

Dex Media, Inc. v. Click-To-Call Technologies, LP, No. 18-916: Whether 35 U.S.C. §314(d) permits appeal of the Patent Trial and Appeal Board's decision to institute an inter partes review upon finding that §315(b)'s time bar did not apply.

Bannister v. Davis, No. 18-6943: Whether and under what circumstances a timely Rule 59(e) motion should be recharacterized as a second or successive habeas petition under *Gonzalez v. Crosby*, 545 U. S. 524 (2005).

Guerrero-Lasprilla v. Barr, No. 18-776; **Ovalles v. Barr**, No. 18-1015: 1) Is a request for equitable tolling, as it applies to statutory motions to reopen, judicially reviewable as a "question of law"? 2) Whether the criminal alien bar, 8 U.S.C. §1252(a)(2)(C), tempered by §1252(a)(2)(D), prohibits a court from reviewing an agency decision finding that a movant lacked diligence for equitable tolling purposes, notwithstanding the lack of a factual dispute.

