

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*

REPLY BRIEF FOR THE PETITIONER

JOHN P. ELWOOD
ANDREW T. TUTT
ARNOLD & PORTER
KAYE SCHOLER LLP
*601 Massachusetts Ave. NW
Washington, DC 20001*

DAVID A. CAINE
ARNOLD & PORTER
KAYE SCHOLER LLP
*Five Palo Alto Square, Ste. 500
3000 El Camino Real
Palo Alto, CA 94306*

LISA S. BLATT
Counsel of Record
ROHIT P. ASIRVATHAM
WILLIAMS & CONNOLLY LLP
*680 Maine Ave. SW
Washington, DC 20024
(202) 434-5000
lblatt@wc.com*

SEAN M. CALLAGY
ISAAC L. RAMSEY
ARNOLD & PORTER
KAYE SCHOLER LLP
*Three Embarcadero Center
10th Floor
San Francisco, CA 94111*

(Additional counsel on inside cover.)

CLARE A. SAUNDERS
ARNOLD & PORTER
KAYE SCHOLER LLP
500 Boylston St., 20th Floor
Boston, MA 02116

TABLE OF CONTENTS

	Page
I. This Case Implicates an Important Circuit Split Over the Lanham Act's Scope	4
II. This Case Is an Ideal Vehicle to Resolve this Circuit Split.....	9
III. The Question Presented Is Exceptionally Important.....	10
IV. The Decision Below Is Incorrect.....	12
CONCLUSION	12

II

TABLE OF AUTHORITIES

Cases:	Page
<i>Abarca Health, LLC v. PharmPix Corp.</i> , 915 F. Supp. 2d 210 (D.P.R. 2012)	9
<i>Baden Sports, Inc. v. Molten USA, Inc.</i> , 556 F.3d 1300 (Fed. Cir. 2009)	2, 6, 7
<i>Belmora LLC v. Bayer Consumer Care AG</i> , 819 F.3d 697 (4th Cir. 2016)	8
<i>Consumer Fin. Prot. Bureau v. Cmty. Fin.</i> <i>Servs. Ass’n of Am., Ltd.</i> , 601 U.S. 416 (2024)	3
<i>Dep’t of State v. Muñoz</i> , 602 U.S. 899 (2024)	3
<i>Forschner Grp., Inc. v. Arrow Trading Co. Inc.</i> , 30 F.3d 348 (2d Cir. 1994)	5, 7, 8
<i>Kehoe Component Sales Inc. v. Best</i> <i>Lighting Prods., Inc.</i> , 796 F.3d 576 (6th Cir. 2015)	5, 7, 8
<i>Med. Marijuana, Inc. v. Horn</i> , 145 S. Ct. 931 (2025)	3
<i>Merck Sharpe & Dohme Corp. v. Albrecht</i> , 587 U.S. 299 (2019)	3
<i>Roof Maxx Technologies, LLC v. Holsinger</i> , No. 2:20-cv-03154, 2021 WL 3617153 (S.D. Ohio Aug. 16, 2021)	9
<i>Sybersound Records, Inc. v. UAV Corp.</i> , 517 F.3d 1137 (9th Cir. 2008)	5, 6
<i>United States v. Williams</i> , 504 U.S. 36 (1992)	10
<i>Williams-Sonoma, Inc. v. Wayfair Inc.</i> , 652 F. Supp. 3d 216 (D. Mass. 2023)	9

III

Statutes:	Page
15 U.S.C. § 1125(a)	1, 2, 4, 5, 7, 8, 9, 10, 11, 12
Other Authorities:	
Bryan P. Collins, <i>Is the Federal Circuit Breathing Life Back Into False Patent Marking Claims?</i> , Pillsbury (Oct. 9, 2024)	3
John Cordani, <i>False Patent Marking Claims Find New Home In Lanham Act</i> , Law360 (Oct. 30, 2024)	3
S. Shapiro et al., Supreme Court Practice § 4.18 (11th ed. 2019)	3-4

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*

REPLY BRIEF FOR THE PETITIONER

Unable to defend the Federal Circuit’s *actual* decision, Dawgs recharacterizes it as a garden-variety § 43(a)(1)(B) case, asserting that the Federal Circuit simply concluded that Crocs misled consumers about the physical or functional characteristics of its shoes. Opp.28-36. That’s right—Dawgs now *agrees* that § 43(a)(1)(B), requires a misleading statement about a product’s physical or functional attributes.

But that interpretation of the panel’s opinion is wrong all the way down. If this case turned on false or misleading statements about the characteristics of Crocs’ shoes, the panel had no need to dwell on whether Crocs “falsely claim[ed] that it possesse[d] a patent,” or to distinguish

“authorship” claims at length, yet the court’s entire discussion focused on the false patent claim. Pet.App.1a, 12a. The Federal Circuit reasoned that Crocs’ advertisements contained false “promotional statements . . . that a patent covers Croslite,” and those “promotional materials further included statements that Croslite has numerous tangible benefits.” Pet.App.11a.

On the basis of those two sentences, without identifying any false statements about Croslite’s tangible characteristics, Dawgs’ suit was allowed to proceed on the theory that Crocs’ statement that Croslite was patented “cause[d] customers to believe that Crocs . . . [are] made of a material that is different than any other footwear” and “all other molded footwear . . . is made of inferior material.” Pet.App.11a-12a.

Thus, Dawgs’ opposition collapses because the panel’s holding expands § 43(a)(1)(B) to capture misstatements about intangibles. As even Dawgs now agrees, that is not the statute Congress wrote.

Dawgs’ claim that there is no circuit split implicated here, Opp.2, 14-23, likewise dissolves upon scrutiny. As the Federal Circuit acknowledged, the circuits are squarely divided over whether the “‘nature, characteristics, [or] qualities’ in Section 43(a)(1)(B) relate to ‘the characteristics of the good itself,’ not intangibles.” Pet.App.7a n.3 (quoting *Baden Sports, Inc. v. Molten USA, Inc.*, 556 F.3d 1300, 1307 (Fed. Cir. 2009)). The Second, Sixth, and Ninth Circuits forbid § 43(a)(1)(B) suits based on misrepresentations regarding intangibles, but the Fourth and Federal Circuits permit them. A statement that a product is “exclusive,” “proprietary,” or “patented” is not a statement about its “nature, characteristics, [or] qualities” under any rational conception of those

words. This case would have come out differently in the Second, Sixth, and Ninth Circuits, where—unless the misrepresentation concerns a good’s “properties or capabilities”—it is not actionable.

Dawgs’ efforts to portray this as a nothing-to-see-here case, Opp.23-28, likewise fail. The Federal Circuit’s unique role as the nation’s primary IP appellate court means that this case will have “outsized, nationwide” reach and “severe” consequences. Accessories Council Br. 3, 7. Commentators *immediately* recognized the decision’s consequences—using words like “flood” and “landslide” to describe the tsunami of lawsuits it permits.¹ The panel’s rule chills ordinary commercial speech by subjecting garden-variety puffery and mismarking to Lanham Act litigation bringing injunctions, disgorgement, and similar “draconian remedies.” Accessories Council Br. 9.

Dawgs’ final effort to stave off review is its claim that this petition is “interlocutory.” Opp.1, 9-11. That is incorrect and in all events would not counsel against review here. The district court granted summary judgment to Crocs. This Court routinely grants certiorari upon vacatur or reversal of summary judgment, particularly when the case presents an important, purely legal question.²

¹ Bryan P. Collins, *Is the Federal Circuit Breathing Life Back Into False Patent Marking Claims?*, Pillsbury (Oct. 9, 2024) (“landslide”); John Cordani, *False Patent Marking Claims Find New Home In Lanham Act*, Law360 (Oct. 30, 2024) (“flood”).

² See *Med. Marijuana, Inc. v. Horn*, 145 S. Ct. 931, 937 (2025); *Dep’t of State v. Muñoz*, 602 U.S. 899, 906-07 (2024); *Consumer Fin. Prot. Bureau v. Cmty. Fin. Servs. Ass’n of Am., Ltd.*, 601 U.S. 416, 423 (2024); *Merck Sharpe & Dohme Corp. v. Albrecht*, 587 U.S. 299, 309-10 (2019); see also S. Shapiro et al., Supreme Court Practice § 4.18

There is no reason to wait: denying review would leave in place a vast expansion of § 43(a)(1)(B) that infringes upon the exclusive domains of Copyright and Patent law and promises an avalanche of frivolous litigation.

I. This Case Implicates an Important Circuit Split Over the Lanham Act’s Scope

A. Dawgs’ claim that this case does not implicate the question presented is wrong. Dawgs argues that the Federal Circuit “did not[] decide whether misrepresentations about intangible properties are actionable on their own.” Opp.12. But Dawgs concedes that the *only* claimed misrepresentations Crocs made were that Croslite was “patented” “proprietary” and “exclusive.” Indeed, Dawgs’ concedes that Crocs are “soft, comfortable, lightweight, odor-resistant, and non-marking,” Pet.App.24a. The only false statements Dawgs ever identified are supposed “misrepresentations about intangible properties . . . on their own.” Opp.12. Dawgs’ suit was allowed to proceed entirely on the theory that Crocs’ statement that Croslite was patented “cause[d] customers to believe that Crocs . . . is made of a material that is different than any other footwear” and “all other molded footwear . . . is made of inferior material.” Pet.App.11a-12a. Thus, this case squarely presents the question whether statements about intangible properties are actionable under § 43(a)(1)(B).

Dawgs argues that Crocs “linked” false statements about intangible qualities to product characteristics or

(11th ed. 2019) (interlocutory review appropriate when, *inter alia*, the case presents a “clear-cut issue of law that is fundamental to the further conduct of the case” or “the opinion . . . below . . . decide[s] an important issue” that is “worthy of review”).

qualities.³ But all the Federal Circuit required was that a false statement about patent status appear in the same advertisement as truthful statements about the product’s properties. Pet.App.11a-12a. Dawgs never explains how this linking theory turns true statements about product characteristics into misleading statements about them. If the shoes are actually soft, calling them “patented” soft shoes does not change that fact. The only way a false statement that a product is patented can “cause[] consumers to be misled about the nature, characteristics, or qualities” of a product (as the Federal Circuit held, Pet.App.2a), is if the word “patented” somehow describes the nature, characteristics, or qualities of the product.

The cases on the long side of the split confirm the point. In each of them—*Sybersound Records, Inc. v. UAV Corp.*, 517 F.3d 1137 (9th Cir. 2008), *Kehoe Component Sales Inc. v. Best Lighting Prods., Inc.*, 796 F.3d 576 (6th Cir. 2015), and *Forschner Grp., Inc. v. Arrow Trading Co. Inc.*, 30 F.3d 348 (2d Cir. 1994)—the court concluded that falsehoods about intangible properties are not actionable under § 43(a)(1)(B). None of those cases proceed to analyze whether the misstatements about intangibles indirectly influenced consumers’ perceptions of the products’ *other* qualities or characteristics. Because it makes no sense to do so. Falsely claiming a product is “patented” misleads consumers about one thing: whether the product is patented. In the Second, Sixth, and Ninth

³ Dawgs’ contention that Crocs admitted that its advertisements “linked” Croslite’s intangible qualities to its “features, characteristics, and qualities,” Opp.28 (quoting Pet.App.15a) (cleaned up), is incorrect. Crocs disputed this assertion in the briefing below, Appellee Br. 15 n.5, and in any event that purported admission played no role in the decision below.

Circuits that would not have been enough. The Federal Circuit’s decision thus squarely implicates the circuit conflict.

B. Dawgs marches through the cases in the split, declaring that this case does not implicate each one and straining to argue that there is no split. Those arguments are meritless.

1. Dawgs tries a stylized interpretation of each case—arguing that each was decided for reasons the court did not mention or based on distinctions the court did not draw.

Start with *Sybersound*. Dawgs argues that “[t]his case falls on the actionable side of the line *Sybersound* . . . drew” and there “is no reason to think the Ninth Circuit would disagree” with the Federal Circuit’s reasoning below. Opp.17. But *Sybersound* focused on the characteristics of the product itself, saying that “to avoid overlap between the Lanham and Copyright Acts, the nature, characteristics, and qualities of karaoke recordings . . . are more properly construed to mean characteristics of *the good itself*, such as the original song and artist of the karaoke recording, and the quality of its audio and visual effects.” 517 F.3d at 1144 (emphasis added). Nothing in *Sybersound* suggests that intangibles would be relevant to the Ninth Circuit’s analysis.

Dawgs’ account of *Baden* similarly fails. In Dawgs’ telling, *Baden* left room for patent status to be a “nature, characteristic, or quality” of a good. Opp.16. Not true. *Baden* interpreted “nature, characteristic, or quality” to mean “physical or functional attributes.” 556 F.3d at 1307. *Baden* squarely held that false claims of “authorship” are

not actionable under § 43(a)(1)(B). *See* Opp.16-17. Determining whether Molten was liable required determining whether Molten made misleading statements about the basketballs’ “nature, characteristics, or quality.” So the court asked whether Baden alleged—and this is key—that “*physical or functional attributes* of the basketballs [we]re implied by Molten’s advertisements.” *Baden*, 556 F.3d at 1307. *Baden* thus interpreted § 43(a)(1)(B) to only reach misrepresentations about physical or functional attributes *themselves*—not speculation that statements about intangibles might affect consumers’ perceptions. *But see* Opp.16-17.

Kehoe so clearly states that § 43(a)(1)(B) applies only to a good’s “properties or capabilities,” Opp.17-18 (quoting *Kehoe*), that Dawgs can attempt to distinguish it only by rewriting the facts of *this* case. Dawgs’ sole answer to *Kehoe* is that this case is simply a run-of-the-mill § 43(a)(1)(B) case where “Crocs used its false ‘patented’ claims to mislead consumers about the ‘properties or capabilities’ of its shoes.” Opp.18. As explained above, pp.4-6, that is not true. *See* Pet.App.2a, 12a.

Similarly, Dawgs has no answer to *Forschner*. *See* Opp.18-19. There, the plaintiff argued that the defendant’s “reference to its knife as a Swiss Army knife constitute[d] a misrepresentation of quality [under § 43(a)(1)(B)] because a Swiss Army knife is necessarily one of high quality.” *Forschner*, 30 F.3d at 356. Though the Second Circuit acknowledged that the phrase “Swiss Army” might cause consumers to believe that defendant’s shoddy knives were of the same high quality as the plaintiff’s, it nonetheless rejected plaintiff’s § 43(a)(1)(B) claim because it concluded that there is no “touchstone for the quality of multifunction pocketknives.” *Id.* at 357. In

other words, the status of being called a “Swiss Army knife” is too intangible to come within the scope of § 43(a)(1)(B). *Id.* Had this case been in the Second Circuit, Dawgs’ claim could not proceed.

2. Dawgs’ discussion of the Fourth Circuit’s decision in *Belmora LLC v. Bayer Consumer Care AG*, 819 F.3d 697 (4th Cir. 2016), only underscores the split. Dawgs concedes that the Fourth Circuit permitted Lanham Act liability on the basis of misrepresentations about “intangible features,” Opp.22—holding the defendant liable under § 43(a)(1)(B) because it misled “consumers into thinking its product was really its competitor’s better-known product.” Opp.22. That is exactly the theory *Kehoe* rejected. *See* Pet.15.

3. Dawgs portrays the Federal Circuit’s footnote recognizing it was splitting with the Sixth and Ninth circuits, Pet.App.7a n.3, as something else entirely. Opp.19-20. In Dawgs’ telling, the footnote is ornamental, meant to flag only the First Circuit’s suggestion that § 43(a)(1)(B) could apply to false authorship claims. Opp.19-20. That is implausible. The opinion never otherwise addresses that question. By contrast, the Federal Circuit held that the term “nature, characteristics, [or] qualities” in § 43(a)(1)(B) encompasses “intangibles” and is not limited to “the characteristics of the good itself.” Pet.App.7a n.3. The Federal Circuit dropped the footnote to acknowledge it was rejecting the rule adopted by the greater number of circuits. *See* Appellee Br. 53-59.

4. The petition cited conflicting district court opinions to underscore that this issue is difficult, recurrent, and warrants review. *See* Pet.18. Dawgs argues that these decisions “undercut the claimed split” because they can all

be explained as “application of the circuits’ consistent approach” to § 43(a)(1)(B). Opp.23. But in the same breath Dawgs reveals that it views *Williams-Sonoma, Inc. v. Wayfair Inc.*, 652 F. Supp. 3d 216 (D. Mass. 2023), as wrongly decided, and *Roof Maxx Technologies, LLC v. Holsinger*, No. 2:20-cv-03154, 2021 WL 3617153 (S.D. Ohio Aug. 16, 2021), and *Abarca Health, LLC v. PharmPix Corp.*, 915 F. Supp. 2d 210 (D.P.R. 2012), as rightly decided. The measure of whether an issue is recurrent and difficult is not whether Dawgs agrees with it, but whether the cases are consistent with one another—and Dawgs concedes that these district court decisions are not. Opp.23. They thus confirm that this issue warrants resolution by the Court.

Dawgs’ § 43(a)(1)(B) claim would have failed in three circuits encompassing sixteen states and two territories. Because Dawgs sued elsewhere, its claim was permitted to proceed.

II. This Case Is an Ideal Vehicle to Resolve this Circuit Split

A. This issue was squarely presented and decided by both courts below. Pet.23. Dawgs argues this case is a poor vehicle because the case is “interlocutory” (at 9-11), and the “intangibles” argument was not preserved (at 14). Neither argument has merit.

1. Dawgs’ claim that this appeal is “interlocutory” is simply incorrect. The district court granted summary judgment on Dawgs’ § 43(a)(1)(B) claim. That is a final judgment on the merits. There is nothing interlocutory about the appeal from it. But *even were* the case interlocutory, that would be no basis to deny review. The Federal Circuit resolved the scope of § 43(a)(1)(B) as a matter of law; that legal holding will control all further proceedings. Taking the case now will prevent the acknowledged split

from hardening and forestall the sweeping impact of the rule announced below in the court that oversees most of the Nation's IP litigation.

2. Dawgs' contention that Crocs forfeited the arguments it raises in the petition (Opp.13-14) is false. Crocs devoted six pages of its appellate brief to the argument that § 43(a)(1)(B) does not reach non-physical attributes like whether a technology is "patented," "proprietary," and "exclusive," grounding the argument in text, structure, and the Sixth and Ninth Circuits' "properties or capabilities" formulation. *See* Appellee Br. 53-59. But even setting that aside, the panel below squarely held that § 43(a)(1)(B) reaches false statements about intangible characteristics, *see supra* at 4-6, and review is undeniably proper where an issue was "passed upon" below. *United States v. Williams*, 504 U.S. 36, 41 (1992).

III. The Question Presented Is Exceptionally Important

A. The decision below is exceptionally important. The Federal Circuit's rule, which depends on whether a statement "causes consumers to be misled," Pet.App.2a, 12a, turns every trivial misstatement about an intangible trait into a full-blown Lanham Act violation. This case is the poster-child. Crocs' transgression? Putting the word "patented" alongside *truthful* statements describing uncontroversial product features. Under the Federal Circuit's ruling, the word "patented" alone is enough to bring claims involving otherwise uncontroversial statements about accepted product characteristics to a jury. Pet.App.2a, 11a-12a. The parade of horrors is not mere speculation, Pet.19-22; *contra* Opp.23-25; it is the logical implication of the Federal Circuit's rule.

B. Dawgs all but concedes commercial speech will be chilled by this rule. Opp.25-27. *Any* misrepresentation

about *any* trait in *any* advertisement is now the basis for a lawsuit—even if every word about the good’s physical and functional attributes is true. An advertisement for “proprietary high-speed internet” is actionable if the internet is not in fact proprietary, even if it is high-speed, because customers could infer that “proprietary” high-speed internet is superior to others.

Dawgs attempts to pin the harmful consequences of the panel’s rule on other features of the Lanham Act, namely its purported lack of an intent requirement. Opp.25-27. But the fact that § 43(a)(1)(B) has been applied without proof of intent only amplifies the consequences of Dawgs’ erroneous reading of “nature, characteristics, [or] qualities.” On Dawgs’ view, an inadvertent false statement that a product is patented, coupled with entirely *true* statements about the characteristics of the product itself, can give rise to § 43(a)(1)(B) liability *even if* the advertiser had no intention to deceive. That is not only an incorrect reading of § 43(a)(1)(B), it is also a rule with “severe” consequences for “commonplace” commercial speech. Accessories Council Br. at 7.

C. Dawgs waves away the conflict between the decision below and the Patent and Copyright Acts. Opp.27-28. But proximate-cause is no safeguard here: competitors can readily plead lost sales or reputational harm. *Contra* Opp.27. And the ruling invites creative plaintiffs to relabel false-marking claims as § 43(a)(1)(B) claims—reimposing precisely the harm Congress remedied in the America Invents Act. This case proves the point: Dawgs previously attempted to assert false marking claims for the very statements now at issue. Pet.10.

IV. The Decision Below Is Incorrect

Section 43(a)(1)(B)’s text, structure, history, and purpose confirm that it does not reach misrepresentations about a product’s intangible attributes. Pet.23-30. Dawgs does not disagree: it *concedes* 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,” Opp.30, and accepts that *Dastar* points the same way. Opp.31-32.

Dawgs therefore seeks to defend the decision below by recasting it as something it is not: that on these facts, a jury could find Crocs misrepresented the physical or functional characteristics of its shoes. Opp.28-36. That reading cannot be squared with the opinion. Under the Federal Circuit’s rule, the false assertion of patent ownership is the operative misrepresentation for § 43(a)(1)(B) purposes. *See* Pet.App.1a, 12a.

Dawgs presents this as a run-of-the-mill § 43(a)(1)(B) decision involving misleading statements about the physical or functional qualities of a product. But this is not that case. The Federal Circuit held that a false claim to own a patent *alone* transformed innocuous and truthful advertising statements into Lanham Act violations. That holding untethers § 43(a)(1)(B) from its text and transforms it into the boundless unfair-competition remedy no one considers it to be.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

JOHN P. ELWOOD
ANDREW T. TUTT
ARNOLD & PORTER
KAYE SCHOLER LLP
*601 Massachusetts Ave. NW
Washington, DC 20001*

DAVID A. CAINE
ARNOLD & PORTER
KAYE SCHOLER LLP
*Five Palo Alto Square, Ste. 500
3000 El Camino Real
Palo Alto, CA 94306*

CLARE A. SAUNDERS
ARNOLD & PORTER
KAYE SCHOLER LLP
*500 Boylston St., 20th Floor
Boston, MA 02116*

LISA S. BLATT
Counsel of Record
ROHIT P. ASIRVATHAM
WILLIAMS & CONNOLLY LLP
*680 Maine Ave. SW
Washington, DC 20024
(202) 434-5000
lblatt@wc.com*

SEAN M. CALLAGY
ISAAC L. RAMSEY
ARNOLD & PORTER
KAYE SCHOLER LLP
*Three Embarcadero Center
10th Floor
San Francisco, CA 94111*

SEPTEMBER 10, 2025