

No. 25-753

IN THE
Supreme Court of the United States

ZIONESS MOVEMENT, INC.,

Petitioner,

v.

THE LAWFARE PROJECT, INC.,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

REPLY BRIEF FOR PETITIONER

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REPLY BRIEF FOR THE PETITIONER

The court of appeals held that two entities that compete in the same market may co-own a trademark—violating a fundamental principle of trademark law. Respondent argues that the decision below did not address the question “squarely” because Petitioner’s acceptance of a legally faulty jury verdict sheet (that included “both” as an option for ownership), after Petitioner objected to all of the jury instructions that could support that outcome, amounted to a waiver of Petitioner’s argument on appeal. But that is wrong, conflicts with this Court’s decision in *Dupree v. Younger*, 598 U.S. 729 (2023), and goes against the precedent of the second circuit court of appeals: in the second circuit, as in many other circuits (but not all), an objection to jury instructions avoids waiver of legal arguments on appeal.

There is no procedural obstacle to this Court addressing the fundamental question of whether two competing entities can co-own the same trademark. Even if Petitioner had not objected to the jury instructions that led to this result—which it did—it would be a fundamental error to allow two competing entities to co-own a trademark. This issue is ripe for consideration by this Court.

Respondent also argues that there is no disagreement among the circuits, but ignores the circuit split highlighted by Petitioner. As detailed in the petition, there is a split amongst the circuits concerning whether an objection that has been raised and ruled upon must be restated to avoid waiver. Here, the court of appeals did not follow its own circuit rule.

Respondent also argues that “this case is not the correct vehicle for undoing decades of precedent on trademark rights.” (Opp. Br. 8.) Petitioner is not asking for precedent to be undone, but rather applied. The decision by the court of appeals—allowing competing entities in the same market to co-own the same trademark—undoes the twin purposes of trademark law: source identification and avoidance of consumer confusion. *Jack Daniel’s Props., Inc. v. VIP Prods. LLC*, 599 U.S. 140, 145 (2023).

The questions presented are recurring and important and this Court should grant certiorari to address the fundamental question of whether two competing entities can both co-own and use the same trademark in the same market.

1. The Court should review and reverse the decision below to avoid continued confusion over “joint ownership” of federal trademarks.

Respondent appears to concede that the decision that Zioness Movement and The Lawfare Project co-own the mark is unworkable and impracticable. (Opp. Br. 14-15.) Respondent insists, however, that this Court should not be concerned because it “has not sought to have the USPTO amend” the registration. (*Id.*) That conclusion ignores the real harm that is being caused to Zioness Movement and the procedural posture: Once the appeals process is completed, the final decision will be reported to the USPTO, and, if this Court does not grant certiorari, the USPTO will update the trademark registration to reflect the ownership as determined by the lower courts, with both Respondent and Petitioner listed as owners.

But even without that change by the USPTO, Respondent has been using the mark to identify itself as Zioness (Petitioner), causing confusion to Petitioner’s donors.

Permitting joint ownership of a trademark by two competing entities in the same market is directly contradictory to this Court’s recent guidance that trademark law should be applied to avoid confusion as to source. *Jack Daniel’s*, 599 U.S. at 147 (confusion as to source is the “bête noire of trademark law”).

If this Court permits lower courts to determine that two competing entities can co-own the trademark, this Court should—and can, in this case—provide guidance to parties and the Director of the USPTO, about limitations of use that should or must be added to avoid consumer confusion.

This case squarely presents this issue and provides a vehicle for the Court to delineate whether, how, and when joint ownership of a trademark can be created, what conduct constitutes continuous use to maintain joint ownership of a trademark, and when and how co-ownership rights cease.

2. The Court should extend its holding in *Dupree* and resolve the circuit split, holding that objections to legal instructions provided to the jury preserve arguments on appeal, including arguments about the contents of a verdict sheet.

As this Court has recently held, legal issues determined at summary judgment are preserved for

appeal even if they are not included in a post-trial motion. *Dupree v. Younger*, 598 U.S. 729, 736 (2023). Applying this same logic, this Court should find that a party has not waived its right to appeal an adverse verdict where the party does not object to a proposed response on a verdict form so long as the party objected to the jury instructions that led to the inclusion of the proposed response on the verdict sheet.

The Court should take this opportunity to resolve this issue because there is a split between the circuit courts on whether an objection that has been raised and ruled upon must be restated. The second, third, fourth, fifth, sixth, eighth, ninth, tenth, eleventh, and D.C. circuit courts of appeal permit limited exceptions to the strict rule requiring restatement of objections. *Teel v. Lozada*, 99 F.4th 1273, 1281 (11th Cir. 2024); *Parker v. Scrap Metal Processors, Inc.*, 386 F.3d 993, 1018 (11th Cir. 2004); *Smith v. Borough of Wilkinsburg*, 147 F.3d 272, 277 (3d Cir. 1998); *Denny v. Ford Motor Co.*, 42 F.3d 106, 111 (2d Cir. 1994); *Rodick v. City of Schenectady*, 1 F.3d 1341, 1348 (2d Cir. 1993). The reasoning is the same as this Court's in *Dupree*: "it is difficult to contemplate what objective would be served by requiring counsel to restate an objection that had already been raised and ruled upon." *Smith v. Borough of Wilkinsburg*, 147 F.3d 272, 277 (3d Cir. 1998); *Dupree v. Younger*, 598 U.S. 729, 736 (2023) ("there is no benefit to having a district court reexamine a purely legal issue after trial, because nothing at trial will have given the district court any reason to question its prior analysis").

Conversely, the first and seventh circuit courts of appeal hold that unless specifically objected to and

restated, objections are waived. *Wilson v. Mar. Overseas Corp.*, 150 F.3d 1, 6 (1st Cir. 1998); *see also Chestnut v. Hall*, 284 F.3d 816, 819 (7th Cir. 2002). This reflects a clear circuit split in how repeated, futile objections are handled.

Respondent's contention that Petitioner did not object to the jury instructions that led to the co-ownership verdict is demonstrably false on the record. As noted in the petition, the district court refused requests by Petitioner at trial to instruct the jury that, to find that one of the two parties was the owner of the Zioness mark, the mark must be used as a source identifier of that party, that party's use of the mark must be continuous, and a licensor can only retain ownership of the mark if the license contains enforceable restrictions. (Petition, p. 8). The decision of the court of appeals ***did not*** find that Petitioner failed to object to the jury instructions—because the record is clear that ***Petitioner did object***. Rather, the circuit court's decision was based on its erroneous finding of waiver by Petitioner's acceptance of the verdict sheet. This was contrary to second circuit precedent and to this Court's *Dupree* decision.

Respondent's reliance on *Springfield v. Kibbe* is misplaced. In that case, the petitioner did not object to the relevant jury instruction, proposed its own comparable jury instruction, and did not argue the standard on appeal (comprising the questions presented on certiorari). *City of Springfield, Mass. v. Kibbe*, 480 U.S. 257, 258 (1987) (“It appears that in the District Court petitioner did not object to the jury instruction stating that gross negligence would suffice [] and indeed proposed its own instruction to the same effect. [] Nor did it argue for a higher standard than gross negligence in the Court of Appeals.”). *Springfield*

does not apply because Petitioner here, unlike there, timely objected to the jury instructions and raised the questions presented on appeal to the court of appeals. This case falls under the *Dupree* doctrine: the argument was preserved for appeal even though Petitioner here did not object again when presented with a verdict sheet that included an outcome that was only possible because of the rejected objections to the jury instructions. That is, had the district court upheld Petitioner's objections to jury instructions, ownership by "both" would not have been a possible outcome on the verdict sheet.

As for Respondent's suggestion that continued litigation is a "waste" of the resources of two non-profits, permitting Respondent The Lawfare Project to "co-own" the mark and identify itself as Zioness is undermining Petitioner Zioness Movement's very existence, impairing its ability to identify itself in the marketplace and raise funds, and depriving it of the full use of intellectual property it has developed through substantial time, money, and effort. And, this firm is representing Zioness Movement on this appeal to the Supreme Court without charge.

3. This Court should grant certiorari to provide clear guidance on joint and concurrent ownership under the Lanham Act.

The parties agree that the Lanham Act's limited recognition of concurrent ownership does not provide guidance as to how parties who claim joint or concurrent ownership of trademarks should act in the marketplace to avoid consumer confusion and continue to provide source identification. (Opp. Br. 13-14.) This Court should grant

certiorari to provide clear guidance: Joint or concurrent ownership can **only** be created by **joint, continuous** use of a mark to identify source. And an employee's use of a trademark for a completely separate organization **does not** automatically give an employer trademark rights in that mark. Without such guidance, the decision below is likely to cause confusion and upheaval in trademark law.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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