

No. 18-302

IN THE
Supreme Court of the United States

ANDREI IANCU, UNDER SECRETARY OF COMMERCE
FOR INTELLECTUAL PROPERTY AND DIRECTOR,
UNITED STATES PATENT AND TRADEMARK OFFICE,

—v.—

Petitioner,

ERIK BRUNETTI,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE FEDERAL CIRCUIT

**BRIEF *AMICI CURIAE* OF
THE AMERICAN CIVIL LIBERTIES UNION AND
THE ACLU OF THE DISTRICT OF COLUMBIA,
IN SUPPORT OF RESPONDENT**

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U.S. Const. amend. I.....	<i>passim</i>
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OTHER AUTHORITIES

- Jean M. Twenge, Hannah VanLandingham, & W. Keith Campbell, *The Seven Words You Can Never Say on Television: Increases in the Use of Swear Words in American Books, 1950–2008*, SAGE Open (2017), <https://journals.sagepub.com/doi/pdf/10.1177/2158244017723689>..... 20
- Merriam-Webster Dictionary, *occupy*, <https://www.merriam-webster.com/dictionary/occupy> (last visited Mar. 19, 2019) 20
- Trademark Manual of Examining Procedure* (TMEP) (Oct. 2018) 6, 16, 17, 19

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