

No. 22-148

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**In the Supreme Court of the United States**

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JACK DANIEL'S PROPERTIES, INC.,

*Petitioner,*

v.

VIP PRODUCTS LLC,

*Respondent.*

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*ON A WRIT OF CERTIORARI  
TO THE UNITED STATES COURT OF APPEALS FOR THE  
NINTH CIRCUIT*

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**BRIEF OF SCHOLARS, FORMER JUDGES,  
AND FORMER GOVERNMENT OFFICIALS AS  
AMICI CURIAE SUPPORTING PETITIONER IN  
FAVOR OF REVERSAL**

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## INTEREST OF AMICI<sup>1</sup>

The *amici curiae* are scholars, former judges, and former government officials who are experts in trademark law, intellectual property law, or both. As such, they are concerned with ensuring that trademark law properly promotes and secures for owners of trademarks the valuable goodwill developed in their indicators of source. They have no stake in the parties or in the outcome of the case. The names and affiliations of the members of the *amici* are set forth in the Appendix below.

## SUMMARY OF ARGUMENT

This case presents the Court an opportunity to reaffirm the long-standing, traditional view that trademarks and trade dress are the property of their owners, and that those rights cannot be simply ignored by appropriators who claim to be making expressive use. The recognition of trademarks as property should be especially sharp for distinct, iconic trademarks and trade dress like those of Petitioner Jack Daniel's Properties, Inc., that reflect over a hundred years of investment and brand development, exemplifying the commercial goodwill that trademark law promotes and secures to innovative commercial enterprises. Unfortunately, the United States Court of Appeals for the Ninth Circuit ignored this

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<sup>1</sup> No counsel for any party authored this brief in whole or in part, and no person other than *amici* or their counsel made a monetary contribution to the preparation or submission of this brief. See Sup. Ct. R. 37.6.

fundamental policy when it summarily affirmed the district court's reluctant judgment that Respondent VIP Products LLC is not liable for its unauthorized production and sale of ordinary commercial products that trade on Jack Daniel's marks and trade dress.

The Ninth Circuit's decision presents a range of issues that the parties and presumably others will address. *Amici* here offer a more focused insight regarding the Ninth Circuit's failure to recognize a fundamental and long-recognized precept of trademark law: that, in addition to protecting consumers, the law secures the valuable goodwill generated by commercial enterprises like Jack Daniel's through their productive labors in creating, manufacturing, and marketing iconic, famous products like Jack Daniel's Tennessee Whiskey. See *Inwood Lab'ys, Inc. v. Ives Lab'ys, Inc.*, 456 U.S. 844, 854 n.14 (1982) ("By applying a trademark to goods produced by one other than the trademark's owner, the infringer deprives the owner of the goodwill which he spent energy, time, and money to obtain.") (citing S. Rep. No. 1333, 79th Cong., 2d Sess., 3 (1946)); accord *Partridge v. Menck*, 5 N.Y. Ch. Ann. 572, 574 (1847) (stating a trademark owner "is entitled to protection against any other person who attempts to pirate upon [its] good will"). Courts recognize these key, mutually reinforcing policies in trademark law—securing goodwill and protecting consumers—as two sides of the same coin. See *Groeneveld Transport Efficiency v. Lubecore Int'l, Inc.*, 730 F.3d 494, 512 (6th Cir. 2013) ("Trademark law's likelihood-of-confusion requirement . . . incentivizes manufacturers to create

robust brand recognition by consistently offering good products and good services, which results in more consumer satisfaction. That is the virtuous cycle envisioned by trademark law . . .”). These two policies necessarily work together to ensure that trademark law functions properly.

Here, in contrast, the Ninth Circuit disregarded the property-interest side of the equation; it considered only the public interest in free speech and failed to properly balance it against the equally important public interest in incentivizing and securing valuable goodwill created through the private commercial activities in the marketplace of productive enterprises. Since this policy framework is completely absent from the Ninth Circuit’s analysis, *amici* detail it and how it should have informed the evaluation of VIP’s unauthorized use of Jack Daniel’s trademarks and trade dress. *Amici* further explain how the proper balancing of interests between trademark owners and other commercial enterprises using their marks without authorization—regardless of what specific legal test is used to balance these interests—is essential in trademark law and intellectual property law more generally.



## ARGUMENT

### **I. Trademark law unites the interests of consumers and trademark owners by securing the valuable goodwill embodied in trademarks and trade dress.**

This case arose from VIP's unauthorized commercial use of Jack Daniel's famous trademarks and trade dress and its freeriding on Jack Daniel's valuable goodwill. The central importance of protecting the goodwill developed by a trademark owner, as embodied in a trademark, has long been axiomatic to American trademark law. See, e.g., *Hanover Star Milling Co. v. Metcalf*, 240 U.S. 403, 412 (1916), superseded on other grounds by statute, Lanham Act, Pub. L. No. 79-489, 60 Stat. 435. (*Hanover Star*) ("Courts afford redress or relief upon the ground that a party has a valuable interest in the good will of his trade or business, and in the trademark adopted to maintain and extend it."); *United Drug Co. v. Theodore Rectanus Co.*, 248 U.S. 90, 97 (1918) ("There is no such thing as property in a trade-mark except as a right appurtenant to an established business or trade in connection with which the mark is employed."); *Sugar Busters LLC v. Brennan*, 177 F.3d 258, 265 (5th Cir. 1999) ("A trademark is merely a symbol of goodwill and has no independent significance apart from the goodwill that it symbolizes."); *Kenner Parker Toys Inc. v. Rose Art Indust., Inc.*, 963 F.2d 350, 353–354 (Fed. Cir. 1992) ("Even in their earliest common law origins, trademarks functioned to benefit both producers who

invest their good will and capital in a trademark and consumers who rely on those symbols.” (footnote omitted); *Avery & Sons v. Meikle & Co.*, 81 Ky. 73, 86 (1883) (*Avery & Sons*) (“There is no abstract right in a trade-mark. It is property only when appropriated *and* used to indicate the origin or ownership of an article or goods.” (emphasis in original)).

Although the legal test for liability for trademark or trade dress infringement is framed in terms of whether the unauthorized use is “likely to cause confusion,” 15 U.S.C. §§ 1114(1), 1125(a)(1), trademark law *both* secures commercial goodwill *and* prevents consumer confusion. See *Qualitex Co. v. Jacobson Prods. Co., Inc.*, 514 U.S. 159, 164 (1995) (*Qualitex*) (“The law thereby encourages the production of quality products, and simultaneously discourages those who hope to sell inferior products by capitalizing on a consumer’s inability quickly to evaluate the quality of an item offered for sale.” (quotations, citations, and alteration omitted)).

These two functions work in tandem, as the interests of consumers and trademark owners are united by goodwill. A commercial enterprise seeks to earn and secure the habitual patronage of its customers, while these customers wish to obtain an authentic product from this commercial enterprise. These are the two necessary predicates of the valuable goodwill created by a commercial enterprise like Jack Daniel’s and its trademark and trade dress used in connection with the manufacturing, licensing, and sale of products in the marketplace. The trademark

owner seeks to prevent its goodwill from being wrongly diverted by confusion just as consumers wish not to be wrongly misled into making a purchase they might not have otherwise made—such as an unauthorized dog toy with all of the similar indicia of Jack Daniel’s goodwill. See, *e.g.*, *Qualitex*, 514 U.S. at 164 (“[T]he law helps assure a producer that it (and not an imitating competitor) will reap the financial, reputation-related rewards associated with a desirable product.”); 1 J. Thomas McCarthy, *McCarthy on Trademarks and Unfair Competition* § 2:2 (5th ed. 2022) (“Trademark law serves to protect consumers from deception and confusion over trademarks as well as to protect the plaintiff’s infringed trademark as property.”).

In this respect, courts secure trademarks as property interests derived from a commercial enterprise’s underlying property right in its goodwill. See *Power Test Petroleum Distribs., Inc. v. Calcu Gas, Inc.*, 754 F.2d 91, 97 (2d Cir. 1985) (“[A] trademark epitomizes the goodwill of a business.”). This Court has long recognized that “trademarks, and the right to their exclusive use, are, of course, to be classed among property rights; but only in the sense that a man’s right to the continued enjoyment of his trade reputation and the good will that flows from it . . . .” *Hanover Star*, 240 U.S. at 413 (citation omitted). As a New Jersey court succinctly stated the point a few years later: “[T]he owner of a trade-mark . . . cannot have a trade-mark save in connection with his own trade. To borrow the language of easements, there can be no trade-mark in gross, or except as appurtenant to

the business of the owner of the mark.” *Englander v. McKesson-Roeber-Kuebler Co.*, 185 A. 917, 919 (N.J. Ch. 1936).

Scholars have similarly recognized the core policy function of trademark law in securing the goodwill created by a commercial enterprise. In his preeminent 1860 treatise on trademark law, Francis Upton stated that “[a]n unlawful encroachment upon the *good will* of a business, is sometimes the essence of the wrong involved in the violation of a trade mark.” Francis H. Upton, *A Treatise on the Law of Trade Marks, With a Digest and Review of the English and American Authorities* 59 (1860) (emphasis in original). More recently, Professor Mark McKenna has found that “trademark rights were protected as property” by nineteenth-century courts, and these “[p]roperty rights arose out of particular uses of words or symbols in connection with a business, which was the ultimate object of protection.” Mark P. McKenna, *The Normative Foundations of Trademark Law*, 82 *Notre Dame L. Rev.* 1840, 1885 (2007); see also Adam Mossoff, *Trademark as a Property Right*, 107 *Ky. L.J.* 1, 5 (2018) (“In the nineteenth-century, courts first conceptualized a commercial enterprise’s reputational value as ‘goodwill,’ and they secured it in part via a use-right or what earlier common law courts identified as a usufruct—the trademark.”).

Regardless of what legal test this Court uses to analyze VIP’s unauthorized use of Jack Daniel’s trademarks and trade dress and freeriding on Jack Daniel’s valuable goodwill in the commercial sale of its own wares, the analysis must account for the public

interest derived from the protection of Jack Daniel's valuable goodwill and its famous brand identifiers. But the Ninth Circuit failed to account for this key policy function of trademark law in securing famous marks and valuable goodwill to commercial enterprises, and, on remand, the district court reluctantly concluded that Jack Daniel's could not prevail under the Ninth Circuit's new standard. This led the Ninth Circuit down the proverbial garden path in affirming the district court's conclusion following remand that the real-world ramifications of VIP's unauthorized use of Jack Daniel's trademarks and trade dress—including the harm to Jack Daniel's goodwill—are entirely irrelevant to the infringement analysis.

If this Court applies the proper test of trademark law that protects trademark owners' goodwill in their marks, then it should reverse the Ninth Circuit's decision excusing VIP's piracy of Jack Daniel's valuable goodwill through the unauthorized use of its famous trademarks and trade dress. VIP should not receive the benefit of a doctrine that secures free speech interests in "artistic" works, *Rogers v. Grimaldi*, 875 F.2d 994 (2d Cir. 1989) (*Rogers*), for one simple reason: It is selling ordinary commercial products using Jack Daniel's trademarks and trade dress, which the district court found substantially confused consumers about their connection to Jack Daniel's commercial enterprise and the products sold and licensed in connection with its trademarks and trade dress, including other dog products.

Simply put, VIP chose to adorn its own products with Jack Daniel's famous trademarks and trade dress precisely because of Jack Daniel's extremely valuable goodwill and its famous indicators of source. This is classic trademark piracy, and the Ninth Circuit's countenance of it fails to fulfill either of trademark law's basic purposes—it neither protects consumers from confusion nor protects Jack Daniel's investment of significant resources into its goodwill from misappropriation. Courts have long recognized that the “[s]ound policy” in trademark law secures “the fruits of labor to the laborer” from the “grasp of piracy.” *Avery & Sons*, 81 Ky. at 87.

**II. The Ninth Circuit's decision below undermines trademark protections' dual purposes by failing to balance trademark owners' property rights against asserted rights to expressive uses.**

The Ninth Circuit's decision below regarding how and when to apply the test set forth in *Rogers v. Grimaldi*, 875 F.2d 994 (2d Cir. 1989), and how and when to apply the “noncommercial use” exception of Section 43(c)(3)(C) of the Lanham Act, 15 U.S.C. § 1125(c)(3)(C), undermines trademark law's dual purpose of protecting the trademark owner's property rights in its trademark attendant to goodwill and protecting consumers against confusion. In setting an expansive line that makes it all too easy for a junior trademark user seeking to trade on the goodwill of a famous mark to come under the shield of the *Rogers* test or qualify as a “noncommercial use,” the Ninth

Circuit establishes a rubric by which almost any assertion of First Amendment expression immediately trumps a trademark owner's property rights—no matter the presence of demonstrable confusion or dilution and no matter the harm to the property rights and immense investment in a famous, iconic mark. This is wrong.

Trademark law has long utilized tests that recognized mark owners' valuable property rights and gave those rights due consideration and protection, balanced against the First Amendment interests implicated by appropriation for expressive purposes.

For example, in *San Francisco Arts & Athletics, Inc. v. U.S. Olympic Committee*, 483 U.S. 522 (1987), the petitioner sought to use the name "Gay Olympic Games" for an athletic event to "convey a political statement about the status of homosexuals in society." *Id.* at 525, 535. The petitioner argued that a federal statute's grant of rights to the United States Olympic Committee to "prohibit certain commercial and promotional uses of the word 'Olympic'" suppressed political speech in violation of the First Amendment. *Id.* at 526, 535. Analogizing to traditional trademarks, this Court weighed the petitioner's speech interests against the Olympic Committee's legitimate property rights in the term "Olympic," acknowledging:

[W]hen a word acquires value "as the result of organization and the expenditure of labor, skill, and money" by an entity, that entity constitutionally may obtain a limited property right in the word.

*Id.* at 532 (quoting *International News Serv. v. Associated Press*, 248 U.S. 215, 239 (1918)). This Court went on to explain the justifications underlying such a property right:

One reason for Congress to grant the USOC exclusive control of the word “Olympic,” *as with other trademarks*, is to ensure that the USOC receives the benefit of its own efforts so that the USOC will have an incentive to continue to produce a “quality product,” that, in turn, benefits the public.

*Id.* at 537 (citing 1 J. Thomas McCarthy, *McCarthy on Trademarks and Unfair Competition* § 2:1, pp. 44–47 (2d ed. 1984)) (emphasis added).

In assessing the petitioner’s speech rights, the Court observed that the petitioner was not “prohibited” from “conveying its message” and rather only restricted in “the manner in which [it] may convey its message.” *Id.* at 536. The Court found that this did not violate the First Amendment, concluding:

The SFAA’s expressive use of the word [“Olympic”] cannot be divorced from the value the USOC’s efforts have given to it. The mere fact that the SFAA claims an expressive, as opposed to a purely commercial, purpose does not give it a First Amendment right to “appropriat[e] to itself the harvest of those who have sown.” [Citation omitted.] The USOC’s right to prohibit use of the word



“Olympic” in the promotion of athletic events is at the core of its legitimate property right.

*Id.* at 541 (quoting *International News Serv.*, 248 U.S. at 239–240 (brackets in original)).

Consistently, when it established the *Rogers* test at issue, the Second Circuit *balanced* the interests underlying trademarks and the interests underlying free expression:

We believe that in general the Act should be construed to apply to artistic works only where the public interest in avoiding consumer confusion outweighs the public interest in free expression.

*Rogers*, 875 F.2d at 999. And when the Ninth Circuit adopted the *Rogers* test, it also focused on the balance of competing interests, expressly acknowledging the trademark owner’s property rights. *Mattel, Inc. v. MCA Records, Inc.*, 296 F.3d 894, 900 (9th Cir. 2002) (“Our likelihood-of-confusion test . . . generally strikes a comfortable balance between the trademark owner’s property rights and the public’s expressive interests.”); *id.* at 901 (quoting same passage above from *Rogers*).

Similarly, in other areas where First Amendment expression comes into tension with property rights and rights akin to property rights, the prevailing assessments consider and weigh the associated property rights.

For example, in the copyright context, the fair use doctrine balances the rights of the copyright owner against competing interests in free speech. See, e.g., Melville B. Nimmer et al., *Nimmer on Copyright* § 19E.05 (2022) (“several courts found that the defense provides a satisfactory accommodation of free speech concerns, or to borrow Nimmer’s terms, that fair use served to set the definitional balance between copyright law and the First Amendment.”). The fair use doctrine assesses four factors: (1) the purpose and character of the use; (2) the nature of the copyrighted work; (3) the amount or substantiality of the portion used; and (4) the effect of the use on the potential market for or value of the copyrighted work. 17 U.S.C. § 107. The third and fourth factors bear directly on the potential effect on the copyright owner’s property rights.

And in the area of publicity rights, this Court weighed the property right in state-law-established rights to publicity against expressive rights under the First Amendment. *Zacchini v. Scripps-Howard Broadcasting Co.*, 433 U.S. 562, 576–578 (1977). This Court recognized the “desire to compensate the performer” and provide “an economic incentive” to make “investment” as justifications for establishing rights to publicity and found this did not run afoul of the First Amendment. See *id.* at 576; see also J. Thomas McCarthy et al., *The Rights of Publicity and Privacy* §§ 8:22–8:23 (2d ed. 2022) (discussing how courts balance rights of publicity against First Amendment expressive rights).

The Ninth Circuit’s decision below, however, abandons this longstanding balance in trademark law specifically and intellectual property law generally. It completely ignores the trademark owner’s property interests in the face of an assertion that the alleged infringement was expressive.

This is not hyperbole. The district court in this case made specific findings regarding the nature of the alleged expression and the effect on the trademark owner’s property rights. It concluded that VIP had intentionally capitalized on Jack Daniel’s popularity and goodwill, that Jack Daniel’s trademarks and trade dress would be tarnished by VIP’s use, that nearly a third of potential customers were likely to be confused into believing that VIP’s toy is produced or sold by Jack Daniel’s, that VIP’s toy is sold to Jack Daniel’s customers at the same stores that sell Jack Daniel’s products, and that VIP’s own marketing materials even featured Jack Daniel’s whiskey. Pet.App.60a-71a.

In its earlier published decision below, the Ninth Circuit set these findings aside as irrelevant in the face of VIP’s self-serving assertion that its dog toy is an “artistic expression” triggering the *Rogers* test. Pet.App.30a-32a. This broad framing of “artistic expression” as a safe harbor from liability in the unauthorized use of trademarks and trade dress lacks any limiting principle. It will immunize almost any purported claim of “humor” in relation to the sale of an ordinary commercial product—no matter the established intent to capitalize on and profit from a famous mark’s goodwill, no matter the intent to

compete on the same products in the same stores, no matter the presence of confusion or harm—to escape trademark liability unchecked. See Pet.App.18a (trial court noting that it is “nearly impossible for any trademark holder to prevail under the *Rogers* test”).

*Amici* acknowledge that a number of expressive and noncommercial uses of trademarks are permitted by the Lanham Act and the First Amendment. But courts must balance those asserted interests against the property rights of trademark holders and not uncritically accept any assertion of First Amendment protection as a free pass to infringe or dilute valuable trademarks or trade dress, as the Ninth Circuit did in this case.

## CONCLUSION

In its decision below, the Ninth Circuit establishes a system by which the *Rogers* test and the “noncommercial use” exception are so broadly applicable that most any claim of First Amendment expression will immediately trample any asserted trademark interest. By ignoring the valuable goodwill created and maintained in the Jack Daniel’s trademarks and trade dress, the court undermined both the interests of trademark owners nationwide and the business incentives that trademark law has developed to protect. This Court should rebalance that equation to ensure that the property rights of trademark owners are balanced against—rather than reflexively eliminated by—asserted rights to free expression.

Respectfully submitted,

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## **APPENDIX**

App. 1

**APPENDIX OF AMICI**

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\* Institutions of all signatories are for identification purposes only. The undersigned do not purport to speak for their institutions, and the views of *amici* should not be attributed to these institutions.

App. 2

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App. 3

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