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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## TABLE OF AUTHORITIES

## **CASES**

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Belcher v. Tarbox, 486 F.2d 1087 (9th Cir. 1973) 22
Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675 (1986)
Bleistein v. Donaldson Lithographing Co., 188 U.S. 239 (1903)22
Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n, 447 U.S. 557 (1980)
Christian Legal Soc'y Chapter of the Univ. of Cal. Hastings Coll. of the Law v. Martinez, 561 U.S. 661 (2010)13, 14
City of Renton v. Playtime Theatres, Inc., 475 U.S. 41 (1986)
Cohen v. California, 403 U.S. 15 (1971)passim
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In re Riverbank Canning Co., 95 F.2d 327 (C.C.P.A. 1938)
In Re Tinseltown, Inc., 212 U.S.P.Q. (BNA) 863 (T.T.A.B. 1981)



Keyishian v. Bd. of Regents, 385 U.S. 589 (1967) 16
Matal v. Tam, 137 S. Ct. 1744 (2017)passim
Miller v. California, 413 U.S. 15 (1973)
Mitchell Bros. Film Grp. v. Cinema Adult Theater, 604 F.2d 852 (5th Cir. 1979)
Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37 (1983)
Police Dep't of Chicago v. Mosley, 408 U.S. 92 (1972)
R. A. V. v. City of St. Paul, 505 U.S. 377 (1992)
Regan v. Taxation With Representation of Wash., 461 U.S. 540 (1983)
Reno v. American Civil Liberties Union, 521 U.S. 844 (1997)
Rust v. Sullivan, 500 U.S. 173 (1991) 14
Texas v. Johnson, 491 U.S. 397 (1989) 2, 12
Thomas v. Union Carbide Agric. Prods. Co., 473 U.S. 568 (1985)
Widmar v. Vincent, 454 U.S. 263 (1981) 14
Ysursa v. Pocatello Educ. Ass'n, 555 U.S. 353 (2009)
CONSTITUTION & STATUTES
U.S. Const. amend. Ipassim
15 II S C & 1052(a) nassim

## OTHER AUTHORITIES

Jean M. Twenge, Hannah VanLandingham, & W. Keith Campbell, <i>The Seven Words You Can Never</i> Say on Television: Increases in the Use of Swear	
Words in American Books, 1950–2008, SAGE Ope (2017), https://journals.sagepub.com/doi/pdf/10.1177/2158244017723689	
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)	_



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