

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

**BRIEF FOR *AMICUS CURIAE* ACCESSORIES
COUNCIL IN SUPPORT OF PETITIONER**

Matthew V.H. Noller
KING & SPALDING LLP
50 California Street
Suite 3300
San Francisco, CA 94111

Paul d'Ambrosio
KING & SPALDING LLP
110 N Wacker Drive
Suite 3800
Chicago, IL 60606

Jeffrey S. Bucholtz
Counsel of Record
KING & SPALDING LLP
1700 Pennsylvania Ave. NW
Washington, DC 20006
(202) 737-0500
jbucholtz@kslaw.com

Counsel for Amicus Curiae

August 21, 2025

TABLE OF CONTENTS

Table of Authorities	ii
Interest of <i>Amicus Curiae</i>	1
Introduction and Summary of Argument.....	2
Argument	3
I. The Federal Circuit’s decision will have nationwide consequences	4
II. The Federal Circuit’s decision will chill the exercise of important rights	7
A. The decision below will chill patent enforcement	8
B. The decision below will chill protected commercial speech.....	10
Conclusion.....	12

TABLE OF AUTHORITIES

Cases

<i>44 Liquormart, Inc. v. Rhode Island</i> , 517 U.S. 484 (1996).....	2, 11
<i>Air Turbine Tech., Inc. v. Atlas Copco AB</i> , 410 F.3d 701 (Fed. Cir. 2005).....	5
<i>Allergan, Inc. v. Athena Cosmetics, Inc.</i> , 738 F.3d 1350 (Fed. Cir. 2013).....	4, 9
<i>Amana Refrigeration, Inc. v. Quadlux, Inc.</i> , 172 F.3d 852 (Fed. Cir. 1999).....	5
<i>Baden Sports, Inc. v. Molten USA, Inc.</i> , 556 F.3d 1300 (Fed. Cir. 2009).....	5
<i>Bates v. State Bar of Ariz.</i> , 433 U.S. 350 (1977).....	11
<i>Citizens United v. FEC</i> , 558 U.S. 310 (2010).....	11
<i>Clock Spring, L.P. v. Wrapmaster, Inc.</i> , 560 F.3d 1317 (Fed. Cir. 2009).....	5
<i>Connally v. Gen. Constr. Co.</i> , 269 U.S. 385 (1926).....	11
<i>Dastar Crop.</i> <i>v. Twentieth Century Fox Film Corp.</i> , 539 U.S. 23 (2003).....	5
<i>Diamond v. Chakrabarty</i> , 447 U.S. 303 (1980).....	2, 10
<i>Edenfield v. Fane</i> , 507 U.S. 761 (1993).....	12

<i>Hall v. Bed Bath & Beyond, Inc.</i> , 705 F.3d 1357 (Fed. Cir. 2013)	5
<i>Honeywell Int’l, Inc.</i> <i>v. Univ. Avionics Sys. Corp.</i> , 397 F. Supp. 2d 537 (D. Del. 2005)	10
<i>J.E.M. Ag Supply, Inc.</i> <i>v. Pioneer Hi-Bred Int’l, Inc.</i> , 534 U.S. 124 (2001)	2
<i>LensCrafters, Inc. v. Vision World, Inc.</i> , 943 F. Supp. 1481 (D. Minn. 1996)	7
<i>Marino v. Coach, Inc.</i> , 264 F. Supp. 3d 558 (S.D.N.Y. 2017)	7
<i>Nike, Inc. v. Kasky</i> , 539 U.S. 654 (2003)	12
<i>Riley v. Nat’l Fed. of the Blind of N.C., Inc.</i> , 487 U.S. 781 (1988)	12
<i>Sorrell v. IMS Health Inc.</i> , 564 U.S. 552 (2011)	11, 12
<i>Stewart v. Abend</i> , 495 U.S. 207 (1990)	2
<i>Unique Concepts, Inc. v. Manuel</i> , 930 F.2d 573 (7th Cir. 1991)	8
<i>Williams-Sonoma, Inc. v. Wayfair Inc.</i> , 652 F. Supp. 3d 216 (D. Mass. 2023)	7
<i>Zauderer v. Off. of Disciplinary Counsel</i> , 471 U.S. 626 (1985)	11
<i>Zenith Elecs. Corp. v. Exzec, Inc.</i> , 182 F.3d 1340 (Fed. Cir. 1999)	4

Statutes & Rules

15 U.S.C. § 1117(a)	9
28 U.S.C. § 1295(a)(1).....	4
Fed. R. Civ. P. 13(b).....	8

Other Authorities

5 Writings of Thomas Jefferson (Washington ed. 1871).....	2
--	---

Motion for

Final Approval of Class Settlement, <i>Gattinella v. Michael Kors (USA), Inc.</i> , 2015 WL 10384548 (S.D.N.Y. Nov. 17, 2015).....	7
---	---

Sameni, Pedram

<i>Rising to the Top in a Post-Pandemic IP World: A Look at the Most Active Patent Litigators and the Latest District Court Patent Litigation Data</i> , IPWATCHDOG (Jan. 31, 2023).....	6
---	---

The Accessories Council respectfully submits this brief as *amicus curiae* in support of the petition for certiorari filed by Petitioner Crocs, Inc.

INTEREST OF *AMICUS CURIAE*¹

The Accessories Council is a trade association dedicated to helping accessories, jewelry, and footwear companies grow their businesses. It has over 350 members, ranging from large companies to start-ups. The Council hosts over 100 opportunities for its members each year—including awards, events, educational programming, legislative support, mentoring, press support, and sourcing assistance—and publishes a weekly newsletter and a quarterly digital magazine. Many of its members have small budgets and limited resources for protecting their unique designs.

The Council's members have a strong interest in being able to advertise their products and protect their intellectual property without impediment, and the Council exists to protect such interests. Its members rely on vigorous advertising and the protections provided by their numerous patents, trademarks, and copyrights to maintain their businesses. As a representative of companies that both assert and defend against patent and false-advertising claims, the Council writes to share its perspective on the

¹ No counsel for any party authored this brief in whole or in part, and no entity or person, aside from *amicus curiae*, its members, and its counsel, made any monetary contribution toward the preparation or submission of this brief. All parties were provided timely notice of this brief under Rule 37.2.

importance of a legal landscape that encourages free commercial speech and protection of patent rights.

INTRODUCTION AND SUMMARY OF ARGUMENT

The Court should grant the petition for certiorari because the Federal Circuit’s decision below threatens important public values underlying the patent system and the First Amendment. This Court has long recognized that Congress enacted our country’s intellectual-property laws out of a belief that “ingenuity should receive a liberal encouragement.” *Diamond v. Chakrabarty*, 447 U.S. 303, 308–09 (1980) (quoting 5 Writings of Thomas Jefferson 75–76 (Washington ed. 1871)); see *J.E.M. Ag Supply, Inc. v. Pioneer Hi-Bred Int’l, Inc.*, 534 U.S. 124, 134–35 (2001) (rejecting interpretation of patent law that would discourage innovation); *Stewart v. Abend*, 495 U.S. 207, 236 (1990) (stating copyright law should not be interpreted to “stifle the very creativity which that law is designed to foster” (quotation omitted)). This Court has also long protected commercial speech, on which the public “relie[s] . . . for vital information about the market.” 44 *Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 495 (1996). The Federal Circuit’s decision runs counter to both of these policies.

First, the Federal Circuit’s decision will chill *amicus*’s members and other design companies from enforcing their patent rights. Designers commonly describe their products as exclusive in one way or another, and they commonly have patents on their products and designs. But if a designer files a patent-infringement suit, it will ultimately be heard in the Federal Circuit, whose precedent now encourages

infringers to file false-advertising counterclaims based on the designer's descriptions of intangible aspects of its products. Faced with this risk of false-advertising liability, many designers may decide that enforcing their patents is too expensive and impractical. That chill of patent rights justifies this Court's review.

Second, the Federal Circuit's decision will chill *amicus*'s members and other design companies from engaging in protected commercial speech. The decision below provides no clear guidance on when statements about intangible aspects of products—such as whether something about them is “exclusive”—qualify as statements about a product's “nature, characteristics, or qualities” subject to section 43(a)(1)(B) of the Lanham Act. That lack of clarity will put design companies to an intolerable choice: refrain from engaging in truthful commercial advertising, or speak and risk costly and unpredictable litigation under the Federal Circuit's interpretation of section 43(a)(1)(B). Many designers will likely choose silence, a chill on protected speech that this Court should grant review to remedy.

ARGUMENT

The petition for certiorari persuasively explains how the Federal Circuit in this case erroneously joined the minority side of an existing circuit split. *Amicus* submits this brief to explain the significant negative consequences that the decision below, if left unreviewed, will have on *amicus*'s members and other design companies throughout the country. By virtue of the Federal Circuit's unique status as the exclusive appellate forum for patent cases, its decision will have outsized, nationwide consequences. It will discourage

designers from enforcing their valid patents and chill them from engaging in protected commercial speech about their products. To avoid those consequences, this Court should grant certiorari and reverse the decision below.

I. The Federal Circuit’s decision will have nationwide consequences.

As the petition explains, the Federal Circuit’s decision exacerbates a circuit split over whether section 43(a)(1)(B) applies to statements about a product’s intangible attributes. Pet.3. But the decision below will have broader consequences than would a similar decision from any other court of appeals. Because of the Federal Circuit’s unique place among the federal appellate courts, the effects of its decision will be felt nationwide.

The Federal Circuit has exclusive jurisdiction over appeals “in any civil action arising under, or in any civil action in which a party has asserted a compulsory counterclaim arising under, any Act of Congress relating to patents.” 28 U.S.C. § 1295(a)(1). That jurisdiction extends to the entire “civil action.” *Id.* So when the Federal Circuit exercises jurisdiction over a patent case, it also considers all *non*-patent claims that happen to be part of the action (even if the patent claims have dropped out of the case). See *Allergan, Inc. v. Athena Cosmetics, Inc.*, 738 F.3d 1350, 1353–54 (Fed. Cir. 2013); *Zenith Elecs. Corp. v. Exzec, Inc.*, 182 F.3d 1340, 1346 (Fed. Cir. 1999). In particular, the Federal Circuit often reviews false-advertising claims and counterclaims, which are commonly asserted alongside or in response to patent

claims.² That is what happened here, where the Federal Circuit reviewed respondents' section 43(a)(1)(B) claim because respondents asserted it as a counterclaim after petitioner sued them for patent infringement. App.2a.

As a result, the Federal Circuit will apply its decision in this case to Lanham Act claims arising in patent cases throughout the country. Although the Federal Circuit has a “courtesy rule” under which it applies the non-patent precedent of the regional circuit from which a case arises, *Amana Refrigeration, Inc. v. Quadlux, Inc.*, 172 F.3d 852, 856 (Fed. Cir. 1999), that rule works only where there *is* relevant precedent from the regional circuit. When there is no such regional case law, the Federal Circuit conducts its own independent analysis. In this case, for instance, the case arose within the Tenth Circuit, but the Federal Circuit’s decision did not turn on any unique feature of Tenth Circuit case law. Indeed, aside from stating the standard of review, the court did not cite a single Tenth Circuit case or analyze any district court cases from within the Tenth Circuit. The Federal Circuit simply based its decision on its own analysis of this Court’s decision in *Dastar Corp. v. Twentieth Century Fox Film Corp.*, 539 U.S. 23 (2003), and its own decision in *Baden Sports, Inc. v. Molten USA, Inc.*, 556 F.3d 1300 (Fed. Cir. 2009). See App.8a–11a.

² See, e.g., *Hall v. Bed Bath & Beyond, Inc.*, 705 F.3d 1357 (Fed. Cir. 2013); *Baden Sports, Inc. v. Molten USA, Inc.*, 556 F.3d 1300 (Fed. Cir. 2009); *Clock Spring, L.P. v. Wrapmaster, Inc.*, 560 F.3d 1317 (Fed. Cir. 2009); *Air Turbine Tech., Inc. v. Atlas Copco AB*, 410 F.3d 701 (Fed. Cir. 2005).

Because the decision below in no way turned on regional circuit precedent, the Federal Circuit will likely follow the decision going forward unless there is contrary binding precedent from the regional court of appeals. Such precedent exists in three circuits—hence the circuit split—but not the others. *See* Pet.12–13. In the absence of such precedent, the Federal Circuit will naturally look to its own decisions on the same issue as persuasive authority, just like the panel below looked to *Baden*. Thus, the erroneous decision below will hang over patent cases that originate within most circuits, including those whose district courts have the heaviest patent caseloads.³

For these reasons, the Federal Circuit’s decision cannot be dismissed as a one-off error with limited scope. The decision will have important consequences nationwide, which justifies this Court’s review.

³ Texas and Delaware have long been home to a disproportionate share of the country’s patent litigation, *see, e.g.*, Pedram Sameni, *Rising to the Top in a Post-Pandemic IP World: A Look at the Most Active Patent Litigators and the Latest District Court Patent Litigation Data*, IPWATCHDOG (Jan. 31, 2023), <https://ipwatchdog.com/2023/01/31/rising-top-post-pandemic-ip-world-look-active-patent-litigators-latest-district-court-patent-litigation-data/id=155974/> (noting that between 2017 and 2022, 30.9% of all patent cases originated in Texas and 18.6% originated in Delaware), and the Third and Fifth Circuits do not have on-point precedent that would dissuade the Federal Circuit from applying the decision below to section 43(a)(1)(B) issues in patent cases originating from within those circuits.

II. The Federal Circuit’s decision will chill the exercise of important rights.

The consequences of the Federal Circuit’s decision will be severe. The Federal Circuit held that section 43(a)(1)(B) applies to product descriptions, such as “exclusive,” that a court concludes could “cause[] consumers to be misled about the nature, characteristics, or qualities of [the] product.” App.11a–12a (internal quotation marks omitted). But, as *amicus* knows well, such descriptions are commonplace in the fashion and accessories industry, as well as in any other industry focused on creating distinctive designs. A great many design-focused companies market their products as being exclusive, part of exclusive collections, sold exclusively by the designing company, and the like.⁴ Under the Federal Circuit’s decision, every one of those companies—and many more besides—could face false-advertising claims under Section 43(a)(1)(B).

That risk of costly litigation and potential liability will chill valuable conduct this Court has taken pains to protect. First, the Federal Circuit’s decision will chill design companies from suing to enforce their

⁴ See, e.g., *Williams-Sonoma, Inc. v. Wayfair Inc.*, 652 F. Supp. 3d 216, 220 (D. Mass. 2023) (designer referring to one of its furniture lines as “a Wayfair exclusive collection”); *LensCrafters, Inc. v. Vision World, Inc.*, 943 F. Supp. 1481, 1499 (D. Minn. 1996) (designer marketing its products as “exclusively” available in its retail outlets); *Marino v. Coach, Inc.*, 264 F. Supp. 3d 558, 562 (S.D.N.Y. 2017) (designer creating goods exclusively for sale in its stores); Motion for Final Approval of Class Settlement, *Gattinella v. Michael Kors (USA), Inc.*, 2015 WL 10384548 (S.D.N.Y. Nov. 17, 2015) (designer selling its products exclusively in its outlets).

patents, as any patent-enforcement suit could elicit a counterclaim under section 43(a)(1)(B). Second, the Federal Circuit’s decision will chill design companies from engaging in advertising and other protected commercial speech out of fear that their speech could trigger liability under the Federal Circuit’s overbroad interpretation of section 43(a)(1)(B). Each of these chilling effects justifies this Court’s review.

A. The decision below will chill patent enforcement.

Companies whose success hinges on creating visually distinctive products naturally own many patents on their products and designs. The Federal Circuit’s decision below chills *amicus*’s members and other innovative designers from protecting their patents.

Suppose a designer wishes to sue an infringing imitator to enforce a patent it has on one of its designs. If it does so, the infringer could counterclaim under section 43(a)(1)(B) that the designer’s description of its design as patented or exclusive is false or misleading because, for example, the patent has assertedly expired. Or the infringer could target a different product in the designer’s portfolio, contending, for example, that describing the product as part of an “exclusive collection” is false or misleading because the infringer also sells a similar product.⁵ Because

⁵ Under the rules for permissive counterclaims, Fed. R. Civ. P. 13(b), the infringer’s counterclaim would not have to be related to the product at issue on the main claim. See *Unique Concepts, Inc. v. Manuel*, 930 F.2d 573, 574–75 (7th Cir. 1991) (holding that

that counterclaim is part of a patent action, any appeal regarding the counterclaim would be heard by the Federal Circuit, *Allergan*, 738 F.3d at 1353–54, likely under the standard announced in the decision below. And that standard leaves the designer in the dark about its chances, as the decision below provides no clarity on when a statement of “exclusivity” is a non-actionable statement of authorship versus an actionable statement of a product’s “nature, characteristics, or qualities.” *See* Pet.21, 27, 28–29.

Suing to enforce a patent on one product thus potentially exposes the designer’s entire catalogue to a counterclaim governed by the decision below’s vague standard. And even if some such counterclaims are ultimately unsuccessful, section 43(a)(1)(B)’s scope and draconian remedies—including damages, injunctions, disgorgement, and attorney fees, 15 U.S.C. § 1117(a)—present a strong deterrent on the front end. Many designers may well decide not to bring a meritorious patent-infringement suit simply to avoid the expense and risk involved in defending against even an unmeritorious section 43(a)(1)(B) counterclaim.

And the parties who will bear the ill effects of the Federal Circuit’s decision the most are the small businesses that are least able to afford it. Many of *amicus*’s members are small designers who lack the resources to engage in protracted and unpredictable litigation. They do not have in-house legal teams, multi-million-dollar litigation budgets, or the

Federal Circuit had jurisdiction over appeal on permissive counterclaim unrelated to plaintiff’s patent-infringement claim).

institutional knowledge to navigate prolonged and costly lawsuits threatening the drastic remedies available under section 43(a)(1)(B). If the Federal Circuit’s decision stands, *amicus*’s members will be deterred from protecting their innovations by the fear that larger infringers will retaliate with false-advertising counterclaims and leverage their superior resources to litigate *amicus*’s small-business members into oblivion.

Innovative designers should be able to sue to enforce their patent rights without fear they will be subjected to potential section 43(a)(1)(B) liability for vague statements about intangible aspects of their products. A patent that its holder is deterred from enforcing is as good as no patent at all. And if designers do not believe that they can effectively enforce their patents, then they have little incentive to create patentable innovations in the first place. *See Honeywell Int’l, Inc. v. Univ. Avionics Sys. Corp.*, 397 F. Supp. 2d 537, 547 (D. Del. 2005) (“The patent law is largely premised on the desire to give inventors inducements to create.”). Such a deterrent to innovation undermines the “liberal encouragement” to creators that Congress enacted the Patent Act to provide. *Diamond*, 447 U.S. at 308–09 (quotation marks omitted).

B. The decision below will chill protected commercial speech.

The lack of clarity in the Federal Circuit’s decision will also chill designers from engaging in constitutionally protected commercial speech about their products. The Federal Circuit’s test—that a statement about intangible aspects of a product

violates section 43(a)(1)(B) when it could “cause[] consumers to be misled about the nature, characteristics, or qualities of [a] product,” App.12a—does nothing to distinguish permissible descriptions from unlawful ones. As explained above, countless designers advertise their products as in some way exclusive, unique, special, or the like. All those designers are now left to guess whether their advertising statements leave them legally exposed. That will lead many designers to refrain from making even truthful statements about intangible attributes of their products.

Being forced to “guess” whether one’s speech violates the law chills the exercise of a fundamental constitutional right. *Citizens United v. FEC*, 558 U.S. 310, 324 (2010) (quoting *Connally v. Gen. Constr. Co.*, 269 U.S. 385, 391 (1926)). While this Court has stated that commercial speech may be more resistant to “chilling effect[s]” than noncommercial speech, the Court has not hesitated to protect commercial speech from unjustified burdens. 44 *Liquormart*, 517 U.S. at 499. After all, “a ‘consumer’s concern for the free flow of commercial information often may be far keener than his concern for urgent political dialogue.’” *Sorrell v. IMS Health Inc.*, 564 U.S. 552, 566 (2011) (quoting *Bates v. State Bar of Ariz.*, 433 U.S. 350, 364 (1977)). And so “chilling protected commercial speech” can “offend the First Amendment” in the same way as chilling noncommercial speech. *Zauderer v. Off. of Disciplinary Counsel*, 471 U.S. 626, 651 (1985).

Protecting design companies like *amicus*’s members “from the chilling effect of the prospect of expensive litigation is therefore . . . a matter of great

importance.” *Nike, Inc. v. Kasky*, 539 U.S. 654, 664 (2003) (Stevens, J., concurring in dismissal of writ as improvidently granted). If such companies are chilled from speaking about their products, society will be deprived of a free “commercial marketplace” in which “ideas and information flourish.” *Sorrell*, 564 U.S. at 579 (quoting *Edenfield v. Fane*, 507 U.S. 761, 767 (1993)). Because *amicus*’s members “cannot be made to wait for years before being able to speak with a measure of security,” *Riley v. Nat’l Fed. of the Blind of N.C., Inc.*, 487 U.S. 781, 793–94 (1988) (quotation marks omitted)), the Court should grant certiorari now and reverse the Federal Circuit’s decision.

CONCLUSION

The Court should grant the petition for certiorari.

Respectfully submitted,

Matthew V.H. Noller	Jeffrey S. Bucholtz
KING & SPALDING LLP	<i>Counsel of Record</i>
50 California Street	KING & SPALDING LLP
Suite 3300	1700 Pennsylvania Ave NW
San Francisco, CA 94111	Washington, DC 20006
Paul d’Ambrosio	(202) 737-0500
KING & SPALDING LLP	jbucholtz@kslaw.com
110 N Wacker Drive	
Suite 3800	
Chicago, IL 60606	

Counsel for Amicus Curiae

August 21, 2025