

No. 22-148

IN THE
Supreme Court of the United States

JACK DANIEL'S PROPERTIES, INC.,

Petitioner,

v.

VIP PRODUCTS LLC,

Respondent.

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

**BRIEF OF *AMICI CURIAE* OF LEVI
STRAUSS & CO. AND PATAGONIA, INC.
IN SUPPORT OF PETITIONER**

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Patagonia, Inc. (“Patagonia”) and Levi Strauss & Co. (“Levi Strauss”) (“Amici”) submit this brief in support of Jack Daniel’s Properties, Inc. (“JDPI” or “Jack Daniel’s”).¹

AMICI’S INTERESTS IN THE PETITION FOR CERTIORARI

Amici own famous brands and use them to communicate specific values and public commentary about those values to consumers. Confusing parodies – as VIP Products’ purported parody was held to be – create profound first amendment concerns for Amici in addition to harming their commercial interests. Uncertainty about the source of brand related expressions inevitably will erode public confidence in and effectiveness of brand owners’ expression to consumers. The *VIP Products* decision (expanded yet further by the Ninth Circuit’s intervening application of its rationale) ignores Congress’s protection against confusion and dilution in favor of every “parodist” that can claim “any” expressive dimension to their appropriation of others’ brands. The public has a right to know the source of expression communicated through brands, and the Lanham Act reserves the source identification function of brands used in commerce or expression exclusively to the owners that built them.

Amici use their brands to identify their commercial businesses, but also to convey values that traverse a range of public interests and issues:

1. Amici and their counsel are the sole authors of this brief, which is submitted within seven (7) days of JDPI’s brief on the merits. S. Ct. R. 37.3(a). No party or counsel for a party, and no person other than amici and their counsel, made a monetary contribution intended to fund the preparation or submission of this brief. S. Ct. R. 37.6.

Patagonia, Inc.: Patagonia has been in business for fifty years and its famous Patagonia® brand is revered by consumers as much for its culture as its products. Patagonia, whose owners recently gave away their full stake in the company to fight climate change, is “in business to save our home planet.” It uses its brand and logo prominently in its environmental advocacy, including in charitable foundations, documentary films, public education on environmental issues, books, and other public commentary.



Levi Strauss & Co.: Levi Strauss is the renowned apparel company whose founders invented the blue jean. From

its gold rush beginnings, Levi Strauss became one of the preeminent casual apparel companies of our time. Levi Strauss owns the Levi's® brand that originally was worn by miners and later became the uniform of choice for multiple generations. From photos showing a sea of LEVI'S jeans at the Woodstock music festival to exhibits at the Museum of Modern Art and the Smithsonian Institution, the LEVI'S brand is celebrated as a “staple of American culture, symbolizing youth, freedom, and effortless cool.”

Levi Strauss has devoted itself to issues of diversity, equality and responsible sourcing of its products. It communicates these values in its advertising, product graphics, and public and industry outreach:





False or the wrong association with a famous brand, however, can cause enormous damage. The Ninth Circuit's blanket approval of confusing and diluting expressions, accordingly, creates substantial conflict and uncertainty for companies like Amici. The ease with which so-called parodies can be produced (e.g., in print on demand shops and below-standard production facilities), marketed, and distributed through online platforms has flooded the market with products that compete directly with products put out – and speech authored – by trademark owners. The Ninth Circuit's extension of immunity to such uses, and tens of thousands like them, poses a substantial threat to the viability of brands the public has come to trust.

The barrier to protection from trademark infringement and dilution taking root in the Ninth Circuit in the name of free speech, in fact, portends an enormous burden on the free speech rights of trademark owners. The Ninth Circuit has provided no justification for ignoring the public's identification of trademark owners exclusively as the

source of expression made under their brands. Patagonia and Levi Strauss are supporting JDPI's position because it is critical to their reputations and means of communicating with the public that the public knows who is speaking when their brands are used. Amici and many other brand owners make great contributions to public discourse but this value requires that the public knows for what they stand (and just as importantly, for what they do not). The Ninth Circuit's decision, and later courts' inability to corral its logic, hands control over Amici's reputations to their competitors.

SUMMARY OF ARGUMENT

The Ninth Circuit's *VIP Products* decision creates a mammoth loophole in the Lanham Act's protections of brand owners and the public. After the Ninth Circuit's decision, a parodist's use of a trademark that is likely to cause consumer confusion about the source of the product or speech is now "irrelevant," unless the trademark owner can satisfy the *Rogers* test by proving that the mimicked logo, mark, or brand was not used for *any* expressive purpose, or that the parodist *explicitly* misrepresented the source. The decision shows equal indifference to trademark owners' rights to use their marks in expressions and the public's right to know the source of such expression. The Ninth Circuit's favoritism for the constitutional interests of the parodist, which the court overstates without adequate analysis, cannot be reconciled with the First Amendment or this Court's prior holdings regarding permissible source identification regulations adopted by Congress.

By bypassing rather than prioritizing source confusion and brand reputation and focusing instead on the bare presence or not of “artistic expression,” the Ninth Circuit’s decision ignores the countervailing constitutional interests of trademark owners and the public. It explicitly exalts VIP Products’ confusing commercial expression over JDPI’s ability to speak with clarity to the public. Even if *Rogers* has any merit in the limited context of movie or book titles, it has no place protecting confusing exploitation of brands on commercial products. Trademark owners have constitutional rights to speak through their brands, and the public has a constitutional right to know the source of such expression. The rationale applied by the Ninth Circuit failed to consider these rights.

The dog toys involved in this case – and the poop humor used to taint JDPI’s hard earned goodwill – are the tip of the iceberg. As evidenced by the continued and unrestrained expansion of the Ninth Circuit’s permissive stance toward infringement and dilution, garden variety trademark violators now routinely label their products or even their brands as “parody” or “expression” and interpose a “first amendment” defense to otherwise straightforward trademark claims. Famous brands, built over decades or centuries, essentially have been relegated to the public domain in the Ninth Circuit, even for use as a competitor’s source identifier or degrading associations, provided the misappropriation crosses an elusive “expressive” threshold that is “more than zero.”

As understood for decades, the Lanham Act strikes a balance that protects trademark owners’ and the public’s rights by regulating confusing information about the source of expression involving trademarks and brands.

The Act, including for expressive uses of a famous brand that tarnish a brand's reputation, appropriately carves out the limited circumstances where fair use and parodies require protection. The shell that remains of the Lanham Act after the Ninth Circuit's "expression" doctrine is applied, however, exposes brand owners and the public to unrestrained confusion and degradation of brands the public relies on.

Neither prong of the *Rogers* test is grounded in the text of the Lanham Act and neither affords any effective guidance about what, if any, use of others' brands remains subject to regulation. As to the "artistic relevance" prong, only a singularly unimaginative seller could fail to raise issues about whether there is "any" relationship between its expressions and the famous brand it is exploiting. The Ninth Circuit's recent expansion of its *VIP Products* holding to mere use of another's "expressive" mark only confirms how hollow this protection will be. As to the "explicitly misleading" prong, unless they are counterfeiting a mark, most "parodists" can successfully trade on the goodwill of famous marks like those built by Amici without "explicitly" misrepresenting to the public that the trademark owner authored their expression.

The Ninth Circuit has developed its doctrine without ever addressing the line between commercial and noncommercial speech. The Ninth Circuit interpreted the antidilution provisions to immunize "expression," such that any use of a mark is deemed "non-commercial" if it contains any expression. This interpretation conflicts directly with Congress's recognition that "parodies" may reflect mere commercial uses that should not receive immunity (and Congress's unwillingness to extend any

immunity to infringement claims). The Ninth Circuit magnified this error by extending this reasoning to the constitutional issue, ruling that *any* expressive content in the use of a brand is “noncommercial” and accorded full constitutional protection. This holding conflicts with this Court’s prior decisions that identify speech as “commercial” – and subject to regulation – even though it may contain noncommercial (or “expressive”) elements. Had the Ninth Circuit properly interpreted the antidilution provisions, or distinguished between noncommercial and commercial speech, it would have affirmed the district court’s infringement and dilution judgments.

Time and again – with restraint and focus on ensuring trademark owners’ and consumers’ rights are respected – courts have developed appropriate standards under the Lanham Act for privileged competition and free discourse. The tropes VIP Products and its Amici have invoked, however, fail to isolate any proper standard for differentiating harmless jokes from confusing misappropriations. No constitutional principle arises from a desire that JDPI find a better sense of humor or a conviction that artistic works short of the Mona Lisa are worthy of protection. The proper approach to the constitutional issues would require courts to fashion standards that ensure only non-confusing, non-tarnishing, non-commercial parodies are immunized by any constitutional concerns. Confusion about the source of speech is not “irrelevant” and the Ninth Circuit’s intuition about the inviolate artistic value of parodies does not support a constitutional rule that threatens to nullify the Lanham Act in many important contexts.

ARGUMENT

I. IMPORTANT FINDINGS AND FACTS RELEVANT TO THE COURT'S DECISION

A. The District Court's Findings of Substantial Likely Confusion and Dilution Provide Important Context for the Ninth Circuit's Decision

Two sets of findings inform Amici's concern about how the Ninth Circuit applied *Rogers*. The district court found that VIP Products' dog toy presented substantial likely source confusion with JDPI. *VIP Prods. LLC v. Jack Daniel's Prods., Inc.*, 291 F. Supp. 3d 891, 911 (D. Ariz. 2018) *rev'd in part, vacated in part, VIP Prods. LLC v. Jack Daniel's Prods., Inc.*, 953 F.3d 1170 (9th Cir. 2020) ("VIP1"). The court found that almost every applicable confusion factor tilted in favor of JDPI. *Id.* at 908. The district court relied on a likelihood of confusion survey showing 29% net actual confusion about the source of the dog toys. *Id.* at 907-08. It also found that JDPI was selling competitive and related products. *Id.* at 909. It found VIP Products' trade dress and trademarks highly similar to JDPI's strong and famous trade dress and trademarks. VIP Products admitted it used its facsimile of JDPI's mark as a source identifier and the district court concluded that VIP Products had done so "to capitalize on Jack Daniel's popularity and good will for its own gain..." *Id.* at 908. In short, the district court made all the findings necessary to characterize VIP Products' dog toy as a competing seller's deliberate knock-off of a famous brand.

The district court also ruled VIP Products had diluted JDPI's famous trade dress. The court held that consumers' positive associations with the JACK DANIELS brand would be "tarnished" if the brand were "portrayed in an unwholesome or unsavory context likely to evoke unflattering thoughts about the owner's product." *Id.* at 900-903. This test was met, the district court held, by VIP Products' integration of "defecation, feces, and poo" with JDPI's trade dress. *Id.* at 903.

These findings and holdings – never questioned by the Ninth Circuit's decision – are important because they flow directly from the text of the Lanham Act. The statutory text prohibiting infringements is triggered by "use in commerce" if such use causes "likely" source confusion. 15 U.S.C. § 1114. Tarnishment claims are triggered where such use will harm a trademark's reputation or diminish its significance. 15 U.S.C. § 1125(c). Likely confusion or tarnishment is hardly possible unless "expression" is "relevant to the underlying [mark]." *VIP Prods. LLC v. Jack Daniel's Props., Inc.*, 953 F.3d 1170, 1174 (9th Cir. 2020) ("*VIP Prods.*"). Immunizing VIP Products' dog toy in the face of the district court's findings shows how far the Ninth Circuit's decision strays from the purpose of the Lanham Act. If commonplace misappropriations like this are safeguarded, the court has created a yawning gap in trademark protection as it has been understood for the decades during which Amici built their brands.

B. Dangerous Expansion of *Rogers* led to *VIP Products*, and Continues Unchecked

Since *VIP Products*, the practice of ignoring confusion and dilution – or dismissing cases before evidence even

can be developed – has expanded yet further within the Ninth Circuit and its district courts. Courts rely on *VIP Products* or its reasoning, no matter how commercial the defendant’s use of another’s mark, and in some cases with respect to ordinary trademark copying that fails to include any “commentary” or “parody” about the brand owner or trademark at all.

In *Punchbowl, Inc. v. AJ Press LLC*, the court applied *Rogers* to reject trademark infringement claims asserted by Punchbowl, a web-based greeting card company, against an online media company that had adopted an identical Punchbowl trademark for its political podcasts and blogs. 549 F. Supp. 3d 1061, 1072 (C.D. Cal. 2021), *aff’d*, 52 F.4th 1091 (9th Cir. 2022). No “parody” was involved; just identical marks. The district court entered summary judgment, in the face of evidence that the defendant’s use was misleading and had caused actual confusion among customers. *Id.* at 1069. The court also rejected Punchbowl’s Rule 56(d) request for discovery about the defendant’s intent and the extent of actual confusion. *Id.* at 1072. Because the court had determined mere use of the trademark was “expressive,” this discovery into standard confusion evidence was off limits because *Rogers* dictated that likely confusion was irrelevant. *Id.* The Ninth Circuit affirmed on similar logic. *Punchbowl, Inc. v. AJ Press LLC*, 52 F.4th 1091 (9th Cir. 2022). The logic of *VIP Products* and absence of any meaningful limits to its application compelled the outcome in *Punchbowl*. But if mere trademark use as a source identifier is “expression,” it is difficult to fathom how famous brands (or any brands) have meaningful recourse to the Lanham Act.

Other decisions involving competing commercial products have produced the same result even at the pleading stage. In *Activision Publ'g, Inc. v. Warzone.com, LLC*, Case No. 2:21-cv-03073-FLA (JCx), 2022 WL 4117035, at *5 (C.D. Cal. Aug. 15, 2022), video game competitors adopted “Warzone” in the name of their games. The court dismissed infringement claims without leave to amend. Warzone.com had sold its online military strategy game under the Warzone name since 2017. *Id.* at *1. Activision adopted the Warzone mark as part of the latest installment in its “Call of Duty” franchise, branded “Call of Duty: Warzone,” and applied to register WARZONE and CALL OF DUTY WARZONE as its own trademarks. *Id.* The court applied *Rogers* and then held use of identical mark on overlapping goods failed to plausibly suggest that Activision’s mark is “explicitly misleading.” *Id.* at *5.

Infringement claims also were dismissed without discovery in *Saber Interactive Inc. v. Oovee, LTD.*, Case No. 2:21-CV-01201-JHC, 2022 WL 5247190 (W.D. Wash. Oct. 6, 2022). Saber, doing the right thing, exclusively had licensed the trademark and trade dress rights in Kirovets’ K-700 tractor for use in driving simulator games. Oovee produced a directly competing game that permitted players to drive a realistic K-700 tractor, rendering Saber’s bargained-for exclusivity meaningless. *Id.* at *2. Applying *Rogers*, the court dismissed the claims on the pleadings. The court explained that “[e]ven if the public believes that vehicles in video games are typically licensed (potentially generating consumer confusion), Saber cannot satisfy this prong without pointing to an explicitly misleading statement.” *Id.* at *4 (citing *Brown v. Elec. Arts, Inc.*, 724 F.3d 1235, 1247 (9th Cir. 2013) (noting

that this prong of the *Rogers* test is not satisfied even if “a majority of the public believes that identifying marks cannot be included in products without permission”).

This extension of *Rogers* beyond parodies to mere trademark use underscores the dangers posed by the Ninth Circuit’s expansion of *Rogers*. *Rogers*, a questionable precedent in its own right, originally was conceived as a limited exception to standard confusion analysis but now has swallowed the Lanham Act whole. Unless this Court intercepts the continued expansion of this misguided rationale, Amici’s treasured brands are put at risk, evident from just a few examples of the kind of expressions third parties make involving their marks:





II. TRADEMARK OWNERS HAVE FIRST AMENDMENT RIGHTS TO USE THEIR MARKS FOR EXPRESSIVE PURPOSES

This Court has confirmed that the *trademark itself* – and the adoption and use of that mark – is a form of expression that warrants protection. In *Matal v. Tam*, 137 S. Ct. 1744, 1760 (2017), this Court concluded that the Lanham Act’s provision prohibiting the registration of “disparaging” trademarks violates the First Amendment. The government therefore cannot restrict federal trademark applications based on the viewpoint expressed in proposed marks. Protection of these rights when used by a trademark owner in its expression, however, does not safeguard misleading or confusing speech.

In treating trademarks as expressive speech, the Court recognized that a mark may serve a range of expressive purposes for its owner, including political, social, critical, and creative ones. The Court stated: “[T]rademarks often have an expressive content. Companies spend huge amounts to create and publicize trademarks that convey a message. It is true that the necessary brevity of trademarks limits what they can say.

But powerful messages can sometimes be conveyed in just a few words.” *Matal*, 137 S. Ct. at 1760. “[T]rademarks do not simply identify the source of a product or service but go on to say something more, either about the product or service or some broader issue.” *Id.* at 1764; *see also Iancu v. Brunetti*, 139 S. Ct. 2294, 2306 (2019) (Lanham Act’s prohibition on registration of “scandalous” marks violates First Amendment).

The Ninth Circuit has turned this principle on its head – in favor of the infringer. Under its test, it applies more protection to misleading expression arising from an infringer’s use of a mark than it does to a trademark owner’s expression. The recognition in *Matal* and *Iancu* that trademarks contain expressive content and convey protected expression, when applied in favor of the infringer, produces the outcome in the *Punchbowl* case that permits naked misappropriation of a mark unless its use is explicitly misleading. For practical purposes under this standard, all trademark uses (whether parodies or not) – however confusing – are insulated from challenge. But misleading or confusing expression arising from use of another’s mark raises no constitutional concerns.

This Court was clear-eyed about the distinction between constitutionally protected expressive elements in trademarks and limits on appropriation of the source identifying function of trademarks belonging to others. After observing that trademarks “have an expressive component in addition to a commercial one” Justice Breyer explained in his concurring *Iancu* opinion:

[T]rademark law, is a highly regulated one with a specialized mission: to “hel[p] consumers

identify goods and services that they wish to purchase, as well as those they want to avoid.” As I have noted, that mission, by its very nature, requires the Government to impose limitations on speech. Trademark law therefore forbids the registration of certain types of words—for example, those that will likely “cause confusion,” or those that are “merely descriptive.” 15 U.S.C. §§ 1052(d), (e). For that reason, an applicant who seeks to register a mark should not expect complete freedom to say what she wishes but should instead expect linguistic regulation.

139 S. Ct. at 2306 (internal citations omitted); *see also Matal*, 137 S. Ct. at 1768 (Kennedy, J., concurring) (“It is ‘well settled’ that ‘to the extent a trademark is confusing or misleading the law can protect consumers and trademark owners.’”).

The Ninth Circuit’s application of *Rogers* to confusing expressions of a logo or brand ignores trademark owners’ right to speak freely through their brands (and to have their brands identify them as the authors of expressive speech). The *VIP Products* rule requires that a brand owner’s First Amendment rights play second fiddle to the “parodist’s” rights or, in many cases, are not to be considered at all. The decision forsakes the Lanham Act’s fundamental mission to enable trademarks to identify the trademark owner as the source of expression and dispenses entirely with legitimate “linguistic regulation” that protects prior – or in this case famous – trademarks.

III. THE PUBLIC HAS A RIGHT TO KNOW THE SOURCE OF SPEECH

The First Amendment also protects the recipient's right to hear expressions from famous brand owners, including brands like Amici's that became famous in some part as much for their expression as their products. While the First Amendment makes no mention of a right "to listen," "to hear," or "to know," this Court has determined that First Amendment protection "is to the communication, to its source and to its recipients both." *Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748, 756 (1976). Where one enjoys a right to speak, others hold a "reciprocal right to receive" that speech, which "may be asserted" in court. *Id.* at 757.

A long line of cases recognizes this right to hear. In *Lamont v. Postmaster General*, 381 U.S. 301 (1965), this Court confirmed the First Amendment rights of citizens to receive political publications sent from abroad. In *Kleindienst v. Mandel*, 408 U.S. 753, 762-763 (1972), this Court acknowledged that the First Amendment includes a right to "receive information and ideas," and that freedom of speech "necessarily protects the right to receive" (internal citations omitted). And in *Procunier v. Martinez*, 416 U.S. 396 (1974), where censorship of prison inmates' mail was under examination, this Court ruled it was unnecessary to examine the rights of the inmates themselves, because censorship of their letters infringed the rights of non-inmate recipients of the correspondence. Numerous other decisions are to the same effect. *See, e.g., Red Lion Broad. Co. v. FCC*, 395 U.S. 367, 390 (1969) ("It is the [First Amendment] right of the viewers and listeners, not the right of the broadcasters, which

is paramount”); *Stanley v. Georgia*, 394 U.S. 557, 564 (1969) (“It is now well established that the Constitution protects the right to receive information and ideas. This right to receive information and ideas, regardless of their social worth, is fundamental to our free society.”); *Thomas v. Collins*, 323 U.S. 516, 534 (1945); *Martin v. City of Struthers*, 319 U.S. 141, 143 (1943) (freedom of speech “embraces the right to distribute literature and necessarily protects the right to receive it” (internal citation omitted)).

Fundamental to the recipient’s right to hear is the right to know the speaker’s identity. The Ninth Circuit’s decision, however, disregards the consumer’s right to be free from confusion about the source of products – or the messages or expressive content they bear. Source confusion, the central focus of the Lanham Act, inherently interferes with consumers’ rights to know the source of expression, including the trademark owner’s speech and even the parodist’s speech. The purported parodist’s joke is compromised if the audience likely believes it was the brand owner who authored it.

These are not hypothetical concerns. This Court has stated that the consumer’s right to hear – and specifically, the right to know who is producing commercial products – is fundamental to the functioning of an effective democracy. In the context of commercial advertising, the First Amendment protects the right to hear due to the need for public “information as to who is producing and selling what product, for what reason, and at what price” to allow for informed participation in and regulation of the economy. *Va. State Bd. of Pharmacy*, 425 U.S. at 765. The allocation of resources in our economy, the

Court reasoned, will be made largely through private economic decisions. *Id.* “It is a matter of public interest that those decisions, in the aggregate, be intelligent and well informed.” *Id.*

Similarly, in the context of political speech and campaign advertising, this Court has recognized the importance of ensuring that “voters are fully informed about the person or group who is speaking.” *Citizens United v. Fed. Election Comm’n*, 558 U.S. 310, 326 (2010). “Identification of the source of advertising may be required as a means of disclosure, so that the people will be able to evaluate the arguments to which they are being subjected.” In validating these regulations against a constitutional challenge, the Court relied on “*the competing First Amendment interests of individual citizens seeking to make informed choices in the political marketplace.*” *McConnell v. Fed. Election Comm’n*, 540 U.S. 93, 197 (2003) (emphasis added)²; *see also First Nat’l Bank of Boston v. Bellotti*, 435 U.S. 765, 792, n. 32 (1978) (“Identification of the source of advertising may be required as a means of disclosure, so that the people will be able to evaluate the arguments to which they are being subjected.”) Forcing the public to hear parodic (or cultural, critical, or political) expression with no safeguard against confusing source information compromises its ability to meaningfully evaluate the messages it receives.

2. Many of the campaign finance regulations involved in *McConnell* and *Citizens United* divided the Court. The Court was nearly unanimous, however, in concluding that the disclosure requirements were constitutional.

The Ninth Circuit, by elevating the parodist's interests, even in confusing expression, over the trademark owner's own expression also has compromised the public's right to reliable source identification. It has offered no rationale for why a joke, humorous message, or other confusing expression by an interloper to a brand's goodwill and recognition is more important than the brand owner's use of its mark to convey its own values or produce expressive works under its brand. Ultimately, the Ninth Circuit's preference for the parodist's confusing expression harms the public and undoes the very premise of an equal exchange of information and ideas that the Ninth Circuit purports to uphold.

IV. THE NINTH CIRCUIT'S TEST DOES NOT CONSIDER THE TRADEMARK OWNER'S OR THE PUBLIC'S INTERESTS IN FREE SPEECH

The trademark owner's free speech interest and the public's First Amendment rights to know the source of speech are vindicated primarily through the likelihood of confusion prohibitions in the Lanham Act. *Rogers'* first prong requires a finding that the expression is "not artistically relevant to the underlying work." *VIP Prods.*, 953 F.3d at 1174. The requirement is nearly impossible to satisfy. *Punchbowl*, 52 F.4th at 1100 ("The first part of this test sets a very low threshold: 'the level of [artistic] relevance merely must be above zero.'"). The Ninth Circuit means it when it says that *any* expressive impulse will do. "[J]uxtaposition" of an "irreverent" representation of the mark in place of the "idealistic" representation the trademark owner is sufficient. *VIP Prods.*, 953 F.3d 1170, 1174.

This requirement has no substance and affords no consideration to the possibility the trademark owner itself may make irreverent, critical or political commentary through its mark. It ignores that the “parodist” may be using the parody as its own source indicator (a factor Congress thought was relevant when it afforded limited protection of parodies from the antidilution provisions of the Lanham Act) or, as held in the *Punchbowl* decision, solely as a source indicator with no “parody” at all. The decision ignores the prospect that a parodist’s “expression” may be more commercial lure than “artistic” choice. The impact such circumstances may have on likely consumer confusion is “irrelevant” in the Ninth Circuit; confusion is discarded in favor of a standard of “artistic relevance” that has no textual support.

The second *Rogers* prong focuses on whether expressive content is “explicitly” misleading about source. Again, this limitation does not arise from any “construction” of the statutory language. Certainly, an explicit misrepresentation may cause likely confusion, but the long-established tests for likely confusion under the statute are oriented to consumer perceptions of source, not on whether the author of “expression” deliberately lied about source. An express misrepresentation is not a condition for likely confusion under any reasonable construction of the text. “Counterfeits” and “willful” infringements, to which such “explicit” misrepresentations might be relevant, receive different treatment (15 U.S.C. §§ 1117(a), (c)), but these are not requirements for infringement under the plain text of the statute.

Insulating infringers from the source identification provisions of the Act effectively nullifies trademark

owners' interest in their own expressive speech and the public's interest in knowing who is speaking (aside from explicit misrepresentations). The *VIP Products* decision fails to grapple with these equivalent (at least) First Amendment rights to express and hear speech without misleading source confusion, or the prospect that Congress was well within its purview when it balanced these relevant First Amendment stakes. The Ninth Circuit's test nakedly prefers the "parodist's" speech, provides it with unbridled First Amendment protection, and nullifies the Lanham Act protections of the trademark owner and the public.

The Ninth Circuit's failure to recognize that source confusion implicates the trademark owner's and public's constitutional rights also ignores this Court's precedents. In *S.F. Arts & Athletics, Inc. v. U.S. Olympic Comm.*, the Court confirmed the constitutionality of Congress's delegation to the United States Olympic Committee of the exclusive right to use the word "Olympic." 483 U.S. 522 (1987). Notably, as it relates to this dispute, the Court upheld the statute even though – as is true under the Lanham Act's antidilution provisions – it is not necessary under the statute to show the contested use was likely to cause confusion and an unauthorized user does not have the defenses and limited immunities available under the Lanham Act. *Id.* at 532; *see also* 534–35 ("Congress' decision to grant the USOC a limited property right in the word 'Olympic' falls within the scope of trademark law protections, and thus certainly within constitutional bounds."). This decision, like the campaign finance decisions upholding disclosure requirements, are impossible to square with the Ninth Circuit's conclusion that Congress may not stop the source confusion caused by VIP Products' misleading expressions. The public interest

is the same: preventing speakers from “hid[ing] behind dubious and misleading names....” *McConnell*, 540 U.S. at 196-97; *Citizens United*, 558 U.S. at 367.

The Court’s conclusion that Congress legitimately may regulate even the most important speech against efforts to disguise or hide its source speaks directly to the Ninth Circuit’s overreach in immunizing commercial, if expressive, use of marks that confuse consumers. The Ninth Circuit should have acknowledged the competing and primary constitutional rights of trademark owners and the public, and “rigidly adhered” to the tenet “never to formulate a rule of constitutional law broader than is required by the precise facts to which it is to be applied.” See *United States v. Raines*, 362 U.S. 17, 21 (1960) (internal citation omitted).³

V. THE NINTH CIRCUIT FAILED TO CONSIDER CONGRESS’S RECOGNITION OF COMMERCIAL PARODIES OR THIS COURT’S PRECEDENTS REGARDING COMMERCIAL SPEECH, INFECTING ITS DECISION ON ALL ISSUES

Congress unequivocally identified parodies like VIP’s “Bad Spaniels” mark as, at most, “commercial” uses of a mark when it adopted the Trademark Dilution Revision

3. Courts “may impose a limiting construction on a statute only if it is readily susceptible to such a construction.” They may not “rewrite a law to conform it to constitutional requirements, for doing so would constitute a serious invasion of the legislative domain.” *United States v. Stevens*, 559 U.S. 460, 481 (2010) (internal citations omitted); see also *Seminole Tribe of Fla. v. Fla.*, 517 U.S. 44, n.9 (1996) (“The absence of a textual warrant for imposing such a broad limitation on the legislative branch counsels against this Court extratextually imposing one.”)

Act. *See* Trademark Dilution Revision Act of 2006, Pub. L. 109-312, 120 Stat. 1730 (“TDRA”). If VIP Products’ dog toy parody was a “commercial” use of a mark – even if a funny, commercial expression – the Ninth Circuit should have affirmed both the infringement and the dilution awards. Instead, in no more than a few sentences, the Ninth Circuit relied on obsolete statutory construction and evaded this Court’s precedents discussing “commercial” and “noncommercial” speech. It rejected both the infringement and dilution awards on grounds that all parodies are inherently “noncommercial” and entitled to full-fledged First Amendment protection.

Congress provided immunity for dilution caused by “noncommercial uses of a mark.” 15 U.S.C. § 1125(c)(3)(C). In the TDRA, Congress also adopted a *partial* immunity from dilution claims – not for infringement claims at all – for fair use of parodies about a mark. *Id.* (immunizing fair use “identifying and parodying, criticizing, or commenting upon the famous mark owner or the goods or services of the famous mark owner”). The immunity of parodies from dilution claims applies only to those parodies that operate “other than as a designation of source for the person’s own goods or services.” *Id.* at § 1125(c)(3)(A).

Congress’s decision to immunize all “noncommercial uses” but only some parodies from dilution claims acknowledges that some parodies are at most “commercial” uses of a mark. The limited immunity for parodies would be meaningless if all parodies are “noncommercial.” “A statute should be construed so that effect is given to all its provisions, so that no part will be inoperative or superfluous, void or insignificant....” *Hibbs v. Winn*, 542 U.S. 88, 101 (2004) (quoted in *Corley v. United States*, 556

U.S. 303, 314 (2009)); *see also Bailey v. United States*, 516 U.S. 137, 146 (1995) (“We assume that Congress used two terms because it intended each term to have a particular, nonsuperfluous meaning.”).

Congress did not import the commercial/non-commercial speech distinction into the Lanham Act when it extended immunity to non-commercial “uses” of a mark. There is no blanket constitutional immunity from tarnishing another’s famous brand just because there is “more than zero” expression in a parody (it is hard to conceive how one could tarnish a brand with zero expression). That said, if only “commercial” speech – attendant to commercial uses – were involved in VIP Products’ parody, there is no question Congress was well within its rights to protect trademarks from likely source confusion, tarnishment, or diminution in distinctiveness caused by such commercial parodies. *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm’n of New York*, 447 U.S. 557, 563 (1980) (“there can be no constitutional objection to the suppression of commercial messages that do not accurately inform the public about lawful activity.”).

The Ninth Circuit hurdles any analysis of commercial speech by holding that “[s]peech is noncommercial if it does more than propose a commercial transaction and contains some protected expression” *VIP Prods.*, 953 F.3d 1170, 1176 (internal quotations and citations omitted).⁴ Poo

4. This feature of the Ninth Circuit’s attempt to differentiate “commercial” from “noncommercial” speech has doubtful roots. This Court posed the same question whether speech did nothing more than propose a commercial transaction but did so in the context of determining *whether speech was devoid of any first amendment protection at all*, not whether speech should receive

humor comingled with confusing branding to sell dog toys is enough, it appears, to satisfy this “test.”

This Court has not supported a rule that speech is “noncommercial” just because “some protected expression” is present, even if the speech were not misleading or tarnishing. To the contrary, this Court repeatedly has held that the presence of noncommercial expression does not mean speech automatically is afforded full First Amendment protection. *Bolger v. Youngs Drug Prod. Corp.*, 463 U.S. 60, 67–68 (1983). In *Bolger*, mailers promoted the sale of contraceptives and discussed public health and policy issues. The Court concluded – despite the discussion of public policies – the mailers only would receive the limited protection accorded commercial speech. *Id.* (“The mailings constitute commercial speech notwithstanding the fact that they contain discussions of important public issues such as venereal disease and family planning.”) (footnotes and citations omitted); *see also Central Hudson Gas & Electric Corp. v. Public Service Comm’n*, 447 U.S. 557, 563, n. 5 (noting that advertising which “links a product to a current public debate” is

full protection (noncommercial speech) or intermediate protection (commercial speech). *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 762 (1976). Other courts recognize that speech which contains expressive content that goes beyond proposing a commercial transaction still may be commercial speech. *Spirit Airlines, Inc. v. U.S. Dep’t of Transp.*, 687 F.3d 403, 412 (D.C. Cir. 2012) (“where speech cannot be characterized merely as proposals to engage in commercial transactions, it is nonetheless commercial in certain circumstances, for instance when it is an advertisement, refers to a specific product, and the speaker has an economic motivation for it.”) (internal quotations and citations omitted).

not thereby entitled to the constitutional protection afforded noncommercial speech); *San Francisco Arts & Athletics*, 483 U.S. at 541 (“The SFAA’s expressive use of the word [“Olympics”] 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 appropriate to itself the harvest of those who have sown.”) (internal quotations and citation omitted); *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 592–93 (1994) (approving Congress’s requirement that a fair use defense for parody of a copyrighted work include consideration of the commercial impact caused by the alleged infringement).

In *VIP Products*, the Ninth Circuit relied on its prior *MCA* decision for its expansive interpretation of “noncommercial” speech but *MCA* was decided under the Federal Trademark Dilution Act, the predecessor statute to the Trademark Dilution Revision Act. *VIP Prods.*, 953 F.3d at 1176, citing *Mattel, Inc. v. MCA Recs., Inc.*, 296 F.3d 894, 906 (9th Cir. 2002) (decided under the FTDA when uses were immunized unless they were “wholly commercial”). Whatever merit *MCA* may have had under the FTDA, the statute did not then address immunity for parodies. The limited parody immunity – and the unambiguous inference that Congress considered parodies used to indicate source, at most, to be “commercial” uses – first appeared in 2006 when Congress passed the TDRA. When the Ninth Circuit expanded this immunity to funny dog toys, it failed to consider the obsolescence of the *MCA* holding on this point, or Congress’s inescapable intention to regulate commercial parodies that are used by parodists as a source identifier.

The Ninth Circuit instead settled for reasoning that speech “short of the Mona Lisa” might be entitled to full noncommercial speech protection under the First Amendment. *VIP Prods. LLC*, 953 F.3d at 1175. The ‘Mona Lisa’ straw man, however, reflects nothing more than a truism. It does not answer whether Congress constitutionally might regulate “commercial” parodies or, as Congress required for dilution, commercial parodies found to be used by the parodist as a source identifier. The statute and this Court’s First Amendment decisions differentiating between “commercial” and “noncommercial” speech compel the conclusion that Congress was within its power to regulate “parodies” that, at most, involve commercial speech. The district court was right when it tried to protect JDPI’s famous brands from infringement and dilution.

VI. THE COURT SHOULD RESOLVE ANY CONCERNS ABOUT NON-CONFUSING PARODIES BY DIRECTING LOWER COURTS TO IDENTIFY THE RELEVANT EFFECTS SUCH EXPRESSION HAS ON LIKELY CONFUSION

Numerous other Courts of Appeal have limited their First Amendment concerns under the Lanham Act to how the expressive use of a trademark affects the likelihood of source confusion. None of these courts have abandoned famous brands as has the Ninth Circuit. *See Harley-Davidson, Inc. v. Grottanelli*, 164 F.3d 806 (2d Cir. 1999) (“we have not hesitated to prevent a manufacturer from using an alleged parody of a competitor’s mark to sell a competing product... [i]n this context, parodic use is sharply limited.”); *Louis Vuitton Malletier, S.A. v. Haute Diggity Dog, LLC*, 507 F.3d 252 (4th Cir. 2007) (“The

finding of a successful parody only influences the way in which the [likelihood-of-confusion] factors are applied.”); *Nike, Inc. v. “Just Did It” Enterprises*, 6 F.3d 1225 (7th Cir. 1993) (“we agree with the district court that parody is not an affirmative defense but an additional factor in the analysis.”); *Mutual of Omaha Insurance Co. v. Novak*, 836 F.2d 397 (8th Cir. 1987) (“We therefore conclude that in the circumstances of this case failure to protect Mutual’s trademark rights would amount to an unwarranted infringement of property rights, for it would diminish [those] rights without significantly enhancing the asserted right of free speech.”) (internal quotations and citation omitted); *Elvis Presley Enterprises, Inc. v. Capece*, 141 F.3d 188 (5th Cir. 1998) (“Parody is one such other relevant factor that a court may consider in a likelihood-of-confusion analysis”); *Jordache Enterprises v. Hogg Wyld, Ltd.*, 828 F.2d 1482 (10th Cir. 1987) (affirming district court holding that parody diminished likelihood of confusion).

This approach makes sense: the factor tests that have developed over decades assess likely confusion in specific factual contexts that vary across many relevant dimensions. Adjunct tests have developed regarding concepts of “fair use” that bear on free speech interests, but with a clear view to the impact on likely source confusion. Nominative fair use, for example, that does not use the marks in a manner likely to convey the trademark owner’s sponsorship of the message, is protected speech. *New Kids on the Block v. News America Pub., Inc.*, 971 F.2d 302 (9th Cir. 1992). Classic fair use or use of generic terms is protected because such uses are not meaningfully confusing or indicate source. *See, e.g., Cairns v. Franklin Mint Co.*, 292 F.3d 1139, 1150-51 (9th

Cir. 2002). Product configuration trade dress, because product configuration typically is not used by consumers as a signal of source, must acquire distinctiveness or secondary consumer associations before it is protected against source confusion. *Wal-Mart Stores, Inc. v. Samara Bros.*, 529 U.S. 205, 214 (2000) (“given the unlikelihood of inherently source-identifying design, the game of allowing suit based upon alleged inherent distinctiveness seems to us not worth the candle.”). In none of these contexts have courts deemed it necessary to depart from the Lanham Act’s basic mission to guard against source confusion.

The proper approach to resolving this case, accordingly, required the Ninth Circuit to give due weight to the impact of the parody as it should have affected, if at all, the findings that led the district court to identify likely confusion and tarnishment of a brand. Surveys showing actual confusion, sales of related and competing goods, a deliberate effort to associate with and trade on the trademark owner’s goodwill all are signs of likely source confusion. If a “parodist” is permitted to use JDPI’s famous mark as a source indicator and to associate the (ingestible) brand with dog poo, Patagonia is not safe from confusing expression advocating fossil fuel consumption, any more than Levi Strauss would be free from use of its brand to make “jokes” about homophobia or sweat shops. These factors cannot be ignored and still give effect to the free speech interests of the trademark owner and the public.

If the nature of parodies or expressions bear on whether a use is genuinely likely to be confusing, then the courts should fashion additional factors consistent with the statute. But myriad expressions in the form of

good (or bad) jokes, book titles, fictional record labels, an expressive brand, or other types of “artistic expression” do not affect confusion in any uniform way that facilitates uniform treatment under an “explicitly misleading” standard. The Ninth Circuit does not address whether all these different forms of expression are equally likely to affect potential source confusion; its decisions simply ignore any differences and likely confusion altogether. The only “commonality” the Ninth Circuit has identified in these contexts before nullifying the Lanham Act’s protection from infringement and dilution is that they all involve “more than zero” expression. No constitutional rule requires Congress to ignore misleading source confusion or tarnishment of a famous mark – even if caused by protected speech – and the Ninth Circuit’s failure to analyze whether different rules should apply to expressions that are more or less likely to cause these harms cannot be squared with a proper balancing of First Amendment stakes or the court’s mandate.

There is ample justification in this case – if only based on the district court’s finding that VIP Products deliberately used JDPI’s marks as a source indicator and traded on its goodwill – for reinstatement of the district court’s ruling. *See Salinas v. United States*, 522 U.S. 52, 61 (1997). But if the Court addresses the constitutional issues, it should announce a rule that reverses the unjustified expansion of *Rogers* in the Ninth Circuit (or overrules *Rogers* altogether) and insists “likely confusion” must remain the focus of any safeguards that are necessary for protection of expressive works. The governing principle should be likely confusion – to be determined by relevant factors as confusion traditionally has been determined – not a standardized analysis for anything identifiable as

“expression.” In addition to grounding the constitutional analysis in the statutory text as required, this approach also accommodates the need to consider other important stakeholders whose First Amendment and property rights are affected by expressive works.

CONCLUSION

The cost to develop meaningful trademarks is enormous and requires decades of investment and effort to establish a public audience worthy of a parody. Trademark owners, of course, should be able to take a joke but not at the cost of their own source identifiers or the public’s understanding of their speech. The Court should remedy the Ninth Circuit’s errors.

Respectfully submitted,

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