No. 20-365

IN THE

Supreme Court of the United States

JACK DANIEL'S PROPERTIES, INC.,

Petitioner,

v.

VIP PRODUCTS LLC,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for The Ninth Circuit

BRIEF OF *AMICI CURIAE* ALCOHOL BEVERAGE INDUSTRY ASSOCIATIONS SUPPORTING PETITIONER

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QUESTIONS PRESENTED

Respondent VIP Products LLC's business model is based on marketing and selling dog toys that intentionally use the trademarks and trade dress of well-known companies, in a way that courts have deemed likely to confuse consumers about the source of the toys and to tarnish the reputation of such companies, including petitioner Jack Daniel's Properties, Inc. The questions presented are:

1. Whether a commercial product using humor is subject to the same likelihood-of-confusion analysis applicable to other products under the Lanham Act, or must receive heightened First Amendment protection from trademark-infringement claims, where the brand owner must prove that the defendant's use of the mark is either "not artistically relevant" or "explicitly misleads consumers."

2. Whether a commercial product's use of humor renders the product "noncommercial" under 15 U.S.C. 1125(c)(3)(C), thus barring as a matter of law a claim of dilution by tarnishment under the Lanham Act.

CORPORATE DISCLOSURE STATEMENT

Amicus American Craft Spirits Association (ACSA) is a 501(c)(6) industry association. It has no parent company, and no publicly traded company has an ownership interest in ACSA.

Amicus American Distilled Spirits Alliance (ADSA) is a d/b/a of The Presidents' Forum of the Distilled Spirits Industry (PFDSI), a Delaware non-profit corporation, and a federally registered 501(c)(6) industry association. It has no parent company, and no publicly traded company has an ownership interest in ADSA or PFDSI.

Amicus The Beer Institute is a 501(c)(6) industry association. It has no parent company, and no publicly traded company has an ownership interest in The Beer Institute.

Amicus The Brewers Association is a 501(c)(6) industry association. It has no parent company, and no publicly traded company has an ownership interest in The Brewers Association.

Amicus Distilled Spirits Council of the United States (DISCUS) is a 501(c)(6) industry association. It has no parent company, and no publicly traded company has an ownership interest in DISCUS.

Amicus Wine Institute is a 501(c)(6) industry trade association. Pursuant to Supreme Court Rule 29.6, Wine Institute discloses the following. There is no parent or publicly held company owning 10% or more of Wine Institute's stock.

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INTEREST OF *AMICI CURIAE*[1]

Amici are six industry associations representing different memberships of producers and importers of alcohol beverages.

The American Craft Spirits Association (ACSA) is the only national non-profit trade group led by and for the over 2100 craft distilleries operating in the United States. With over 500 members in each of the fifty states, ACSA is loyal to its mission to elevate and advocate for the community of craft spirits producers.

The American Distilled Spirits Alliance (ADSA) is a non-profit trade association comprised of 27 member companies, with common interests in manufacturing, importing, and marketing of distilled spirits in the United States. ADSA member companies represent over 60% of all distilled spirits sales in the United States.

The Beer Institute is the not-for-profit trade association representing America's brewers, beer importers, and suppliers to the beer industry. The Beer Institute's members today supply 85% of the volume of beer sold in the United States. The American beer industry supports more than 2.1 million jobs throughout the beer supply chain—ranging from farmers and can and bottle manufacturers to brewery workers, truck drivers, and waiters and waitresses.

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[1] No counsel for any party to this case authored this brief in whole or in part, and no person other than *amici* made a financial contribution for the preparation or submission of this brief. Petitioner has filed blanket consent to the filing of *amicus* briefs, and Respondent was provided timely notice and has provided written consent to the filing of this brief.

The Brewers Association is the not-for-profit trade association dedicated to small and independent American brewers, their beers and the community of brewing enthusiasts. The Brewers Association today has over 5,300 U.S. brewery members, 2,500 allied trade and associate members, and 40,000 members in its affiliate, the American Homebrewers Association.

The Distilled Spirits Council of the United States (DISCUS) is the principal trade association for the leading producers and importers of distilled spirits products sold in the United States. DISCUS members produce or import a majority of the distilled spirits sold in the United States.

Wine Institute is the public policy advocacy association representing over a thousand California wineries and affiliated businesses responsible for 80 percent of the nation's wine production and more than 90 percent of U.S. wine exports.

The *certiorari* petition and non-industry *amici* provide full arguments on the facts of this case and the significant commercial consequences for trademark holders from the decision below. See Pet. 26-30 (explaining consequences of the decision below for trademark holders); *id*. at 30-37 (explaining the significant errors in the decision below). *Amici* alcohol beverage industry associations wish to highlight the consequences of the decision below for an issue in which Congress, the Federal Trade Commission (FTC), and the alcohol beverage industry have invested substantial resources: responsible advertising of alcohol beverages.

The alcohol beverage industry recognizes its duty to promote responsible use of alcohol beverage products. Operating under advertising codes promulgated by

ACSA, ADSA, The Beer Institute, The Brewers Association, DISCUS, and Wine Institute, the industry has an important system of self-regulation to prevent improper advertisements of alcohol beverages.[2] *Amici* and their members, working cooperatively with the FTC, have made great strides over the past 20 years in assuring that advertising of alcohol beverages happens in a responsible manner.

The novel exceptions to trademark liability announced by the decision below, absent this Court's review, will seriously undermine *amici* and their members' efforts at industry self-regulation by permitting irresponsible uses of recognizable alcohol beverage trademarks and trade dress so long as the infringing uses are arguably humorous. *Amici* therefore file this brief to urge this Court to review this nationally important case.

SUMMARY OF ARGUMENT

The alcohol beverage industry has invested extensive resources in combatting irresponsible alcohol use. This work includes industry self-regulation of alcohol beverage advertising, which strictly limits the use of trademarks associated with alcohol beverage brands to ensure that all advertising using those marks

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[2] See ACSA, *Code of Advertising Practice of the American Craft Spirits Association* (2017), https://bit.ly/36Vh2cK (ACSA Code); ADSA, *Statement of Responsible Practices* (2020), https://bit.ly/3jZhcDz (ADSA Statement); The Beer Institute, *Advertising/Marketing Code and Buying Guidelines* (2018), https://bit.ly/2EZd33g (BI Code); The Brewers Association, *Brewers Association Marketing and Advertising Code* (2020), https://bit.ly/2GCLiOt (BA Code); DISCUS, *Code of Responsible Practices for Beverage Alcohol Advertising and Marketing* (2020), https://bit.ly/3iskWf9 (DISCUS Code); Wine Institute, *Code of Advertising Standards* (2014), https://bit.ly/33rkjOW (WI Code).

promotes responsible adult consumption and does not improperly appeal to minors. The codes promulgated by the main industry associations preclude industry participants from advertising alcohol beverage products in ways that appeal to minors, promote underage drinking, encourage excessive or irresponsible consumption, or depict illegal activity like drunk driving. If members violate these codes and do not take responsive action to remove or amend the advertisement(s) in question, they face expulsion from the industry associations.

This industry self-regulation polices alcohol beverage promotion and advertising without costly government intervention. As the FTC has noted, self-regulation "conserves limited government resources and is more prompt and flexible than government regulation, given the substantial time required to complete an investigation or adopt and enforce a regulation." FTC, *Self-Regulation in the Alcohol Industry: Report of the Federal Trade Commission* 34 (2014), *available at* https://bit.ly/3iu5ijD (2014 FTC Rep.).

Industry participants must have control over their trademarks for these self-regulatory efforts to succeed. If infringing uses of famous marks associated with alcohol beverages gain broad exemptions from the Lanham Act, then rampant infringement will make leading producers' social responsibility meaningless by allowing parties outside of the industry's self-regulatory system to use trademarks and trade dress associated with the industry to promote irresponsible drinking. While industry members cannot police all third-party promotions of irresponsible alcohol use, infringements implying that popular brands support such activities harm the industry's efforts by associat-

ing its most well-known names with problematic drinking.

The decision below permits exactly the sort of infringements that will undermine industry self-regulation. Despite the District Court's findings at trial that Respondent's "Bad Spaniel's" dog toys could tarnish Jack Daniel's brand, including by suggesting associations between whiskey and children (Pet. App. 41a-42a), the Ninth Circuit held that adding scatological humor to an infringing consumer good entitles the good to broad protection from infringement liability and renders the good "noncommercial" for trademark dilution purposes. These holdings open the door to any number of allegedly humorous infringements of famous trademarks associated with alcohol beverages. The decision below has no limiting principle that would prevent the extension of its reasoning to jokes about underage drinking, excessive consumption, or drunk driving. From children's toys to drinking game kits to automobile accessories, anyone making an infringing product need only claim some element of juvenile humor to gain sweeping immunity from trademark infringement or dilution liability.

This humor-based exemption from ordinary trademark law, which contradicts decades of trademark law in other Circuits as well as this Court's intellectual property jurisprudence, threatens significant social harm that goes well beyond the commercial injuries to trademark owners. *Amici* therefore urge this Court to grant the petition for *certiorari* and reverse the judgment below.

ARGUMENT

I. THE ALCOHOL BEVERAGE INDUSTRY, IN COOPERATION WITH THE FEDERAL TRADE COMMISSION, HAS MADE SUBSTANTIAL INVESTMENTS IN RESPONSIBLE ADVERTISING OF ALCOHOL BEVERAGES.

1. Recognizing its responsibility to adhere to appropriate advertising standards, the alcohol beverage industry has worked with the FTC since the late 1990s to improve standards for advertisements of alcohol beverages. In the Conference Report for the FTC's Fiscal Year 1998 appropriation bill, conferees from the House of Representatives' and the Senate's Committees on Appropriations raised "concerns about the impact of alcohol advertising on underage drinking" and called for the FTC to "investigate when problematic practices are discovered, encourage the development of effective voluntary advertising codes, and report their findings back to the Committees on Appropriations." H.R. Conf. Rep. No. 105-405 (1997), 143 Cong. Rec. H10860 (November 13, 1997) (quoted in FTC, *Self-Regulation in the Alcohol Industry: A Review of Industry Efforts to Avoid Promoting Alcohol to Underage Consumers* 4 (1999), *available at* https://bit.ly/2SqaNVP (1999 FTC Rep.)).

In response, the FTC issued a report endorsing industry self-regulation as the appropriate strategy for addressing concerns about advertisements for alcohol beverages. It found that industry self-regulation efforts would provide an efficient, effective, and less complicated solution to the issues raised, noting:

> Self-regulation is a realistic, responsive and responsible approach to many of the issues

> raised by underage drinking. It can deal quickly and flexibly with a wide range of advertising issues and brings the accumulated experience and judgment of an industry to bear without the rigidity of government regulation. The Commission regards self-regulation as particularly suitable in this area, where government restriction — especially if it involves partial or total advertising bans — raises First Amendment issues.

1999 FTC Rep. at 2.

While endorsing the concept of self-regulation broadly, the FTC had concerns regarding the efficacy of then-existing industry programs. The Commission "conclude[d] that for the most part, members of the industry comply with the current standards set by the voluntary advertising codes, which prohibit blatant appeals to young audiences and advertising in venues where most of the audience is under the legal drinking age." *Id*. at 3. At the same time, the Commission found that "improvements are needed both in code standards and implementation to ensure that the goals of the industry codes are met." *Ibid*. These included adoption of third-party review of complaints concerning violations of industry codes, increasing the standards for ad placement, and implementing best practices "that reduce the likelihood that [alcohol beverage] advertising and marketing will reach — and appeal to — underage consumers." *Ibid*.

2. The alcohol beverage industry, working through its main industry associations, listened to these recommendations. In particular, the Beer Institute, DISCUS, and Wine Institute, working cooperatively with the FTC, reformed existing codes to make them even more effective. They raised the standards for ad

placement, requiring that at least 70% of the target audience for any forum where alcohol beverage advertising appeared consist of adults over 21 years-old,[3] an increase from the prior standard of 50%. See FTC, *Alcohol Marketing and Advertising: A Report to Congress* i-ii (2003), *available at* https://bit.ly/3jq0Pjb. This helps ensure that alcohol is not improperly marketed to underage individuals. The industry associations also developed external review boards to resolve claims of potential advertising code violations. See FTC, *Self-Regulation in the Alcohol Industry: Report of the Federal Trade Commission* ii (2008), *available at* https://bit.ly/3jvHhdj. Additionally, the Beer Institute and DISCUS have implemented media buying guidelines that help guide members in responsible use of their advertising expenditures. See 2014 FTC Rep. at 12. The associations have also adopted guidelines specific to digital media advertising activities. *Id*. at 15-16.[4]

By 2014, the FTC found that "[s]ince 1999, the alcohol industry has substantially improved in self-regulation[.]" 2014 FTC Rep. at 34-35. In particular, more than 90% of ad placements and over 97% of ad impressions (that is, individual ad views) met the heightened requirements for target audience age. *Id*. at i. Industry associations and their members continue to cooperate with the FTC on implementing standards for responsible advertising within the industry, and the FTC refers consumers to the Beer Institute,

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[3] Each code presently requires that advertisements be placed only where 71.6% of the audience is of legal drinking age.

[4] See also ACSA Code, "Responsible Content" ¶ 24; BA Code, *Digital Media Guidelines* (April 2017), https://bit.ly/34uSZOZ; DISCUS Code, *Digital Marketing Guidelines* (2020), https://bit.ly/3iskWf9; Wine Institute, *Digital Marketing Guidelines* (2014), https://bit.ly/33rkjOW.

DISCUS, and Wine Institute for handling complaints about potentially inappropriate alcohol beverage advertisements. FTC, "Alcohol Advertising," https://www.consumer.ftc.gov/articles/0391-alcohol-advertising (last accessed Oct. 4, 2020).

II. THE EFFICACY OF RESPONSIBLE ADVERTISING EFFORTS DEPENDS ON STRONG TRADEMARK PROTECTIONS.

1. Each industry code restricts advertising practices in ways that implicate the use of industry participants' trademarks. For example, the Beer Institute directs that "[n]o beer identification, including logos, trademarks, or names should be used or licensed for use on clothing, toys, games or game equipment, or other materials intended for use primarily by persons below the legal drinking age." BI Code ¶ 3(f). DISCUS cites the use of "brand identification—including logos, trademarks, or names—on clothing, toys, games, game equipment, or other items intended for use primarily by persons below the legal purchase age" as an example of conduct that would violate its Code. DISCUS Code at 6. More generally, each of the industry codes contains provisions mandating that alcohol beverage advertisements refrain from promoting underage use, excessive use, drunk driving, or other irresponsible uses, all of which presumes that industry members have control over the use of their trademarks and trade dress.[5]

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[5] See ACSA Code "Responsible Content" ¶¶ 2-6, 10, & 16 (prohibiting advertising to minors and advertising portraying excessive consumption or drunk driving); ADSA Statement (member commitment to marketing products for responsible consumption and to direct marketing to adults of legal drinking age); BI Code ¶¶ 2 & 3 (prohibiting portrayal of excessive drinking or drunk

Review boards for the associations enforce these restrictions,[6] and they publish their decisions on their associations' websites.[7] These boards have success-

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driving in advertising and advertising that appeals primarily to under-age consumers); BA Code ¶ (1)(a)-(h) (prohibiting beer marketing that, among other things, condones driving and drinking, depicts excessive consumption, portrays illegal activity, or promotes underage drinking); DISCUS Code at 5 (requiring that advertisements primarily appeal to adults of legal age, promote responsible drinking, and not portray drunk driving); WI Code ¶¶ 1, 3, & 4 (prohibiting advertising content that promotes excessive drinking, appeals to under-age consumers, or connects drinking wine to the use of vehicles).

[6] See ACSA, *Advertising Complaint Review Process* (2017) (Advertising Review Panel to adjudicate advertising complaints), https://bit.ly/30X1ilF; BI Code at 9 (Code Compliance Review Board "composed of individuals with a variety of experience who are independent of the brewing industry," and brewers found to have violated the code are "expected" to "promptly revise" or "withdraw" any offending "advertising or marketing materials"); The Brewers Association, "Advertising Complaint Review Process," https://bit.ly/2GCLiOt (last accessed Oct. 10, 2020) (standing panel of three experts otherwise unaffiliated with the Association to review Advertising and Marketing Code Complaints); DISCUS Code at 8-9 (Code Review Board comprised of members appointed by DISCUS's Board of Directors, which will "urge[] the advertiser to revise or withdraw" any advertisement that violates the DISCUS Code); Wine Institute, *Complaint Review Process* (2005), https://bit.ly/33rkjOW (Internal Review Committee that initially resolves complaints about wine advertisements, with an appeal available to an Independent Third Party Reviewer).

[7] See The Beer Institute, "Code Compliance Review Board," https://bit.ly/3nT91ei (last accessed Oct. 10, 2020); The Brewers Association, "Advertising and Marketing Code Complaint Process," https://bit.ly/33T9Dca (last accessed Oct. 10, 2020); DISCUS, "DISCUS Code Review Board Decisions," https://bit.ly/30Zx959 (last accessed Oct. 10, 2020); Wine Institute, "Wine

fully promoted compliance with the industry codes within the industry, and could even expel members from the industry associations in serious cases. But they have no ability to address the use of industry participants' trademarks and trade dress in irresponsible ways by individuals and companies outside of the alcohol beverage industry, and non-members have no incentives to abide by association standards.

Given the limited legal authority of the review boards, the system of industry self-regulation on advertising can only succeed where industry members have effective control over the use of their trademarks and trade dress. Because the system lacks the enforcement mechanisms that governmental regulation carries, it relies on industry members' desire to maintain their reputations within the industry and society at large to drive adherence to responsible advertising standards and compliance with external review board decisions. If members lose control of their trademarks and non-industry participants can infringe those marks to promote irresponsible drinking, then that loss of control compromises the efficacy of the self-regulation system. The industry has no way to police such misconduct other than by trademark enforcement, so the success of the industry's self-regulation efforts depends on legal protection of members' trademark rights.

2. Importantly, moreover, even seemingly innocuous knock-offs can undermine the industry's credibility when they confuse consumers as to what messaging and products well-known alcohol beverage brands endorse. In the bench trial below, the District

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Institute's Code of Advertising Standards," https://bit.ly/3lBRTrF (last accessed Oct. 10, 2020).

Court credited expert testimony on tarnishment that showed Respondent's "Bad Spaniels" dog toy inflicted significant reputational harm to the Jack Daniel's brand. Pet. App. 35a-42a. This included perceptions associated with underage drinking, where the District Court concluded "that dilution by tarnishment will occur due to Jack Daniel's trademarks and trade dress being associated with toys, particularly the kind of toys that might appeal to children; Jack Daniel's is in the whiskey business and its reputation will be harmed due to the negative mental association of evoking whiskey with children, something Jack Daniel's has never done." *Id*. at 41a-42a. In its infringement findings, the District Court further found that roughly 29% of surveyed consumers would likely be confused as to whether Jack Daniel's endorses Respondent's "Bad Spaniels" dog toy. Pet. App. 47a-48a.

This widespread confusion illustrates the importance of industry members maintaining control over the use of their trademarks. The dissonance between the sophisticated, adult image that a brand like Jack Daniel's invests in and the childishness of the infringing use here not only harms Jack Daniel's commercial interests, but tarnishes a prominent whiskey brand with the exact associations that the entire industry has worked hard to eliminate from its advertising. This in turn undermines the industry's self-regulation project by creating a public perception that the industry accepts associations between its products and children. And if a line of dog toys can create that perception, one can only imagine what children's toys, apparel, drinking game sets, or other infringing products could do. The facts of this case thus serve to highlight the overwhelming importance of strong

trademark protections for the success of the alcohol beverage industry's self-regulation efforts.

III. THE DECISION BELOW INFLICTS ENTIRELY UNJUSTIFIED HARM TO INDUSTRY SELF-REGULATION EFFORTS.

1. The decision below deals a serious blow to industry self-regulation and the well-established rights of trademark owners. As to trademark infringement, the Ninth Circuit's requirement that the trademark owner prove that a potentially humorous use of its marks is "not artistically relevant to the underlying work" or "explicitly misleads consumers as to the source or content of the work" largely immunizes parties marketing infringing goods so long as they can identify a humorous element to the goods. Pet. App. 10a (citation omitted). And by holding that use of a mark for ordinary consumer goods becomes "noncommercial" when the use has an element of humor, the Ninth Circuit created a gaping hole in protection from trademark dilution. Pet. App. 13a.

These amorphous standards threaten to gut trademark protections. Some might see humor in the shear audacity of a knock-off product, and an infringer can point to the irresponsibility of its infringing use as evidence of irony. This means that nearly all infringing uses will have to be scrutinized for potential comedic value. Trademark litigation in the Ninth Circuit will devolve into lawyers and judges haggling over what does and does not constitute humor, an exercise most would agree lies well outside of the legal system's core institutional competencies.

2. The Ninth Circuit's holdings inflict massive commercial harm to trademark owners generally, and they will have an especially pernicious impact on the

alcohol beverage industry. Jokes about irresponsible drinking, such as losing time to blackouts or using alcohol as a substitute for mental health services, are, unfortunately, ubiquitous. Despite the industry's work to promote a more sophisticated image and encourage responsible consumption, some people will inevitably find humor in alcohol abuse and misuse.

Under the Ninth Circuit's ruling, industry members face significant loss of control over the use of their trademarks. By depriving the holders of famous trademarks of the ability to police infringing but allegedly humorous uses of their marks, the decision below opens the door to the use of such marks in, for example, a t-shirt featuring a famous tequila brand in a joke about blacking out or a bumper sticker using a well-known beer brand to announce the driver's skill at drunk driving, provided that the infringer can claim that the use of the marks furthers the humor of the products. By adding protections for humorous infringements that neither the Lanham Act nor the First Amendment require, the Ninth Circuit has deprived trademark holders in the alcohol beverage industry of important tools for policing irresponsible uses of their trademarks.

Notably, the same harms could arise in other industries with significant advertising sensitivities. From children's toys incorporating tobacco company logos to pill boxes promoting misuse of branded pharmaceutical products, it does not take much imagination to see how the Ninth Circuit's humor exception to otherwise applicable trademark law threatens to permit infringers to associate well-known brands with illegal or irresponsible behavior. This issue goes well-beyond the alcohol beverage industry to implicate any

industry where participants must balance the use of humor in advertising with social responsibility.

3. Other Circuits recognize that a case-by-case analysis focused on likelihood of confusion, rather than a *per se* shielding of potentially humorous infringements, strikes the needed balance between the interests of trademark owners and the First Amendment. As the Eighth Circuit, quoting the Second Circuit, has summarized:

> There is no simple, mechanical rule by which courts can determine when a potentially confusing parody falls within the First Amendment's protective reach. Thus, "in deciding the reach of the Lanham Act in any case where an expressive work is alleged to infringe a trademark, it is appropriate to weigh the public interest in free expression against the public interest in avoiding consumer confusion." [] "This approach takes into account the ultimate test in trademark law, namely, the likelihood of confusion as to the source of the goods in question."

Anheuser-Busch, Inc. v. Balducci Pubs., 28 F.3d 769, 776 (8th Cir. 1994) (quoting *Cliffs Notes, Inc. v. Bantam Doubleday Dell Pub. Grp., Inc.*, 886 F.2d 490, 494-95 (2d Cir. 1989)) (internal citation omitted).

This Court has adopted a similar case-by-case approach to parodies in the copyright context. Rejecting the claim that parodies always constitute fair use, the Court instead held:

> The fact that parody can claim legitimacy for some appropriation does not, of course, tell either parodist or judge much about where to draw the line. Like a book review quoting the

> copyrighted material criticized, parody may or may not be fair use, and petitioners' suggestion that any parodic use is presumptively fair has no more justification in law or fact than the equally hopeful claim that any use for news reporting should be presumed fair[.] The Act has no hint of an evidentiary preference for parodists over their victims, and no workable presumption for parody could take account of the fact that parody often shades into satire when society is lampooned through its creative artifacts, or that a work may contain both parodic and nonparodic elements. Accordingly, parody, like any other use, has to work its way through the relevant factors, and be judged case by case, in light of the ends of the copyright law.

Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, 581 (1994) (citation omitted).

This approach makes sense. In some uses, like a short clip in a film, the association between the work and the trademark-protected product lines may be so attenuated that the alleged infringement causes little to no likelihood of confusion. In such circumstances, free-expression concerns become paramount. But where, as here, substantial evidence shows that consumers actually thought the infringing good came from a trademark owner, the owner's interests in preventing that confusion properly outweighs any expression claims by the infringer. See Pet. App. 47a-48a (District Court's factual findings of consumer confusion). See also *In re R.M.J.*, 455 U.S. 191, 203 (1982) ("Truthful advertising related to lawful activities is entitled to the protections of the First Amendment. But when the particular content or method of

the advertising suggests that it is inherently misleading or when experience has proved that in fact such advertising is subject to abuse, the States may impose appropriate restrictions. Misleading advertising may be prohibited entirely.").

4. The Ninth Circuit's decision will have a sweeping impact given that it covers states accounting for nearly 20% of the U.S. population, including the home states of many producers of alcohol beverages. Moreover, the gap between the Ninth Circuit's *per se* protection of potentially humorous infringements and the case-by-case approach of other circuits will inevitably lead to forum shopping. Indeed, Respondent appears to have adopted an approach of filing pre-emptive declaratory judgment actions in Arizona because it lost on almost identical facts 12 years ago in Missouri. See Pet. 28-29 (collecting actions filed by Respondent since 2009). See also *Anheuser-Busch, Inc. v. VIP Prods., LLC*, 666 F. Supp. 2d 974, 986 (E.D. Mo. 2008) (granting preliminary injunction against Respondent's "Buttwiper" dog toy as infringing BUDWEISER mark and trade dress, "find[ing] that VIP's parody argument does not defeat the likelihood of confusion established by Plaintiff.").

This incentive to forum shop will lead infringers to rush to Ninth Circuit forums with declaratory judgment actions to avoid accountability for their infringements. While venue and transfer provisions may provide some relief in egregious cases, not every forum-shopped case will meet the standard for dismissal or transfer on those bases.

The decision below thus creates a legally unjustified problem of national scope for the entire alcohol beverage industry and its efforts to ensure that trademarks associated with the industry do not appear in irresponsible advertisements or consumer products.

This Court should therefore grant the petition for *certiorari*, reverse the decision below, and clarify that claims of humor do not immunize flagrant violations of the Lanham Act.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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