

No. 25-75

IN THE
Supreme Court of the United States

CROCS, INC.,

Petitioner,

v.

DOUBLE DIAMOND DISTRIBUTION, LTD. et al.,

Respondents.

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

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Section 43(a)(1)(B) of the Lanham Act creates a private cause of action for anyone who suffers commercial harm caused by a false or misleading statement in commercial advertising that “misrepresents the nature, characteristics, qualities, or geographic origin of ... [a] person’s goods, services, or commercial activities.” 15 U.S.C. §1125(a)(1)(B).

In this case, petitioner admitted that it falsely advertised that its shoes are made of a “patented” material that, in reality, is not (and never was) patented. Pet.App.7a. And at least for summary judgment purposes, petitioner admitted to linking that false claim to “features, characteristics, and qualities” of its shoes’ material—and that it did so to advance a message that its shoes’ features were superior to its competitors’. Pet.App.15a-16a.

On this record, the question presented is:

Whether the Federal Circuit erred in holding that because petitioner used admittedly false statements that its products are made of patented material to ascribe tangible characteristics to those products, petitioner was not entitled to summary judgment.

CORPORATE DISCLOSURE STATEMENT

Respondent Double Diamond Distribution, Ltd. has no parent corporation, and no publicly held company owns 10% or more of its stock.

Respondent U.S.A. Dawgs, Inc. has no parent corporation, and no publicly held company owns 10% or more of its stock.

Respondent Mojave Desert Holdings, LLC has no parent corporation, and no publicly held company owns 10% or more of its stock.

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BRIEF IN OPPOSITION

Section 43(a)(1)(B) of the Lanham Act makes advertisers liable for any false or misleading statement of fact that “misrepresents the nature, characteristics, qualities, or geographic origin of” their own or others’ “goods, services, or commercial activities.” 15 U.S.C. §1125(a)(1)(B).

Petitioner Crocs, Inc. falsely advertised that its shoes are different from and superior to competitors’ shoes because they are made from a “patented,” “proprietary,” and “exclusive” material that provides tangible benefits. Crocs admits that the material was never actually patented, and there is a genuine dispute as to whether it was proprietary or exclusive.

Applying section 43(a)(1)(B)’s plain text to the summary judgment record in this case, the Federal Circuit allowed respondents (Dawgs) to proceed with their false advertising claim because Crocs used its admittedly false statements to ascribe tangible characteristics to its products. The court declined Crocs’ invitation to carve out an atextual exception immunizing all false claims of patent protection—no matter their context, their connection to tangible characteristics, or how consumers perceive them.

Crocs now asks this Court to take up its interlocutory petition and create an even broader exception—this time for “misrepresentations about [a] product’s intangible properties.” Pet.i. That question has nothing to do with this case. Crocs was denied summary judgment below because it misrepresented its products’ tangible properties, not merely intangibles. This Court should not jump in to issue an advisory opinion

about a question not presented, let alone rush to do so before final judgment.

Beyond the glaring vehicle problems, Crocs' arguments for review cannot withstand the slightest scrutiny. This case does not implicate Crocs' purported circuit split, which in any event is illusory. The Federal Circuit's factbound decision simply applied settled law to the record here. The relevant version of the statute has been around for nearly forty years without Crocs' novel exception, and there is no reason to think the decision below unleashed the chaos Crocs predicts.

And the Federal Circuit got it right. Even Crocs admits that section 43(a)(1)(B) prohibits falsely advertising what a product is made of. That is exactly what Crocs did, and that is why Crocs is not entitled to summary judgment.

This Court should therefore deny the petition.

STATEMENT OF THE CASE

A. Legal background

1. This case involves a false advertising claim under the Lanham Act. Among that statute's purposes is to "protect persons engaged in" commerce within Congress's purview "against unfair competition." 15 U.S.C. §1127.¹

To that end, section 43(a)(1) of the Lanham Act provides for civil liability for certain types of unfair competition. §1125(a)(1). That provision "creates two

¹ Unless otherwise noted, all further section citations are to Title 15 of the U.S. Code.

distinct bases of liability: false association” under section 43(a)(1)(A) and “false advertising” under section 43(a)(1)(B). *Lexmark Int’l, Inc. v. Static Control Components, Inc.*, 572 U.S. 118, 122 (2014).

Section 43(a)(1)(B) prohibits the use “in commercial advertising” of “any word, term, name, symbol, or device, or any combination thereof, or any false designation of origin, false or misleading description of fact, or false or misleading representation of fact, which ... misrepresents the nature, characteristics, qualities, or geographic origin of ... [any] person’s goods, services, or commercial activities.” §1125(a)(1).

2. This Court considered the scope of false association liability under section 43(a)(1)(A) in *Dastar Corp. v. Twentieth Century Fox Film Corp.*, 539 U.S. 23 (2003). That case involved a video producer, Dastar, that took a public-domain television series, “copied it, made modifications (arguably minor), and produced its very own series of videotapes” that it sold “as its own product” with its own title. *Id.* at 31; *see also id.* at 25-27. The distributors of the original series sued on a “reverse passing off” theory, alleging that Dastar falsely designated itself as the origin of its edited series. *Id.* at 27-31. Put another way, the distributors sought to use section 43(a)(1)(A) as “a cause of action for, in effect, plagiarism.” *Id.* at 36.

The Court rejected that claim, holding that the statutory “phrase ‘origin of goods’ ... refers to the producer of the tangible goods that are offered for sale, and not to the author of any idea, concept, or communication embodied in those goods.” *Dastar*, 539 U.S. at 37.

The Court recognized, however, that different facts might have led to liability under section 43(a)(1)(B): “If ... the producer of a video that substantially copied the [original] series were, in advertising or promotion, to give purchasers the impression that the video was quite different from that series, then [the distributors] might have a cause of action ... for misrepresentation under the ‘misrepresents the nature, characteristics [or] qualities’ provision of” section 43(a)(1)(B). *Dastar*, 539 U.S. at 38 (last alteration in original).

3. In the more than two decades since *Dastar*, only a handful of appellate decisions have had occasion to consider how it interacts with section 43(a)(1)(B). Those courts of appeals that have confronted the question have uniformly held that the statute and *Dastar* mean what they say: Section 43(a)(1)(B) provides a cause of action when, and only when, the false advertising “misrepresents the nature, characteristics, qualities, or geographic origin” of the “goods, services, or commercial activities” themselves, §1125(a)(1)(B). See *Sybersound Records, Inc. v. UAV Corp.*, 517 F.3d 1137, 1143-44 (9th Cir. 2008); *Baden Sports, Inc. v. Molten USA, Inc.*, 556 F.3d 1300, 1307-08 (Fed. Cir. 2009) (applying Ninth Circuit law); *Kehoe Component Sales Inc. v. Best Lighting Prods., Inc.*, 796 F.3d 576, 590 (6th Cir. 2015); *Belmora LLC v. Bayer Consumer Care AG*, 819 F.3d 697, 706 (4th Cir. 2016). By contrast, misrepresenting who came up with the “ideas ... embodied in th[e] goods,” *Dastar*, 539 U.S. at 37, without more, is not within section 43(a)(1)(B)’s ambit.

This case involves an application of that straightforward rule: False claims about a product’s legal

status, ownership, intellectual origin, and the like can be made in a way that misleads consumers about what that product is—about its nature, characteristics, or qualities. And as the decision below held, section 43(a)(1)(B) makes no exception for false advertising of that sort. Pet.App.11a-12a.

B. Factual and procedural background

1. Crocs and Dawgs sell competing shoes. Since its start in 2002, Crocs has made a material it calls “Croslite” the central selling point of its shoes. Pet.App.3a-4a, 15a-16a.² Crocs set out to convince consumers that its shoes “have superior characteristics, qualities, and features” because they are made of Croslite. Pet.App.15a-16a. It touted Croslite’s “numerous tangible benefits,” Pet.App.11a, such as that Croslite “warms and softens with your body heat and molds to your feet,” Appx1449; and that “bacteria and fungus can’t stick to” it, preventing foul odors, Appx1457.³ And to bolster the impression that Croslite alone—and not competitors’ materials—provides those advantages, Crocs advertised that Croslite was “patented,” “proprietary,” and “exclusive.” Pet.App.3a-4a.

But in truth, Croslite is essentially the same stuff Crocs’ competitors’ shoes are made of. As Dawgs alleged here, it is merely a “run-of-the-mill,” “rubber-

² Because Crocs’ summary judgment motion targeted Dawgs’ counterclaim allegations on their face, D.Ct.Dkt.909 at 2-3, the facts here are based on both those allegations and the record evidence, as was the decision below, *see* Pet.App.3a-4a, 11a.

³ “Appx” refers to the Joint Appendix filed in the Federal Circuit (Ct.App.Dkt.45).

like copolymer” ethyl vinyl acetate that Dawgs and others use, too. Appx493. Crocs admits that Croslite is not and never has been patented. Pet.App.7a. Nor is it “proprietary” or “exclusive,” though the parties still dispute that point. Pet.App.3a; *see* Pet.10.

Crocs’ scheme worked. The record is full of evidence showing that Crocs’ false claims that Croslite is patented fooled consumers and the media into thinking Crocs’ shoes are made of a different material with concrete advantages. *See* Ct.App.Dkt.25 at 7-12 (collecting evidence); D.Ct.Dkt.913 at 4-6.

2. The many twists and turns of this litigation are not relevant here. Suffice it to say that Dawgs counterclaimed for false advertising under section 43(a)(1)(B), alleging that Crocs deployed its false claims that its shoes are made of a “patented,” “proprietary,” and “exclusive” material to misrepresent the nature, characteristics, and qualities of its shoes. Pet.App.3a-4a. Said differently, Dawgs’ claim was that by linking the false claim of patent protection to the asserted tangible benefits of Croslite, Crocs tricked consumers into believing that its shoes were made of a different, better material not available from its competitors. *See id.*

Well before fact discovery closed, Crocs sought summary judgment, contending that Dawgs’ allegations amounted to the same “false authorship” theory rejected in *Dastar*. Pet.App.20a-21a; D.Ct.Dkt.909.

But false authorship was not Dawgs’ theory. As Dawgs told the district court, its objection to Crocs’ advertising was that Crocs used its false claims of patent protection and exclusivity to mislead consumers about

the “specific qualities and characteristics of its shoe material.” D.Ct.Dkt.913 at 1-2.

Meanwhile, expert discovery provided still more proof that Crocs’ false advertisements were working. Both sides’ experts conducted surveys showing that consumers understood “patented” in the context of Crocs’ advertising to mean that Crocs’ shoes were made of better material with the tangible benefits Crocs was touting. Ct.App.Dkt.25 at 10-12 (collecting evidence). For example, when Crocs’ own expert asked consumers what “Patented Croslite™ material” meant to them, their answers included “lightweight and indestructible”; “makes the crocs lightweight, ergonomic, and odor resistant”; “waterproof and sturdy”; and so on. *Id.* at 12.

The district court granted summary judgment for Crocs. Pet.App.14a-28a. The court declined to consider the expert evidence and mostly set aside Dawgs’ other evidence, including the advertisements at issue. *See* Pet.App.26a-30a. Instead, the court lasered in on the term “patented” and decided—as a matter of law and no matter the context—that “claiming to have ‘patented’ something is akin to claiming to have ‘invented’ it.” Pet.App.26a-27a.

From there, the district court analogized false “patented” claims to the “plagiarizing”-type claim in *Dastar*. Pet.App.27a. It therefore concluded that Crocs’ false claims were “nothing more than a false designation of authorship”—that is, false claims to have “created Croslite.” *Id.* And with that “false authorship” label applied, the court concluded that *Dastar* foreclosed Dawgs’ claims. Pet.App.27a-28a.

3. A unanimous panel of the Federal Circuit reversed. It rejected the district court's view that "patented" is only ever "an expression of innovation and, hence, authorship." Pet.App.11a. Rather, it considered Crocs' advertisements in context and recognized that Crocs "link[ed]" its false claims that its shoes are made of "patented" material to its products' "tangible nature, characteristics, or qualities." *Id.*

Applying section 43(a)(1)(B)'s plain text to those facts, the Federal Circuit had little trouble concluding that Dawgs' claim passed muster. It concluded that Dawgs' "allegations about Crocs' advertisement statements are directed to the nature, characteristics, or qualities of Crocs' shoes." Pet.App.12a. And so it held that section 43(a)(1)(B) provides a cause of action "where a party falsely claims that it possesses a patent on a product feature and advertises that product feature in a manner that causes consumers to be misled about the nature, characteristics, or qualities of its product." *Id.*

Because this case did not present the question, the Federal Circuit did not decide whether a "false claim that a product is patented," "stand[ing] alone," could give rise to liability. Pet.App.11a.

4. Crocs petitioned for rehearing en banc. In addition to pressing a repackaged version of its "false authorship" theory, Ct.App.Dkt.75 at 10-16, Crocs argued for the first time that section 43(a)(1)(B) should be cabined to avoid any overlap with the false patent marking statute, *id.* at 16-20.

The Federal Circuit denied the petition without requesting a response and without any noted dissent. Pet.App.36a-37a.

5. The Federal Circuit issued its mandate in February, and the case is now back in district court. Ct.App.Dkt.92. In a March status report, Crocs told the district court that there are another four “independent reasons” Dawgs should lose “as a matter of law.” D.Ct.Dkt.1211 at 6. It also said the court should “adjudicate motions to exclude expert testimony” that “would further limit or dispose of Dawgs’s claim.” *Id.*

A few months later, Crocs sought certiorari, arguing for the first time that the statute draws a bright line between tangible and intangible product characteristics. Pet.i.

REASONS FOR DENYING THE WRIT

I. This case does not present—and Crocs did not preserve—the question Crocs’ interlocutory petition asks the Court to answer.

Crocs calls this case “the perfect vehicle” to decide the question presented. Pet.12. It is anything but.

1. This case’s interlocutory posture is reason enough to deny certiorari. Because the court of appeals reversed the grant of summary judgment and remanded for further proceedings, Crocs is effectively asking this Court to review the denial of summary judgment. But this Court’s established practice is to “await final judgment in the lower courts before exercising [its] certiorari jurisdiction.” *Va. Mil. Inst. v. United States*, 508 U.S. 946, 946 (1993) (Scalia, J., respecting the denial of certiorari); *see also, e.g., Harrel v. Raoul*, 144 S. Ct. 2491, 2492 (2024)

(statement of Thomas, J.) (“This Court is rightly wary of taking cases in an interlocutory posture.”); *Bhd. of Locomotive Firemen & Enginemen v. Bangor & Aroostook R.R. Co.*, 389 U.S. 327, 328 (1967) (per curiam) (denying certiorari because the court of appeals remand left the case “not yet ripe for review by this Court”). The lack of a final judgment “alone furnishe[s] sufficient ground for the denial of the application.” *Hamilton–Brown Shoe Co. v. Wolf Bros. & Co.*, 240 U.S. 251, 258 (1916).

This case is a poster child for the disadvantages of interlocutory review. On a limited summary judgment record, the court of appeals made a factbound decision about issues that may not be outcome-determinative by the time this case is litigated through trial, postjudgment motions, and another appeal. Waiting for a final judgment will allow the facts and issues to be fully developed and will ensure that any question this Court takes up is one that matters. *See, e.g.*, Pet.App.14a-15a. (highlighting unresolved fact dispute about “exclusive” and “proprietary”).

Because Crocs sought summary judgment based on the allegations in Dawgs’ counterclaim long before discovery finished, the decision below was made on a record even more preliminary than the typical summary judgment record. Indeed, the district court refused to consider evidence developed during expert discovery. Pet.App.28a-30a.

Finishing the work on remand to develop the full picture—and test it before the jury—is particularly important in light of the fact-sensitive nature of Dawgs’ Lanham Act claim, which ultimately turns on the perspective of ordinary consumers, not federal

judges. *See, e.g., Bell v. Publix Super Mkts., Inc.*, 982 F.3d 468, 479 (7th Cir. 2020). The Federal Circuit reached its decision based on the particular facts before it, considering Crocs’ admittedly false claims in the specific context of the advertisements in the record. Pet.App.11a-12a. There is no telling what the jury will decide or whether the Federal Circuit will see the case differently with the benefit of the trial record.

Even setting aside all that remains to be done on the issue decided below, there are a host of issues still to be addressed on remand that could obviate the need to answer any question fairly presented now. Take it from Crocs’ own mouth: Crocs told the Federal Circuit that a reversal “would win [Dawgs] little” because Crocs “has several additional defenses” the district court did not reach. Ct.App.Dkt.38 at 7. Crocs has not changed its tune on remand. It told the district court that there are still four “independent reasons” why “Dawgs’s claim fails as a matter of law”—plus “motions to exclude expert testimony” that “would further limit or dispose of Dawgs’s claim.” D.Ct.Dkt.1211 at 6; *see also id.* at 5-7 (raising procedural and discovery issues). If any question worthy of review survives the final judgment, this Court will have an opportunity to take it up then on a complete record.

In short, this is not the “extraordinary case[]” warranting interlocutory review. *Hamilton–Brown*, 240 U.S. at 258.

2. This case does not present the question Crocs wants this Court to decide. Crocs frames the issue as whether section 43(a)(1)(B) bars “misrepresentations about [a] product’s intangible properties, like its patent status.” Pet.i. But the decision below did not

address that issue because this case does not implicate it. Because Crocs' misrepresentations were about tangible properties, the Federal Circuit had no reason to, and so did not, decide whether misrepresentations about intangible properties are actionable on their own.

The Federal Circuit held that Dawgs' claim survived summary judgment precisely because Crocs' false advertisements misrepresented the tangible characteristics of its shoes—specifically, “what [they are] made of,” Pet.24. *See* Pet.App.11a-12a. So this case about tangible characteristics would come out the same way no matter the answer to Crocs' question about intangibles.

Make no mistake: The Federal Circuit did not hold that falsely designating a product as “patented,” without more, constitutes a misrepresentation about the product's nature, characteristics, or qualities. Its decision explicitly left untouched the rule that “a false claim of origin, and nothing more, is a claim of authorship and does not give rise to a cause of action.” Pet.App.10a-11a.

The crux of the Federal Circuit's factbound decision was that “here, the false claim that the product is patented does not stand alone.” Pet.App.11a. Rather, the advertisements at issue “link[ed]” Crocs' false claims that its shoes are made of “patented” material to its products' “tangible nature, characteristics, or qualities.” *Id.* Crocs attributed “numerous tangible benefits” to its supposedly “patented” material when, in reality, that material was never patented. *Id.*; *see supra* pp.5-6. All in all, the “allegations and evidence” in the summary judgment record showed “that the

falsity of Crocs’ promotional statements [was] rooted in the nature, characteristics, or qualities of Crocs’ products.” Pet.App.11a.

So it was in that context that the Federal Circuit held that section 43(a)(1)(B) provides a cause of action “where a party falsely claims that it possesses a patent on a product feature *and* advertises that product feature in a manner that causes consumers to be misled about the nature, characteristics, or qualities of its product.” Pet.App.12a (emphasis added).

Crocs’ petition gives up the game when it gets to the merits. After a handful of pages attempting to defend its bright-line rule about intangibles, Crocs pivots to arguing that the real problem with the decision below is its “indirect-effects reading” allowing too loose a link between Crocs’ false claims and its shoes’ tangible characteristics. Pet.28-29. But that is not the question the petition presents, Pet.i, not the question on which Crocs claims the circuits are divided, Pet.13-19, and not a question Crocs preserved below, *see* Pet.App.15a-16a (district court finding that Crocs conceded the link between its false claims and its products’ “features, characteristics, and qualities”).

Anyhow, Crocs’ latest theory underscores yet again why this is not the extraordinary case warranting interlocutory review. With trial still to come, Crocs will have the opportunity to try to convince the jury that its false “patented” claims would not, in fact, have misled consumers about its shoes’ nature, characteristics, or qualities. Although this case is unlikely to ever warrant review, the Court should at the very least wait for a final judgment.

3. Finally, Crocs’ failure to timely raise the arguments it relies on now would hinder this Court’s review. Crocs did not present its argument for an “intangibles” carveout to either court below. And it first raised the purported conflict with the false patent marking statute when seeking rehearing en banc. Even if those belated arguments are not forfeited, Crocs’ failure to give the courts below an opportunity to consider them would put this Court in the undesirable position of deciding them in the first instance. *See, e.g., Cutter v. Wilkinson*, 544 U.S. 709, 718 n.7 (2005) (“[W]e are a court of review, not of first view ...”).

II. This case does not implicate a circuit split.

Crocs’ lead argument for certiorari is that this case implicates a 3-2 circuit split that the Federal Circuit acknowledged below. Pet.12-19. Crocs is wrong thrice over: This case does not implicate the purported split. Which is why the Federal Circuit did not, in fact, acknowledge that it was joining a split. Besides, there is no split.

1. This case does not implicate Crocs’ asserted split. As discussed, it does not present the question on which Crocs says there is a split: whether “misrepresentations about a good’s intangible properties” are actionable, Pet.12. *See supra* pp.11-13. And there is no reason to think this case would have come out differently in any circuit Crocs puts on the other side of the purported split.

a. Like the decision below, the Ninth Circuit distinguishes between misrepresentations that go to “the nature, characteristics, and qualities” of “the good itself” and those that do not. *Sybersound Records*,

Inc. v. UAV Corp., 517 F.3d 1137, 1144 (9th Cir. 2008).
Contra Pet.13-14.

Sybersound held that a karaoke recording’s “copyright licensing status” was not a “characteristic” of the recording as section 43(a)(1)(B) uses that term. 517 F.3d at 1144. It reached that conclusion not because licensing status is intangible, but because it has no connection to the recording itself. *See id.* That makes sense: The same digital file or physical disc could be either licensed or not. *Cf. Phoenix Ent. Partners v. Rumsey*, 829 F.3d 817, 824-25 (7th Cir. 2016) (noting, in rejecting a section 43(a)(1)(A) claim based on unauthorized copying of karaoke recordings, that “all that distinguishes the legitimate copy from the illegitimate copy is authorization to make the copy”). And the same product’s licensing status might even change over time (if, say, the license expired) or based on where or how it is used (if the license is limited in scope) without any change in the recording itself.

By contrast, *Sybersound* recognized that misrepresentations about “the original song and artist of the karaoke recording” or “the quality of its audio and visual effects” would go to the “characteristics of the good itself” and could thus be actionable. *See* 517 F.3d at 1144. As those examples of intangibles suggest, *Sybersound* did not draw a line between tangible and intangible characteristics. *See, e.g., Intangible*, Oxford English Dictionary (2d ed. 1989) (def.A.a) (defining “intangible” as “Not tangible; incapable of being touched; not cognizable by the sense of touch; impalpable”). The word “intangible” does not even appear in the opinion. And “tangible” shows up just once, to recount *Dastar*’s distinction between the origin of ideas

“embodied in a good” and the origin “of the tangible good itself.” *Sybersound*, 517 F.3d at 1144 (citing *Dastar*, 539 U.S. at 37). What matters is whether the misrepresentation goes to “the nature, characteristics, [or] qualities ... of the good itself”—nothing more, nothing less. *See id.*

That is precisely how the Federal Circuit understood and applied Ninth Circuit law in *Baden Sports, Inc. v. Molten USA, Inc.*, 556 F.3d 1300 (Fed. Cir. 2009), *cert. denied*, 558 U.S. 822 (2009). *Contra* Pet.14. “Following *Sybersound*’s reasoning,” the Federal Circuit held “that authorship, like licensing status, is not a nature, characteristic, or quality” of a good itself. *Baden*, 556 F.3d at 1307. So the court asked whether Baden, the plaintiff, had “alleged anything more”—such as whether any “physical or functional attributes of the basketballs” at issue were “implied by [defendant] Molten’s advertisements.” *Id.*

Baden made no such claim: Baden’s beef with Molten’s advertising its basketballs as “innovative” was not about whether the technology was innovative (all agreed it was), but about who did the innovating (Baden). 556 F.3d at 1307-08. Indeed, after Baden won summary judgment that Molten’s basketballs infringed its patent, the district court excluded evidence of any “differences between the companies’ basketballs” from the trial on Baden’s Lanham Act claim. *Id.* at 1303-04. And on appeal, Baden confirmed that it “was alleging false advertising based exclusively on Molten’s claim to have been the innovator of the technology,” rather than Baden—a claim of “false attribution of the authorship of th[e] innovation.” *Id.* at 1307-08 (holding that “Baden has waived any ...

argument about novelty or newness” of the product). As a result, the Federal Circuit held that Baden’s claim of false authorship—and nothing more—did not “go to the nature, characteristics, or qualities of the goods, and [was] therefore not actionable under section 43(a)(1)(B).” *Id.* at 1308 (cleaned up).

This case falls on the actionable side of the line *Sybersound* and *Baden* drew. As the Federal Circuit held below, the advertising claims at issue here go to the “characteristics of the good itself,” *Sybersound*, 517 F.3d at 1144—and in particular, “what [Crocs’ shoes are] made of,” Pet.24. See Pet.App.11a-12a. There is no reason to think the Ninth Circuit would disagree.

b. So too for the Sixth Circuit. *Contra* Pet.15. In a case that was *Dastar* all over again—now with lighting products instead of TV documentaries—the Sixth Circuit held that a “misrepresentation about the source of the ideas embodied in a tangible object,” without more, is not actionable. See *Kehoe Component Sales Inc. v. Best Lighting Prods., Inc.*, 796 F.3d 576, 586-90 (6th Cir. 2015). The Lanham Act defendant in *Kehoe* “cloned” the plaintiff’s products—by using the plaintiff’s design and tooling to make “exactly the same product”—and sold them under its own brand. *Id.* at 586. Just as in *Dastar*, the only alleged misrepresentation was about the products’ “intellectual origin.” *Id.* at 590. The plaintiff’s section 43(a)(1)(A) claim was thus squarely foreclosed by *Dastar*, and its section 43(a)(1)(B) claim failed for essentially the same reason: On its own, that misrepresentation said nothing “about the nature, characteristics, or qualities

of the object” itself—“such as its properties or capabilities.” *Id.*

This case has exactly what was missing in *Kehoe*, and so it would come out exactly the same way in the Sixth Circuit. The decision below held that Dawgs’ claim could proceed not because Crocs falsely claimed to be “the source of the ideas embodied in” its shoes, but because Crocs used its false “patented” claims to mislead consumers about the “properties or capabilities” of its shoes. *Kehoe*, 796 F.3d at 590; Pet.App.11a-12a.

c. That leaves the Second Circuit’s thirty-year-old holding about what “Swiss Army knife” means. *Forschner Grp. v. Arrow Trading Co.*, 30 F.3d 348, 350 (2d Cir. 1994); see Pet.15-16.

The Second Circuit held in *Forschner* that no matter what consumers thought, “[t]he phrase Swiss Army knife cannot fairly be read to say ‘made in Switzerland’ so as to be geographically descriptive.” 30 F.3d at 355. It “denotes a knife of the type associated with the Swiss Army, rather than a military knife manufactured in Switzerland.” *Id.* at 356. Put differently, “Swiss Army knife” speaks to the knife’s nature and characteristics—“what type of item it is,” Pet.24—not where it is made. *Contra* Pet.15-16 (asserting incorrectly that *Forschner* involved an alleged misrepresentation of nature or characteristics).

The Second Circuit’s in-depth analysis of a particular phrase’s meaning has little, if anything, to do with this case. *Forschner* provides no reason to think that Dawgs’ claims would fare any worse in the Second Circuit. *Forschner* would not spare Crocs from liability for using “patented” to mislead consumers as to what

its shoes are made of any more than it would allow a knifemaker to use “Swiss Army knife” to trick consumers into thinking its single-function kitchen knives are multifunction pocketknives.

2. Crocs claims that the Federal Circuit “acknowledged” in a footnote “that it was splitting with other circuits.” Pet.11 (citing Pet.App.7a n.3). Not so. The footnote does not say what Crocs says it says. And the decision went on to distinguish, not disagree with, the rule discussed in the footnote.

True, the footnote recognized that *Sybersound*, *Baden*, and *Kehoe* held that “nature, characteristics, [or] qualities” in section 43(a)(1)(B) “relate to the characteristics of the good itself, not intangibles involving the source of ideas embodied in a product, like product authorship.” Pet.App.7a n.3. But the Federal Circuit nowhere disagreed with that view. Rather, it distinguished those cases and held that under the particular facts of this case, Dawgs’ “allegations about Crocs’ advertisement statements are directed to the nature, characteristics, or qualities of Crocs’ shoes” because Crocs used the word “patented” “to ascribe” tangible characteristics to the product. Pet.App.8a-11a. This case does not present—and so the Federal Circuit did not answer—the question whether a false claim about an intangible characteristic like “patented” would give rise to a cause of action absent any link to a tangible characteristic.

Crocs used to agree. Its rehearing petition recognized the panel’s holding that this case is “not controlled by *Baden*.” Ct.App.Dkt.75 at 9. And although Crocs contended that the panel was incorrect to

distinguish *Baden*, Crocs never tried characterizing the decision as acknowledging a split. *Id.* at 10-16.

What’s more, the Federal Circuit could not have joined a split here even if it wanted to. The Federal Circuit applies regional circuit law to Lanham Act issues, and absent Tenth Circuit authority on point, the decision below was merely “predict[ing] how the [Tenth Circuit] would have decided the issue.” Pet.App.5a (quoting *Panduit Corp. v. All States Plastic Mfg. Co.*, 744 F.2d 1564, 1575 (Fed. Cir. 1984), *overruled in other part by Richardson-Merrell, Inc. v. Koller*, 472 U.S. 424 (1985)). That prediction binds neither the Tenth Circuit nor even Federal Circuit panels considering cases from other circuits. *See Panduit*, 744 F.2d at 1574-75.

So why the footnote? As its second sentence (which Crocs ignores) reveals, the Federal Circuit was simply flagging the prospect that someday, some disagreement about false authorship claims might emerge. Specifically, the court noted that the First Circuit “has suggested in passing that there is an ‘open possibility that some false authorship claims could be vindicated under’” section 43(a)(1)(B). Pet.App.7a n.3 (alteration incorporated) (quoting *Zyla v. Wadsworth*, 360 F.3d 243, 252 n.8 (1st Cir. 2004)). But the court did not identify any split, let alone say it was taking sides. After all, the First Circuit expressly declined to decide what, if any, false authorship claims might be available, *Zyla*, 360 F.3d at 252 n.8, and the claim here is not a false authorship claim anyway, Pet.App.11a. Even Crocs does not suggest that *Zyla* has anything to do with this case; the petition does not so much as cite it. *See* Pet.vii-viii.

3. Anyhow, there is no split even on the question Crocs presents. With the decision below out of the picture, Crocs is left with its contention that the Fourth Circuit disagrees with the Second, Sixth, and Ninth. Pet.17-18. Crocs is wrong.

Crocs relies on the Fourth Circuit’s decision in *Belmora LLC v. Bayer Consumer Care AG*, 819 F.3d 697 (4th Cir. 2016), *cert. denied*, 580 U.S. 1159 (2017). See Pet.17-18. That fact-intensive decision is not in conflict with any case in Crocs’ purported split. For decades, Bayer sold naproxen sodium, an over-the-counter pain-relief medication, as “Flanax” “in Mexico and other Latin American countries,” while selling the same kind of medication as “Aleve” in the United States through its U.S. sister company. *Belmora*, 819 F.3d at 701-02. Enter Belmora, which started selling naproxen sodium in the United States as “Flanax”—complete with copycat packaging and an advertising campaign pretending its product “was the same as, or affiliated with” Bayer’s Mexican-sold Flanax. *Id.* at 702-04.

The Fourth Circuit’s decision focused less on the merits of Bayer’s claims than on “whether the Lanham Act permits the owner of a foreign trademark and its sister company to pursue” those claims “against the owner of the same mark in the United States.” *Belmora*, 819 F.3d at 701; *see also id.* at 705-08 (detailing the relevant principles from *Lexmark*, 572 U.S. 118). What the court called “perhaps not ‘typical’” was having a plaintiff that was “a foreign entity without direct sales in the territorial United States,” as compared to the U.S. sister company’s more “typical” case as “a direct competitor.” *Id.* at 712. *Contra* Pet.17 (implying

incorrectly that the underlying theory of false advertising was atypical).

The plaintiffs' identities aside, their false advertising theory itself fit comfortably within section 43(a)(1)(B): Belmora, the plaintiffs alleged, went "beyond mere ... false association" to "parlay the passed-off FLANAX mark into misleading statements about the product's 'nature, characteristics, qualities, or geographic origin,' all hallmarks of a false advertising claim." *Belmora*, 819 F.3d at 712-73 (quoting §1125(a)(1)(B)). Belmora falsely conveyed its product's "history," "popularity," and "history of quality" by claiming, for example, that "Latinos have turned to it for generations," that it "is highly recognized and top-selling," and that "Latinos know, trust and prefer" it. *Id.* at 713 (cleaned up). And in the particular factual context at hand, those statements "directly relate[d] to the 'nature, characteristics, qualities, or geographic origin' of [Belmora's] FLANAX as being one and the same as" Bayer's. *Id.*

To be sure, some of the advertising claims the Fourth Circuit discussed focused on intangible features. But nothing in *Sybersound*, *Baden*, *Kehoe*, or *Forschner* turned on any distinction between tangible and intangible attributes. *Supra* pp.14-19. What Belmora was alleged to have done—trick consumers into thinking its product was really its competitor's better-known product—would not have flown in the Second Circuit. *See Forschner*, 30 F.3d at 358-60 (cannot use "Swiss Army knife" to mislead consumers into thinking the product is made by renowned competitors). Nor in the Sixth. *See Kehoe*, 796 F.3d at 586-90. Nor

in the Ninth. *See, e.g., Yuga Labs, Inc. v. Ripps*, 144 F.4th 1137, 1156-57 (9th Cir. 2025).

4. Crocs’ last-ditch attempt to bolster its split with district court cases does not move the needle. *Contra* Pet.18. If anything, they undercut the claimed split. For example, a district court in the Sixth Circuit considered both *Dastar* and *Kehoe* and reached the same result as the decision below: In context, the false claims that a product was patented were not merely claims about “who originated the [p]roduct’s formula,” but rather went “directly to [its] nature, characteristics, and qualities.” *Roof Maxx Techs., LLC v. Holsinger*, 2021 WL 3617153, at *8-9 (S.D. Ohio Aug. 16, 2021); *see also Abarca Health, LLC v. PharmPix Corp.*, 915 F. Supp. 2d 210, 221-22 (D.P.R. 2012) (distinguishing *Baden* where, at least at the pleading stage, it was plausible that the defendant’s representation that its product was “innovative” could refer to the product’s characteristics rather than mere authorship). At best, Crocs comes up with one district court’s unexplained assertion that the “statements of exclusivity” before it “more closely relate[d] to” the goods’ “origin” than their “properties, capabilities, or characteristics.” *Williams-Sonoma, Inc. v. Wayfair Inc.*, 652 F. Supp. 3d 216, 224 (D. Mass. 2023) (citing *Baden*, 556 F.3d at 1308). Right or wrong, that application of the circuits’ consistent approach to a particular set of facts does not support this Court’s intervention.

III. The petition overstates this case’s impact.

There is no good reason to think the Federal Circuit’s ruling is the “speech-stifling” “watershed” Crocs imagines it to be. *Contra* Pet.19-22. All the Federal

Circuit did was apply settled law to the particular facts of this case.

1. Crocs first predicts that the decision below will “open the floodgates,” Pet.27, unleashing “an entirely new category of Lanham Act litigation based on alleged misrepresentations about legal status or intangible product features,” Pet.20. It will not.

For starters, Crocs’ prophecy rests on its mistaken view that this case is about intangibles. It is not. Nothing in the decision below opened the door to liability for advertising that is not “about a product’s inherent traits,” let alone for mere “puffery, opinions, or legal conclusions.” *Contra* Pet.27.

In any event, whatever might be said about the volume of Lanham Act litigation in general, Pet.20, the kinds of cases Crocs worries about are hardly swamping the courts. Crocs had to go back more than a decade to scrounge up just three district court decisions (aside from the one below) that it claims were about the issue it presents. Pet.18. And if Crocs is to be believed, the rule it challenges here has been the law in the Fourth Circuit since 2016. Pet.17. So where’s the flood? Crocs does not identify a single case in the Fourth Circuit in which the “dangers” it warns of have come to pass. Pet.20.

Any impact of this case will be further blunted by the inherently factbound nature of section 43(a)(1)(B) cases. For instance, courts and commentators agree that the meaning of any given advertisement must be understood “in the context of the entire accused advertisement.” *Pernod Ricard USA, LLC v. Bacardi U.S.A., Inc.*, 653 F.3d 241, 253 (3d Cir. 2011); *see also*, *e.g.*, *Bell*, 982 F.3d at 479 (“[W]hat matters is how

consumers actually understand the advertising.”). So too for false claims about patent protection. As with any other advertising, liability for such claims “presents a case specific question with an answer that can vary depending on the circumstances and context of the false statement.” 5 Robert A. Matthews Jr., Annotated Patent Digest §34:108 (July 2025 update) (discussing this case and others).

Crocs says “[c]ourts and litigants need a clear, administrable rule” to prevent disaster. Pet.21. But they already have one, and it’s the rule Congress wrote: Section 43(a)(1)(B) provides a cause of action when, but only when, false claims in product advertising misrepresent a product’s “nature, characteristics, qualities, or geographic origin.” §1125(a)(1)(B). What Crocs really wants is a different rule immunizing it from liability for its specific falsehoods.

In the end, for all Crocs’ doomsaying, the Federal Circuit left section 43(a)(1)(B) where it found it. Future cases involving different advertisements and different products will continue to depend on how their particular facts fit the statute’s straightforward rule.

2. Next up is Crocs’ fear for advertisers’ speech rights. Pet.21. What Crocs tries to sell as a concern for free speech is more accurately a desire for the ability to advertise with little regard for the truth. Regardless, it has nothing to do with this case.

Once again, Crocs’ argument relies on the fiction that the Federal Circuit allowed for liability based merely on an incorrect use of the word “patented,” without more. Pet.21. In reality, nothing in the decision below threatens to extend section 43(a)(1)(B)

liability to “marking mistake[s]” untethered from claims about a product itself. *Contra id.* Section 43(a)(1)(B) is still limited to “commercial advertising and promotion,” and it is still limited to misrepresenting a product’s “nature, characteristics, qualities, or geographic origin.” §1125(a)(1)(B).

Crocs’ speech worries stem not from anything decided below, but rather from section 43(a)(1)(B)’s lack of an intent requirement. Pet.21; *see* Pet.6-7. Companies already need to take care in crafting advertisements. The Federal Circuit simply reiterated that the same expectations apply to claims based on patent protection as to any other claim about a product’s tangible properties.

Crocs’ hypothetical company that accidentally touts its superior wages illustrates the point. Would falsely claiming to pay better than the minimum without ever connecting that claim to any aspect of any product itself trigger liability? Doubtful. But what if the company advertises that its higher wages mean that its workers build more durable widgets? You bet.

Anyhow, it is not at all clear why the need to be responsible in commercial advertising is supposed to be a problem. That was presumably the point of Congress’s decision not to include an intent requirement.

If there is something wrong with how the Lanham Act handles mistakes, this is not the case to grapple with it. This is not a case about a company forgetting to take “patented” out of its advertising materials after a patent expires or is invalidated. Crocs admitted that “its statements that Croslite was covered by a patent are false” because “it was never granted a patent for Croslite.” Pet.App.7a. Crocs nonetheless falsely

labeled its material “patented” in advertising that was undisputedly intended “to imply that its products have superior characteristics, qualities, and features.” Pet.App.15a (cleaned up). This was no mistake; it was exactly the sort of deceptive marketing strategy section 43(a)(1)(B) is meant to prevent.

3. Finally, Crocs worries that the decision below will blur the boundaries between intellectual property statutes. That fear is just as overblown as the rest.

In particular, Crocs complains that the decision below will “allow[] plaintiffs to circumvent” “critical limitations Congress imposed on false patent marking suits.” Pet.21-22. It will not.

The problem Crocs gestures at was an avalanche of false marking claims by “unrelated, private third parties.” *See Sukumar v. Nautilus, Inc.*, 785 F.3d 1396, 1400-01 (Fed. Cir. 2015) (attribution omitted). Congress responded by limiting enforcement to the federal government and private parties who suffered “competitive injury.” *Id.* at 1400-02 (quoting 35 U.S.C. §292(b)).

Section 43(a)(1)(B) cannot be used to end-run that limitation because its cause of action is similarly limited: “To invoke the Lanham Act’s cause of action for false advertising, a plaintiff must plead (and ultimately prove) an injury to a commercial interest in sales or business reputation proximately caused by the defendant’s misrepresentations.” *Lexmark*, 572 U.S. at 140; *see also infra* pp.33-35 (addressing Crocs’ similar merits argument).

The prohibition on false copyright marking is even further afield. *Contra* Pet.22. That Congress included a “fraudulent intent” element when defining a

criminal offense, 17 U.S.C. §506(c), says nothing about what Congress expected to happen in civil suits under the Lanham Act.

IV. The Federal Circuit’s decision is correct.

The Federal Circuit correctly held that Crocs is not entitled to summary judgment on this record because Dawgs “present[ed] allegations and evidence that the falsity of Crocs’ promotional statements is rooted in the nature, characteristics, or qualities of Crocs’ products.” Pet.App.11a-12a. That factbound, context-sensitive conclusion follows from the statutory text and this Court’s precedent. Crocs’ contrary arguments—most of which it failed to raise below—are directed at a decision the Federal Circuit did not make and, in any event, are irreconcilable with section 43(a)(1)(B)’s text.

1. The Federal Circuit correctly answered the question before it. Crocs admitted that its “representation that Croslite is patented is in fact false.” Pet.App.7a. And the district court found that at least for summary judgment purposes, Crocs admitted “that its advertisements have ‘linked’ such terms as ‘patented,’ ‘proprietary,’ and ‘exclusive’ to features, characteristics, and qualities of the product material.” Pet.App.15a; *accord* D.Ct.Dkt.916 at 2-3 ¶¶1-2 (disputing only whether the statements “drove a ‘price premium’ or ‘image of product superiority’”). Crocs even admitted that its “goal in its Croslite messaging was to imply that its products have superior characteristics, qualities, and features.” Pet.App.15a-16a (cleaned up).

Given all Crocs’ concessions, the only remaining question on appeal was whether “commercial

misrepresentations that a product is ‘patented,’ ‘proprietary,’ and ‘exclusive’ are—as Crocs and the district court thought—somehow immunized from Lanham Act liability even when they “are linked to the nature, characteristics, or qualities of the product.” Pet.App.7a. The Federal Circuit’s answer was no. Rightly so: Nothing in the text or this Court’s precedent (or any other case Crocs cites) justifies a custom, context-blind carveout for these terms.

a. Start with the text. Section 43(a)(1) reaches “any word, term, name, symbol, or device, or any combination thereof, or *any ... false or misleading description of fact, or false or misleading representation of fact*, which— ... (B) in commercial advertising or promotion, *misrepresents the nature, characteristics, qualities*, or geographic origin of [the advertiser’s] or another person’s goods, services, or commercial activities.” §1125(a)(1) (emphasis added).

Far from carving out certain words as categorically disallowed, Congress took pains to sweep in just about anything said “in commercial advertising or promotion” “in connection with any goods or services.” §1125(a)(1). The test for liability is not what specific words make up a falsehood, but rather what the falsehood does in context: If it “misrepresents the nature, characteristics, qualities, or geographic origin” of anyone’s “goods, services, or commercial activities,” it is actionable. *Id.* Otherwise, it is not.

Nor did Congress hide a safe harbor for the word “patented” (or any other) in the broad terms “nature,” “characteristics,” and “qualities.” Crocs’ own preferred definitions make that clear. Pet.24 n.3 (“A product’s

characteristics are the properties that distinguish it.” (cleaned up)).⁴

Crocs’ petition as good as concedes the point. Crocs says that the statutory terms “refer to an item’s properties—what it is made of, how it works, or what type of item it is.” Pet.24. And it admits that section 43(a)(1)(B) “protects against misstatements about [a] product’s properties or performance.” Pet.26. As the advertisements at issue in this case demonstrate, a false claim of patent protection can be deployed to mislead consumers on those scores. Which is undisputedly why Crocs made the false claim. See Pet.App.15a-16a.

And there is more. Crocs conceded below that a false “claim that a product was covered by a *specific* patent” is actionable because, in Crocs’ view, “such a mismarking falsely represents the product to actually *have* the characteristics and functionality of the very invention embodied in the actual real-life patent.” Ct.App.Dkt.38 at 67. To be clear, neither Dawgs’ claims nor the decision below depend on a categorical rule like that. The point is that Crocs has never been able to explain why, if a reference to a specific patent can misrepresent a product’s nature, characteristics,

⁴ *Accord Nature (n.)*, Oxford English Dictionary (2d ed. 1989) (def.I.1.a) (defining “nature” as “The essential qualities or properties of a thing; the inherent and inseparable combination of properties essentially pertaining to anything and giving it its fundamental character”); *Characteristic, id.* (def.B.1) (defining “characteristic” as “A distinctive mark, trait, or feature; a distinguishing or essential peculiarity or quality”); *Quality, id.* (def.II.7.a) (defining “quality” as “An attribute, property, special feature or characteristic”).

or qualities, a general reference to patent protection can never do so.

The Federal Circuit was thus right to reject Crocs' bespoke exception for false claims of (general) patent coverage and to instead apply section 43(a)(1)(B) as written.

b. Precedent points the same way. This Court's decision in *Dastar* expressly suggested a cause of action just like the one at issue here. Had Dastar, rather than merely claiming credit, advertised its video in a way that "g[a]ve purchasers the impression that the video was quite different from th[e] series" Dastar copied, this Court said, Dastar's competitors may well have had a cause of action "for misrepresentation under" section 43(a)(1)(B). 539 U.S. at 38.

It is easy to see why a false claim to have created a video "quite different" from the original goes beyond mere authorship to say something about the new video's nature, characteristics, or qualities. Whether the video is something new and different or merely a lightly edited and repackaged copy speaks directly to what the video is, no matter whose idea it was. Consider a consumer who wants something new because she has seen the original. She may be willing to buy the former, but not the latter—and that is true even if she neither knows nor cares who deserves credit.

Likewise, the section 43(a)(1)(B) problem with Crocs' advertisements is not that they falsely claim credit for someone else's idea, but rather that they falsely claim that Crocs' shoes are made of different material than its competitors' shoes. Pet.App.11a-12a; *supra* pp.5-6. In this context, falsely calling the material "patented" bolsters the credibility of the false

claim that it is different and better. *See also Lexmark*, 572 U.S. at 122-23, 138 (holding that the plaintiff’s injuries were within the scope of the Lanham Act where the plaintiff alleged competitive harm from false advertisements, including the defendant’s assertion that the plaintiff’s products were illegal to use and infringed the defendant’s patents).

c. As the Federal Circuit recognized, the district court’s contrary conclusion rested on its mistaken view that “patented” is a claim of authorship and nothing more. Pet.App.11a. Despite relying on that argument both in the district court and on appeal, Crocs’ petition makes no attempt to defend it, and for good reason: That is not at all what “patented” means.

According to the district court, “[f]alsely claiming to have ‘patented’ something is akin to claiming to have ‘invented’ it.” Pet.App.26a-27a. That only highlights the problem with plucking individual words out of the context of the advertisements at issue. The court’s observation is arguably a possible meaning of the verb “patented.”⁵ But Crocs’ advertisements used the adjective. To say that a product is “patented” is to claim that it is “protected by a patent.” *Patented (adj.)*, Oxford English Dictionary (last modified July 2023), https://www.oed.com/dictionary/patented_adj (def.1). On its own, that says nothing about inventorship; patents can be bought, sold, and licensed. It does, however, signal that whoever owns the patent has the right to exclude others from making, using, or selling

⁵ *See, e.g., Patent (v.)*, Oxford English Dictionary (last modified Mar. 2025), https://www.oed.com/dictionary/patent_v (def.3.a.) (defining “patent” as “To take out or obtain a patent for; to obtain by letters patent the sole right to make, use, or sell”).

the patented invention. *See* 35 U.S.C. §271(a). And for that reason, it can—when used like it was here—suggest exclusivity, difference, and superiority.

As a result, the Federal Circuit correctly concluded that Crocs’ false “promotional statements ... that a patent covers Croslite,” in connection with Crocs’ touting the “numerous tangible benefits” of Croslite, are actionable under section 43(a)(1)(B). Pet.App.11a-12a.

2. Crocs’ belated arguments about causation and the false marking statute do not undermine the decision below.

a. Crocs complains that Dawgs’ claim involves an “indirect-effects” theory under which “a false statement that is not about product characteristics” is nonetheless actionable because it “might indirectly cause a consumer to form a mistaken belief about” the product’s characteristics. Pet.28-29. That is not what the decision below held.

Neither Dawgs nor the Federal Circuit suggested that a false claim that a product is “patented,” without more, could be made actionable by consumers’ views. Critical to the decision below was that “here, the false claim that a product is patented does not stand alone.” Pet.App.11a. Rather, it is “rooted in the nature, characteristics, or qualities of Crocs’ products.” *Id.* It was Crocs, not just consumers, that linked “patented” to product characteristics.

b. Crocs’ argument that section 43(a)(1)(B) must be constrained to avoid overlap with the false patent marking statute, 35 U.S.C. §292, fares no better. Nothing in the text of either statute “forbids or limits Lanham Act claims” involving false representations of

patent protection, *POM Wonderful LLC v. Coca-Cola Co.*, 573 U.S. 102, 113 (2014). *See id.* at 105-06, 113-16 (holding that private parties may bring Lanham Act claims challenging federally regulated food labels). Nor does either statute “purport[] to govern the relevant interaction between the Lanham Act” and §292. *See id.* at 113. Instead, Congress chose “to enact two different statutes, each with its own mechanisms to enhance the protection of competitors and consumers.” *Id.* at 116.

The false marking statute preserves the integrity of the patent marking system and the important notice function it serves, *see* 35 U.S.C. §287; protects patentees from counterfeit marking, *id.* §292(a); and protects consumers and competitors from false claims of patent protection, *id.* It is enforceable both by the federal government (through statutory penalties) and competitors (through suits for compensatory damages). *Id.* §292(a)-(b). And it applies without regard to whether the false marking is done in advertising or misleads consumers as to the product’s nature, characteristics, or qualities. *See id.* §292(a); *see also, e.g., Sukumar*, 785 F.3d at 1402 (“[S]ometimes a falsely marked product is also properly marked with other patents.”).

By contrast, section 43(a)(1)(B) more broadly protects the marketplace from deceptive advertising, whether patent-related or not. §1125(a)(1)(B). At the same time, it reaches only a narrower set of falsehoods about patent protection: those made “in commercial advertising or promotion” and that misrepresent a product’s “nature, characteristics, [or] qualities.” *Id.* So despite some overlap, the statutes have distinct

purposes, substantive reach, and enforcement mechanisms. Particularly given Congress’s repeated amendments to both provisions without forbidding overlapping claims, there is no reason for courts to insist on hermetically sealing them off from each other. *See POM Wonderful*, 573 U.S. at 113-16; Matthews, *supra*, §34:108.20 (“Viewing the elements and essence of these two statutory provisions, no apparent ‘conflict’ appears to exist between them.”).

3. Finally, Crocs is wrong about the question it says is presented—which was neither pressed nor passed on below. The reason Crocs cannot find a case drawing a line between tangible and intangible characteristics of a product, *see supra* pp.14-19, is because the statute draws no such line. *Contra* Pet.23-28.

The first red flag for Crocs’ interpretation should be that the words “tangible” and “intangible” are nowhere to be found in section 43. And the words Congress did use undercut Crocs’ reading.

Crocs’ dictionary definitions do not support its assertion that “[i]n ordinary English, the words ‘nature,’ ‘characteristics,’ and ‘qualities’ refer to tangible attributes” alone. *Contra* Pet.24. A product’s distinguishing “properties” or “features” can be both tangible and intangible as a matter of ordinary English.

Congress confirmed the point by using the same words to discuss “services” and “commercial activities.” What even are the “tangible attributes” of a service? At the very least, a service’s intangible attributes are the ones likely to matter. It would be strange for Congress to go to the trouble to include services in section 43(a)(1)(B) only to practically exclude them through an unstated tangible-attribute limitation.

Nor does the inclusion of “geographic origin” require limiting “nature,” “characteristics,” and “qualities” to tangible attributes to avoid superfluity. *Contra* Pet.24-25. By separately listing “geographic origin,” Congress ensured that misrepresentations of geographic origin would be actionable without the need to prove a connection to the product’s “nature, characteristics, [or] qualities.” §1125(a)(1)(B). Besides, reading section 43(a) as a whole confirms that Congress was concerned more with breadth than brevity. If Congress had wanted to limit section 43(a)(1)(B) to tangible characteristics, surely it could have spared one more word to say so.

CONCLUSION

The petition should be denied.

Respectfully submitted,

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August 21, 2025