No. 26A263

In the Supreme Court of the United States

CESARI S.R.L., APPLICANT

v.

PEJU PROVINCE WINERY L.P. AND
PEJU FAMILY OPERATING PARTNERSHIP, L.P., RESPONDENTS

APPLICATION TO RECALL AND STAY THE MANDATE OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT PENDING THE FILING AND DISPOSITION OF A PETITION FOR A WRIT OF CERTIORARI

AND REQUEST FOR AN IMMEDIATE ADMINISTRATIVE STAY

Directed to the Honorable Sonia Sotomayor, Associate Justice of the Supreme Court of the United States and Circuit Justice for the Second Circuit

VALERIA CALAFIORE HEALY
Counsel of Record
HEALY LLC
82 Nassau Street #60253
New York, NY 10038
(212) 810-0377
vch@healylex.com

Counsel for Applicant Cesari S.R.L.

PARTIES TO THE PROCEEDING

Applicant Cesari S.R.L. was plaintiff in the United States District Court for the Southern District of New York and appellee-cross-appellant in the United States Court of Appeals for the Second Circuit.

Respondents Peju Province Winery L.P. and Peju Family Operating Partnership, L.P. were defendants in the District Court and appellants-cross-appellees in the court of appeals.

RULE 29.6 STATEMENT

Cesari S.R.L. is an Italian limited liability company. It has no parent corporation, and no publicly held company owns 10% or more of its stock.

RELATED PROCEEDINGS

United States District Court (S.D.N.Y.)

Cesari S.R.L. v. Peju Province Winery L.P., No. 1:17-cv-00873. Relevant orders:

Decision and Order on issue preclusion (Dec. 11, 2017), 2017 U.S. Dist. LEXIS 210542 (App. 17a)

Opinion and Order after trial (Sept. 22, 2023), 693 F. Supp. 3d 375

Memorandum and Order on fees (July 11, 2024), 2024 U.S. Dist. LEXIS 122194

Amended Judgment (July 11, 2024) (App. 32a)

United States Court of Appeals (2d Cir.)

Peju Province Winery, L.P. v. Cesari S.R.L., Nos. 24-1903 (L), 24-2014 (XAP). Relevant orders:

Summary Order (June 8, 2026), 2026 U.S. App. LEXIS 16442 (App. 1a)

Order denying panel rehearing and reconsideration (July 28, 2026) (App. 14a)

Order denying stay of the mandate (Aug. 21, 2026) (App. 15a)

Mandate (Aug. 21, 2026) (App. 16a)

Trademark Trial and Appeal Board

Cesari S.R.L. v. Peju Province, Opposition No. 91158374. Relevant order: Decision sustaining opposition (July 20, 2004), 2004 TTAB LEXIS 431 (App. 33a)

TABLE OF CONTENTS

PARTIES TO THE PROCEEDING i

RELATED PROCEEDINGS ii

OPINIONS AND ORDERS BELOW 6

JURISDICTION 8

STATEMENT 7

REASONS FOR GRANTING THE APPLICATION 12

I. There Is a Reasonable Probability That the Court Will Grant Certiorari 12

II. There Is a Fair Prospect That the Court Will Reverse 15

III. Absent Relief, Cesari Will Suffer Irreparable Harm 20

IV. The Equities Overwhelmingly Favor Relief 23

CONCLUSION 23

APPENDIX

Summary Order of the United States Court of Appeals for the Second Circuit (June 8, 2026) 1a

Order of the Court of Appeals Denying Panel Rehearing and Reconsideration (July 28, 2026) 14a

Order of the Court of Appeals Denying Cesari's Motion to Stay the Mandate (Aug. 21, 2026) 15a

Mandate of the Court of Appeals (Aug. 21, 2026) 16a

District Court Decision and Order Granting Partial Summary Judgment on Issue Preclusion (Dec. 11, 2017) 17a

Amended Judgment of the District Court (July 11, 2024) 32a

Decision of the Trademark Trial and Appeal Board, Opposition No. 91158374 (July 20, 2004) 33a

TABLE OF AUTHORITIES

Cases

Alabama Ass'n of Realtors v. HHS,
594 U.S. 758 (2021) (per curiam) 20

Axon Enterprise, Inc. v. FTC,
598 U.S. 175 (2023) 22

B&B Hardware, Inc. v. Hargis Indus., Inc.,
575 U.S. 138 (2015) .... passim

B&B Hardware, Inc. v. Hargis Indus., Inc.,
716 F.3d 1020 (8th Cir. 2013), rev'd, 575 U.S. 138 (2015) 2, 16, 19

B&B Hardware, Inc. v. Hargis Indus., Inc.,
573 U.S. 957 (2014) (granting certiorari) 13

B&B Hardware, Inc. v. Hargis Indus., Inc.,
571 U.S. 1122 (2014) (inviting the views of the Solicitor General) 13

Barnes v. E-Systems, Inc.,
501 U.S. 1301 (1991) (Scalia, J., in chambers) 23

Bosse v. Oklahoma,
580 U.S. 1 (2016) (per curiam) 4, 13-14

Bucklew v. Precythe,
587 U.S. 119 (2019) 17

Caetano v. Massachusetts,
577 U.S. 411 (2016) (per curiam) 5, 13-14, 17

California v. American Stores Co.,
492 U.S. 1301 (1989) (O'Connor, J., in chambers) 12

CBS Inc. v. Davis,
510 U.S. 1315 (1994) (Blackmun, J., in chambers) 13

Cesari S.R.L. v. Peju Province,
Opp. No. 91158374, 2004 TTAB LEXIS 431 (T.T.A.B. July 20, 2004) 7

Cesari S.R.L. v. Peju Province Winery L.P.,
2017 U.S. Dist. LEXIS 210542 (S.D.N.Y. Dec. 11, 2017) 7, 9

Cesari S.R.L. v. Peju Province Winery L.P.,
693 F. Supp. 3d 375 (S.D.N.Y. 2023) 4, 7-8, 10

Cesari S.R.L. v. Peju Province Winery L.P.,
2024 U.S. Dist. LEXIS 122194 (S.D.N.Y. July 11, 2024) 8, 10

Coinbase, Inc. v. Bielski,
599 U.S. 736 (2023) 5, 22

Federated Department Stores, Inc. v. Moitie,
452 U.S. 394 (1981) 21, 23

FTC v. Dean Foods Co.,
384 U.S. 597 (1966) 7

FTC v. Standard Oil Co.,
449 U.S. 232 (1980) 22

Garrison v. Hudson,
468 U.S. 1301 (1984) (Burger, C.J., in chambers) 6, 22

Greenlaw v. United States,
554 U.S. 237 (2008) 18

Hercules Inc. v. United States,
309 F.3d 781 (Fed. Cir. 2002) 21

Hollingsworth v. Perry,
558 U.S. 183 (2010) (per curiam) 12

Hutto v. Davis,
454 U.S. 370 (1982) (per curiam) 13

In re E. I. Du Pont de Nemours & Co.,
476 F.2d 1357 (C.C.P.A. 1973) 8, 16, 18

Jim Beam Brands Co. v. Beamish & Crawford, Ltd.,
937 F.2d 729 (2d Cir. 1991) 2-3, 8, 10-11, 16, 19

John Doe Agency v. John Doe Corp.,
488 U.S. 1306 (1989) (Marshall, J., in chambers) 6, 12, 22

Leegin Creative Leather Products, Inc. v. PSKS, Inc.,
No. 06A179 (U.S. Aug. 28, 2006) (Stay Order) 6, 12, 21, 23

Leegin Creative Leather Products, Inc. v. PSKS, Inc.,
551 U.S. 877 (2007) 6

Levy v. Kosher Overseers Ass'n of America, Inc.,
104 F.3d 38 (2d Cir. 1997) 2-3, 8, 10-11, 16-17, 19

Marmet Health Care Ctr., Inc. v. Brown,
565 U.S. 530 (2012) (per curiam) 13

Mathis v. United States,
579 U.S. 500 (2016) 17

Nat'l Insts. of Health v. Am. Pub. Health Ass'n,
145 S. Ct. 2658 (2025) 13, 20

New York v. Kleppe,
429 U.S. 1307 (1976) (Marshall, J., in chambers) 12

Nken v. Holder,
556 U.S. 418 (2009) 23

Octocom Sys., Inc. v. Houston Computer Servs., Inc.,
918 F.2d 937 (Fed. Cir. 1990) 9, 17-18

Peju Province Winery, L.P. v. Cesari S.R.L.,
Nos. 24-1903 (L), 24-2014 (XAP), 2026 U.S. App. LEXIS 16442 (2d Cir. June 8, 2026) 6

Philip Morris USA Inc. v. Scott,
561 U.S. 1301 (2010) (Scalia, J., in chambers) 5, 20

Teva Pharms. USA, Inc. v. Sandoz, Inc.,
572 U.S. 1301 (2014) (Roberts, C.J., in chambers) 12

Turtle Mountain Band of Chippewa Indians v. Howe,
No. 25A62 (U.S. July 24, 2025) (order staying issuance of mandate) 23

United States v. Edge Broadcasting Co.,
509 U.S. 418 (1993) 14

United States v. Sineneng-Smith,
590 U.S. 371 (2020) 18

Statutes and Rules

15 U.S.C. § 1071 9

28 U.S.C. § 1254(1) 7

28 U.S.C. § 1651(a) 1, 7, 24

28 U.S.C. § 2101(f) 1, 7, 23-24

Fed. R. Civ. P. 26(b)(4)(E)(i) 11

Sup. Ct. R. 10(c) 4, 12

Sup. Ct. R. 22 1

Sup. Ct. R. 23 .... 1, 7

Sup. Ct. R. 23.3 7

Sup. Ct. R. 23.4 23

Other Authorities

5 J. Thomas McCarthy, *McCarthy on Trademarks & Unfair Competition* § 32:98 (5th ed. Mar. 2026 update) 17

Br. for Resp't, B&B Hardware, Inc. v. Hargis Indus., Inc., No. 13-352, 2014 U.S. S. Ct. Briefs LEXIS 3732 (Oct. 24, 2014) 15, 17

Lauren Pardee Ruben, *Unpublished Federal Opinions: Not Precedential, But Still Potentially Cert-Worthy*, Morrison & Foerster LLP: All Things Appeals, https://appeals.mofo.com/topics/unpublished-federal-opinions-not-precedential-but-still-potentially-cert-worthy (last accessed Aug. 23, 2026) 14

Stephen M. Shapiro et al., *Supreme Court Practice* § 4.11 (11th ed. 2019) 14

2d Cir. L.R. 32.1 Amendment Order Cmt. (June 26, 2007) 14

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CESARI S.R.L., APPLICANT

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APPLICATION TO RECALL AND STAY THE MANDATE OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT PENDING THE FILING AND DISPOSITION OF A PETITION FOR A WRIT OF CERTIORARI

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TO THE HONORABLE SONIA SOTOMAYOR, ASSOCIATE JUSTICE OF THE SUPREME COURT OF THE UNITED STATES AND CIRCUIT JUSTICE FOR THE SECOND CIRCUIT:

Pursuant to Rules 22 and 23 of the Rules of this Court and to 28 U.S.C. §§ 1651(a) and 2101(f), Cesari S.R.L. respectfully applies for an order recalling and staying the mandate of the United States Court of Appeals for the Second Circuit (App. 16a, 1a-15a), and staying that court's judgment, pending the filing and disposition of Cesari's petition for a writ of certiorari and any further proceedings in this Court. Because the consequences of the mandate, which issued on August 21, 2026, are immediate — including the discharge of the supersedeas bond that has secured Cesari's judgment throughout two years of appellate proceedings — Cesari respectfully requests an immediate administrative recall and stay pending the resolution of this application.

This case presents a stark violation of vertical stare decisis. This Court has already reviewed — and rejected — the rule of trademark issue preclusion the Second Circuit has now revived in direct conflict with the controlling holdings of *B&B Hardware, Inc. v. Hargis Industries, Inc.*, 575 U.S. 138 (2015). In *B&B Hardware*, the Eighth Circuit had denied preclusive effect to a likelihood-of-confusion determination of the Trademark Trial and Appeal Board ("TTAB") by adopting the Second Circuit's decisions in *Jim Beam Brands Co. v. Beamish & Crawford, Ltd.*, 937 F.2d 729 (2d Cir. 1991), and *Levy v. Kosher Overseers Ass'n of America, Inc.*, 104 F.3d 38 (2d Cir. 1997): "for collateral estoppel to apply, the [TTAB] must have examined the 'entire marketplace context'" as a court would. *B&B Hardware, Inc. v. Hargis Indus., Inc.*, 716 F.3d 1020, 1025 (8th Cir. 2013) (citing *Levy*, 104 F.3d at 43) (internal citations and quotation marks omitted). This Court reversed. It held that "the same likelihood-of-confusion standard applies to both registration and infringement." *B&B Hardware*, 575 U.S. at 154. And it supplied the test that governs whether the issue the TTAB decided and the issue in infringement litigation are the same: "If a mark owner uses its mark in ways that are materially the same as the usages *included* in its registration application, then the TTAB is deciding the same likelihood-of-confusion issue as a district court in infringement litigation." *Id.* at 156 (emphasis added) (the "included" test).

The summary order below defies each of those holdings — and adds a rule of its own. *B&B Hardware* asked "whether likelihood of confusion for purposes of registration is the same standard as likelihood of confusion for purposes of infringement," and answered categorically: "We conclude it is." *B&B Hardware*, 575 U.S. at 154. The Second Circuit rewrote that answer as a condition: a TTAB determination has preclusive effect "if" it "looked to the 'same likelihood-of-confusion standard'" as the district court. App. 10a. "Is" became "if." A categorical holding, which this Court did not leave open to case-by-case adjudication, was transformed into a question for the court of appeals to answer anew — and to answer against preclusion. The Order nowhere quotes or applies the "included" test — this Court's test for the very question the Order purported to decide, whether the issue the TTAB adjudicated was the same. Instead, the Order decides whether the issue was the same under the Second Circuit's own test — *Levy*'s "entire marketplace context" — the very formulation this Court rejected when the Eighth Circuit applied it. App. 8a. For *Jim Beam* and *Levy*'s survival of *B&B Hardware*, the Order offers only a treatise comment — written to "ameliorate" the decision's perceived "negative impacts" — asserting without analysis that the opposite rules are "essentially the same." App. 11a. And in place of this Court's holding, the court of appeals created and applied a new federal rule of preclusion, directly contrary to the one *B&B Hardware* prescribes: an actual use *narrower* than the usages in an unrestricted registration application is, on the Order's view, a materially *different* usage. App. 12a. *B&B Hardware* holds the reverse — preclusion follows when a use is "materially the same as the usages included in [the] registration application," 575 U.S. at 156, and a narrower use is included by definition. The court of appeals announced that rule to give effect to a dessert-wine defense Peju had never pleaded, never briefed, and never argued in seven years of litigation: at no point did Peju contend that collateral estoppel should not apply because of some purportedly narrower usage. The rule has no application here in any event. Peju admitted that all thirty-three infringing wines were marked LIANA — only three of them dessert wines — and the District Court awarded disgorgement on all thirty-three. *Cesari S.R.L. v. Peju Province Winery L.P.*, 693 F. Supp. 3d 375, 392-93 (S.D.N.Y. 2023).

On that reasoning, the Order vacated the judgment of a District Court that had faithfully applied *B&B Hardware*'s holdings and its test, App. 17a-31a — seven years of litigation, nineteen hearings, and 108 written orders — and returned the case for relitigation of the very issue this Court's holdings foreclose. The court of appeals denied rehearing, then denied Cesari's motion to stay the mandate and released the mandate the same day. App. 14a-16a. Cesari will promptly file its petition for a writ of certiorari, which is due October 26, 2026. The petition will present a substantial question under Rule 10(c): whether a court of appeals may withhold the preclusive effect *B&B Hardware* commands by modifying its holdings, applying the circuit precedents it abrogated, and announcing a new federal rule of issue preclusion contrary to its test.

* * *

First, there is a reasonable probability of certiorari and a fair prospect of reversal. The Order decides under the Second Circuit's own anterior precedents — the very precedents the Eighth Circuit adopted and this Court reversed — modifies this Court's holdings and the test they prescribe, and creates a new federal rule of issue preclusion. None of that was the court of appeals' to do. This Court corrects such departures, summarily where necessary. *Bosse v. Oklahoma*, 580 U.S. 1, 3 (2016) (per curiam); *Caetano v. Massachusetts*, 577 U.S. 411 (2016) (per curiam). Nor is the Order's nonprecedential form a shield: this Court grants review of summary orders of the Second Circuit, and an unpublished modification of this Court's holdings is still a modification that the court of appeals had no power to make.

Second, the irreparable harm is not prospective; it is underway. The vacatur has taken effect, and the supersedeas bond securing Cesari's $1.35 million judgment faces imminent discharge. Peju has announced that the bond is now "void" and that any attempt by Cesari to collect under it "will cross the line into frivolousness." C.A. ECF No. 136.1, at 5 n.3. And today Peju moved the District Court to discharge the bond, attaching a proposed order that releases the surety "in its entirety" and asking the court to enter it "now" — while dismissing Cesari's forthcoming petition for certiorari as "irrelevant." ECF No. 522 (S.D.N.Y. Aug. 24, 2026). Peju has meanwhile evaded even the smallest award against it: ordered to reimburse $2,697.75 in discovery costs — an award it never appealed — Peju wrote, "We won't be paying the invoice," and three years later it has not. ECF No. 480-4 (S.D.N.Y.). Money that "cannot be recouped" is irreparably lost. *Philip Morris USA Inc. v. Scott*, 561 U.S. 1301, 1304 (2010) (Scalia, J., in chambers). Relitigation, meanwhile, destroys the adjudicated right at the heart of the petition — a right whose benefits are "irretrievably lost" the moment relitigation begins, "even if" this

Court "later concluded" the issue was precluded "all along." *Coinbase, Inc. v. Bielski*, 599 U.S. 736, 743 (2023). And if remand proceedings overtake the certiorari timeline, review itself may be lost: "foreclosure of certiorari review . . . would impose irreparable harm." *Garrison v. Hudson*, 468 U.S. 1301, 1302 (1984) (Burger, C.J., in chambers).

Third, the equities are one-sided. A recall and stay suspends the effect of the vacatur: the District Court's judgment, and the security posted for it, simply remain in place — the status quo of the past two years — while this Court decides whether to grant certiorari to review the decision below. Relief would work no prejudice to Peju whatsoever. The bond that would remain in effect is the bond Peju itself posted, to stay execution during its own appeal. Nor is the relief novel. In *John Doe Agency v. John Doe Corp.*, 488 U.S. 1306 (1989), the Circuit Justice for the Second Circuit recalled and stayed this same court of appeals' already-issued mandate pending certiorari. And in *Leegin Creative Leather Products, Inc. v. PSKS, Inc.*, No. 06A179 (U.S. Aug. 28, 2006) (the "Leegin Stay Order"), this Court recalled and stayed an issued mandate in a private money-judgment case on terms that kept the supersedeas bond posted in the district court in effect pending certiorari — the very protection Cesari seeks here for the bond Peju posted. See *Leegin*, 551 U.S. 877 (2007) (granting certiorari and reversing).

OPINIONS AND ORDERS BELOW

The summary order of the court of appeals is reported at *Peju Province Winery, L.P. v. Cesari S.R.L.*, Nos. 24-1903 (L), 24-2014 (XAP), 2026 U.S. App.

LEXIS 16442 (2d Cir. June 8, 2026), and reproduced at App. 1a-13a. The order denying panel rehearing (July 28, 2026), the order denying a stay of the mandate (Aug. 21, 2026), and the mandate (Aug. 21, 2026) are unreported and reproduced at App. 14a, 15a, and 16a. The decision of the District Court applying issue preclusion is reported at *Cesari S.R.L. v. Peju Province Winery L.P.*, 2017 U.S. Dist. LEXIS 210542 (S.D.N.Y. Dec. 11, 2017), and reproduced at App. 17a-31a; its decision after trial is reported at 693 F. Supp. 3d 375 (S.D.N.Y. 2023). The decision of the TTAB is reported at 2004 TTAB LEXIS 431 (T.T.A.B. July 20, 2004), and reproduced at App. 33a-37a.

JURISDICTION

The court of appeals entered judgment on June 8, 2026, and denied panel rehearing on July 28, 2026. Cesari's petition for a writ of certiorari is due October 26, 2026, and this Court will have jurisdiction under 28 U.S.C. § 1254(1). A Circuit Justice may stay the judgment below under 28 U.S.C. § 2101(f) and Rule 23, and may recall and stay the mandate in aid of this Court's certiorari jurisdiction under 28 U.S.C. § 1651(a). That authority is not confined to cases in which review has already been sought: the writ power "extends to the potential jurisdiction of the appellate court where an appeal is not then pending but may be later perfected." *FTC v. Dean Foods Co.*, 384 U.S. 597, 603 (1966). Because the judgment below is one of vacatur, a stay suspends its effect: the District Court's judgment, and the security posted for it, remain in place. As Rule 23.3 requires, Cesari first sought this relief in the court of appeals, which denied it on August 21, 2026. App. 15a.

STATEMENT

The points necessary to resolve the question the petition will present are few. Cesari holds a federal registration of the mark LIANO for wines. When Peju applied to register LIANA for wine, Cesari opposed, and the TTAB, adjudicating the issue of likelihood of confusion under the multifactor *DuPont* test, concluded that Peju's LIANA for wine is likely to cause confusion with Cesari's registered LIANO for wine, and refused registration. App. 33a-37a. Peju did not appeal. When Peju thereafter resumed use of the same mark on wines, Cesari sued. The District Court held relitigation of the likelihood-of-confusion issue precluded under *B&B Hardware*, App. 17a-31a, and, after a bench trial, entered judgment for Cesari, disgorging Peju's profits on thirty-three wines that Peju admitted bore the mark LIANA. *Cesari S.R.L. v. Peju Province Winery L.P.*, 693 F. Supp. 3d 375, 392-93 (S.D.N.Y. 2023). It found the case exceptional, awarded attorney's fees and costs, and entered an amended judgment of $1.35 million. *Cesari*, 2024 U.S. Dist. LEXIS 122194 (S.D.N.Y. July 11, 2024); App. 32a. The court of appeals vacated that judgment on a single ground — that the issue the TTAB adjudicated was not the same as the issue in the infringement action — resolved not under *B&B Hardware*'s holdings, but under the Second Circuit's own anterior precedents, *Jim Beam* and *Levy*, which those holdings had displaced. App. 1a-13a.

1. Cesari registered the word mark LIANO for "wines" in International Class 33 on January 7, 2003. When Peju applied to register LIANA for "wine" in the same class, without restriction as to channels of trade or classes of purchasers, Cesari opposed. App. 33a-34a. On July 20, 2004, the TTAB sustained the opposition and

refused registration. App. 33a-37a. Its decision applied the multifactor likelihood-of-confusion analysis of *In re E. I. Du Pont de Nemours & Co.*, 476 F.2d 1357 (C.C.P.A. 1973), comparing the marks by their "overall commercial impression" as retained in "the recollection of the average purchaser," and giving particular weight to the similarity of the marks and the similarity of the goods — the same two factors the TTAB had found "most critical" in its decision underlying *B&B Hardware*. App. 35a-36a; *B&B Hardware*, 575 U.S. at 146. The TTAB found the marks "almost identical," distinguished only by "the last letter," and the goods "identical." App. 36a. And it considered — and rejected as "unpersuasive" — Peju's contention that its wine was distinguishable as a dessert wine, because "registrability of an applicant's mark must be decided on the basis of the identification of goods set forth in the application," and neither Cesari's registration nor Peju's application contained any restriction. App. 34a, 36a (quoting *Octocom Sys., Inc. v. Houston Computer Servs., Inc.*, 918 F.2d 937, 942 (Fed. Cir. 1990)). Peju did not appeal to the Federal Circuit or a district court. See 15 U.S.C. § 1071. The determination became final.

2. When Cesari discovered that Peju had resumed use of the same mark on wines, Cesari demanded that Peju cease and desist; when Peju refused, Cesari sued for infringement. The District Court (Buchwald, J.) held Peju precluded from relitigating the likelihood-of-confusion issue the TTAB had decided. *Cesari S.R.L. v. Peju Province Winery L.P.*, 2017 U.S. Dist. LEXIS 210542 (S.D.N.Y. Dec. 11, 2017); App. 17a-31a. Of the elements of issue preclusion, Peju disputed only two: whether

the issue before the TTAB was the same, and whether Peju had a full and fair opportunity to litigate it there. App. 22a. Only the first matters here — it is the sole ground on which the court of appeals later vacated. Applying *B&B Hardware*, the District Court found the issue identical: Cesari's registration is unrestricted as to type of wine, channel of trade, and class of purchaser, so "the marketplace usage the TTAB considered, wines, entirely encompasses the narrower usages defendants proffer in this litigation," and "there are no 'non-disclosed' usages that might necessitate a successive adjudication." App. 24a-25a. "Wines purchased by sophisticated consumers, after all, are still wines." App. 25a. After a four-day bench trial, the District Court found Peju's infringement willful and found infringing thirty-three LIANA-branded wines — only three of them dessert wines — awarding disgorgement on all of them. *Cesari*, 693 F. Supp. 3d at 388, 392-93. It later found the case "exceptional," based in part on Peju's "positions . . . previously rejected as unsupported in law and/or in fact." *Cesari*, 2024 U.S. Dist. LEXIS 122194. The amended judgment awards Cesari $1.35 million. App. 32a. Peju appealed and posted a supersedeas bond to stay execution; Cesari forbore collection throughout the two years of the appeal, including of the portion of the judgment awarding discovery costs unrelated to prevailing-party status, which Peju did not appeal.

3. On June 8, 2026, the court of appeals reversed the preclusion ruling and vacated the judgment by nonprecedential summary order. App. 1a-13a. Its decision rests on a single element of issue preclusion — the identity of the issue — and the Order opens and closes under *Jim Beam* and *Levy*. It states that a TTAB

determination "will have preclusive effect . . . *if* it looked to the 'same likelihood-of-confusion standard' as the district court, even if it evaluated slightly 'different factors,'" App. 10a (emphasis added), and it holds preclusion unavailable because — on the strength of a dessert-wine distinction Peju had never advanced — the usages before the TTAB assertedly differed materially from those in the infringement action. App. 12a. For the proposition that *Jim Beam* and *Levy* survive *B&B Hardware*, the Order relies on a treatise "Author's Comment" describing the opposite rules as "essentially the same," and on a decision of its own that is not an issue-preclusion case. App. 10a-11a.

4. The court of appeals denied panel rehearing on July 28, 2026. App. 14a. On August 3, Cesari moved to stay the mandate pending certiorari. While that motion was pending, Peju represented to the court of appeals that upon issuance of the mandate the bond "will now be discharged," that "by its own terms, the bond obligation is now 'void' because the Judgment was vacated," and that any attempt by Cesari to collect under it "will cross the line into frivolousness and will be met with an appropriate motion." C.A. ECF No. 136.1, at 5 n.3. On August 21, 2026, the court denied the stay motion and issued its mandate the same day. App. 15a, 16a. On August 24, 2026 — the day of this application — Peju moved the District Court to discharge the bond, attaching a proposed order that releases the surety "in its entirety" and asking the court to "dispense with the necessity of a formal motion" and enter the order "now." ECF No. 522 (S.D.N.Y.). Peju's letter-motion quotes the bond's own condition — "if the judgment be set aside, then [the surety's] obligation

shall be void" — and pronounces Cesari's forthcoming petition for certiorari "irrelevant." ECF No. 522, at 2 (quoting ECF No. 519, at 1). Hence this application. Peju has evaded even the unappealed award of discovery costs. Ordered to pay Cesari $2,697.75 in expert-discovery fees under Federal Rule of Civil Procedure 26(b)(4)(E)(i), Peju's counsel wrote on July 17, 2023: "We won't be paying the invoice." ECF No. 480-4 (S.D.N.Y.). The award remains unpaid today.

REASONS FOR GRANTING THE APPLICATION

Relief pending certiorari is warranted where there is "(1) a reasonable probability that four Justices will consider the issue sufficiently meritorious to grant certiorari; (2) a fair prospect that a majority of the Court will vote to reverse the judgment below; and (3) a likelihood that irreparable harm will result from the denial of a stay." *Hollingsworth v. Perry*, 558 U.S. 183, 190 (2010) (per curiam). "In close cases the Circuit Justice or the Court will balance the equities and weigh the relative harms to the applicant and to the respondent." *Ibid.* That the mandate has issued changes the form of relief, not the analysis. Applications to recall a mandate are governed by the same factors, *Teva Pharms. USA, Inc. v. Sandoz, Inc.*, 572 U.S. 1301, 1301-02 (2014) (Roberts, C.J., in chambers), and relief has been granted after issuance — indeed, after a court of appeals deliberately released its mandate. *John Doe Agency*, 488 U.S. at 1306-1310; *California v. American Stores Co.*, 492 U.S. 1301 (1989) (O'Connor, J., in chambers); *Leegin*, No. 06A179 (Stay Order issued Aug. 28, 2006). "Perhaps the most compelling justification for a Circuit Justice to upset an interim decision by a court of appeals" is "to protect this Court's power to entertain a petition for certiorari before or after the final judgment of the Court of Appeals." *John Doe Agency*, 488 U.S. at 1309 (quoting *New York v. Kleppe*, 429 U.S. 1307, 1310 (1976) (Marshall, J., in chambers)). Each requirement is satisfied here.

I. There Is a Reasonable Probability That the Court Will Grant Certiorari.

1. This Court grants review to keep its decisions from being undone in the lower courts. The conflict here is Rule 10(c) in its purest form: the Second Circuit decided this case under its own anterior precedents — the very precedents the Eighth Circuit adopted and this Court reversed. See supra pp. 2-4. A decision of this Court "constitutes a precedent that commands respect in lower courts," its reasoning no less than its judgments, and "a lower court ought not invoke the 'persuasive authority' of . . . a repudiated court of appeals decision to reach a different conclusion on an equivalent record." *Nat'l Insts. of Health v. Am. Pub. Health Ass'n*, 145 S. Ct. 2658, 2663-64 (2025) (Gorsuch, J., concurring). The rule is old and absolute: "unless we wish anarchy to prevail within the federal judicial system, a precedent of this Court must be followed by the lower federal courts no matter how misguided the judges of those courts may think it to be." *Hutto v. Davis*, 454 U.S. 370, 375 (1982) (per curiam). The Court corrects such departures summarily where a lower court professes to apply the very decision it defies. *Bosse*, 580 U.S. at 3 ("[I]t is this Court's prerogative alone to overrule one of its precedents."); *Marmet Health Care Ctr., Inc. v. Brown*, 565 U.S. 530, 531 (2012) (per curiam) (summarily vacating a decision that, "by misreading and disregarding the precedents of this Court," "did not follow controlling federal law"); *Caetano*, 577 U.S.

411. It has stayed proceedings in private civil litigation where the asserted conflict was with "the prior decisions of this Court" alone. *CBS Inc. v. Davis*, 510 U.S. 1315, 1317 (1994) (Blackmun, J., in chambers). And it has already found this question worthy of plenary review once, granting certiorari in *B&B Hardware* after calling for the views of the Solicitor General. *B&B Hardware*, 573 U.S. 957 (2014); see *B&B Hardware*, 571 U.S. 1122 (2014). What this Court resolved then, the Order undoes now. In the Second Circuit, *B&B Hardware* is a dead letter.

2. Below, Peju urged that the Order's summary, nonprecedential form places it beyond this Court's concern. The opposite is true. It was not for the court of appeals to modify this Court's holdings in any form; if litigants cannot rely on the rules this Court has clearly laid down, the certainty of law that stare decisis exists to secure is gone. An unpublished modification of this Court's holdings is still a modification that the court of appeals had no power to make — *Bosse* and *Caetano* limit what courts may do, not what they publish — and this Court grants review of nonprecedential dispositions, including summary orders of the Second Circuit. The Second Circuit's own commentary confirms that nonprecedential status "does not mean that the court considers itself free to rule differently in similar cases," and reserves summary orders for cases whose "result is dictated by pre-existing precedent" — here, a result dictated by abrogated precedent. 2d Cir. L.R. 32.1 Amendment Order Cmt. (June 26, 2007); cf. *United States v. Edge Broadcasting Co.*, 509 U.S. 418, 425 n.3 (1993) (finding it "remarkable and unusual" that a court of appeals announced a consequential holding "in an unpublished per curiam

opinion”). Justice Stevens put the point candidly: he “tend[s] to vote to grant more on unpublished opinions, on the theory that occasionally judges will use the unpublished opinion as a device to reach a decision that might be a little hard to justify.” Stephen M. Shapiro et al., *Supreme Court Practice* § 4.11 (11th ed. 2019), quoted in Lauren Pardee Ruben, *Unpublished Federal Opinions: Not Precedential, But Still Potentially Cert-Worthy*, Morrison & Foerster LLP: All Things Appeals, https://appeals.mofo.com/topics/unpublished-federal-opinions-not-precedential-but-still-potentially-cert-worthy (last accessed Aug. 23, 2026). Peju’s own conduct concedes the decision’s sweeping reach. Its counsel publicly touts the Order as a “landmark reversal.” Mandelbaum Barrett PC, Joel G. MacMull, https://mblawfirm.com/professional-pdf/?pgid=770&refId=29223 (last visited Aug. 21, 2026). Its amicus, the International Trademark Association — which pressed materially the same arguments to this Court in *B&B Hardware* itself, and lost — described this case to the court below as carrying “precedential impact . . . far greater than the Supreme Court’s decision in *B&B Hardware*” itself. INTA Mot. for Leave to File Br. of Amicus Curiae 6-7, C.A. ECF No. 46.1. And it secured leave to appear on the ground that the appeal carries “adverse precedential impact on litigants other than the parties.” C.A. ECF No. 61.1, at 9-10. An order built on arguments imported from the losing side of *B&B Hardware* cannot be defended as a decision without consequence.

II. There Is a Fair Prospect That the Court Will Reverse.

The Order defies *B&B Hardware* on its face. Any one of the conflicts it created warrants reversal. Together, they mandate it.

1. The Order rewrote the holding. *B&B Hardware* asked "whether likelihood of confusion for purposes of registration is the same standard as likelihood of confusion for purposes of infringement," and answered: "We conclude it is." *B&B Hardware*, 575 U.S. at 154. The Order modified that language and restated the holding as a condition: preclusive effect "if" the TTAB "looked to the 'same likelihood-of-confusion standard'" as the district court. App. 10a. "Is" became "if." A categorical answer became a condition to be litigated case by case — and, having invented the condition, the Order held it unmet. This Court did not leave that question open for readjudication.

2. The Order replaced *B&B Hardware*'s test with the test this Court rejected. *B&B Hardware* defined the relevant "usages" as those "listed in the application" — "those goods on which the mark appears along with, if applicable, their channels of distribution" — and called them "critical." *B&B Hardware*, 575 U.S. at 143. The Order plucked those words from their context and the ratio decidendi that produced them, reading them to mean *Levy*'s "entire marketplace context" — the multifactor analysis a court conducts. App. 8a. A category of goods became a mode of analysis, and the *Jim Beam*/*Levy* test was restored word for word — the same test the Eighth Circuit applied when this Court reversed it. *B&B Hardware*, 716 F.3d at 1025. And the substitution rests on a false premise. The TTAB did analyze the marketplace —

it applied the *DuPont* factors, as the Order itself acknowledges, App. 3a-4a, and the *DuPont* analysis is itself a marketplace analysis of likelihood of confusion. "[T]he only relevant application is made in the marketplace." *In re E. I. Du Pont de Nemours & Co.*, 476 F.2d 1357, 1360-61 (C.C.P.A. 1973).

In defense of the substitution, the Order offered two sources. Neither withstands reading. The first is the single sentence of *B&B Hardware* that the Order quotes: "Thus, if the TTAB does not consider the marketplace usage of the parties' marks, the TTAB's decision should 'have no later preclusive effect in a suit where actual usage in the marketplace is the paramount issue.'" *B&B Hardware*, 575 U.S. at 156-57. The Order cut that sentence loose from the reasoning it concludes — a discussion of usages "materially unlike the usages in [the] application," meaning common-law uses the TTAB never adjudicated. *Id.* at 155-56. It then transformed the sentence to mean *Levy*'s "entire marketplace context," and on that substitution revived the very rule this Court rejected when the Eighth Circuit applied it. A lower court is not free to sever a sentence from the reasoning that produced it and give it the force of a rule. The ratio decidendi binds as fully as the holding. *Bucklew v. Precythe*, 587 U.S. 119, 136 (2019); cf. *Caetano*, 577 U.S. at 415 (Alito, J., concurring in the judgment) ("Although the Supreme Judicial Court professed to apply *Heller*, each step of its analysis defied *Heller*'s reasoning."). The second is a treatise comment — written, in its author's words, to "ameliorate" *B&B Hardware*'s "negative impacts" — asserting without analysis that the opposite rules are "essentially the same." App. 11a; 5 J. Thomas McCarthy, *McCarthy on*

Trademarks & Unfair Competition § 32:98 & n.3 (5th ed. Mar. 2026 update). Opposite rules cannot be reconciled, and a treatise's gloss cannot rewrite a holding: "what [this Court's] decisions . . . say and what they mean are one and the same." *Mathis v. United States*, 579 U.S. 500, 514 (2016).

The Order's other ground — *Octocom*, App. 8a-9a, 11a-12a — is the argument Hargis made to this Court in *B&B Hardware* and lost. Br. for Resp't at *74*-75, *B&B Hardware, Inc. v. Hargis Indus., Inc.*, No. 13-352, 2014 U.S. S. Ct. Briefs LEXIS 3732 (Oct. 24, 2014). It is wrong on its face. *Octocom* fixes the scope of the TTAB's adjudication, not its method. Because registrability is decided on the goods identified in the registration application, the applicant defines what the TTAB adjudicates by choosing what goods to list, and an unrestricted identification in that application is presumed to reach all goods in the class, all channels of trade, and all classes of purchaser. *Octocom*, 918 F.2d at 942. *Octocom* does not say that the TTAB ignores the marketplace; it says only which goods the TTAB must decide the case on — and the marketplace analysis of those goods is what the *DuPont* factors perform. Far from defeating preclusion, that principle is the premise on which *B&B Hardware* built its rule: this Court identified the usages "listed in the application" as "critical" precisely because "the applicant's right to register must be made on the basis of the goods described in the application." *B&B Hardware*, 575 U.S. at 143. When Hargis pressed *Octocom* to this Court, the Court accepted the premise and named exactly what the TTAB does not reach: "common-law rights in usages not encompassed by [the] registration." *Id.* at 155-56. The usage the TTAB adjudicated here concerned the LIANA mark on all wines, dessert wines included — Peju identified its goods as "wine," without restriction, in the same class in which Cesari's LIANO is registered for wines — and it is therefore "materially the same as the usages included in [Peju's] registration application," which is all *B&B Hardware* requires. *Id.* at 156. The District Court so held, faithfully applying *B&B Hardware*'s holdings and reasoning. App. 24a-25a.

3. The Order created a new rule, for a defense never presented. Peju's answer pleads thirteen affirmative defenses; none asserts that its use fell outside Cesari's registration because its wine was a dessert wine. The "principle of party presentation" forecloses what the court of appeals did: courts "rely on the parties to frame the issues for decision" and serve as "neutral arbiter[s] of matters the parties present." *United States v. Sineneng-Smith*, 590 U.S. 371, 375 (2020) (quoting *Greenlaw v. United States*, 554 U.S. 237, 243 (2008)). The rule announced to accommodate that phantom defense — that an actual use *narrower* than an unrestricted application escapes preclusion — is the opposite of this Court's holding. A narrower use is included in the application by definition, and "trivial variations between the usages set out in an application and the use of a mark in the marketplace do not create different 'issues.'" *B&B Hardware*, 575 U.S. at 157. A dessert wine is not a variation from the "wine" Peju identified; it is an instance of it. As the District Court put it: "Wines purchased by sophisticated consumers, after all, are still wines." App. 25a. Under the Order's rule, no TTAB determination could ever preclude, because every TTAB determination is made on the goods identified in

the application. The Order says as much: preclusion, on its view, is "the exception, not the norm." App. 8a. That premise is not a reading of *B&B Hardware*; it is the very result *B&B Hardware* forbade when it reversed the Eighth Circuit's application of *Jim Beam* and *Levy* — a test that would make preclusion "difficult . . . ever to apply in trademark disputes." *B&B Hardware*, 575 U.S. at 141; see *B&B Hardware*, 716 F.3d at 1024-25 (applying *Jim Beam* and *Levy*).

4. Together, these conflicts produce the opposite of what *B&B Hardware* commands. The court of appeals denied preclusive effect to a use *included* in an unrestricted registration application — under the very rule this Court reversed the Eighth Circuit for applying. And it reversed a District Court that had applied *B&B Hardware* meticulously — matching the usages the TTAB adjudicated against the usages in suit, element by element, and confirming that none fell outside the registration. App. 22a-26a. The Order thus converts a rule of federal preclusion designed to defeat relitigation into an instrument of it. None of that is permissible under any rule. It is the kind of defiant conflict this Court corrects summarily. The "fair prospect" standard asks far less.

III. Absent Relief, Cesari Will Suffer Irreparable Harm.

Three irreparable injuries follow from denial, and none could be undone by a later judgment in Cesari's favor.

1. The bond. For the two years of Peju's appeal, Cesari forbore execution on its judgment because a supersedeas bond secured it — the security that is the bond's very purpose. The mandate's issuance vacated the judgment. On August 24,

2026, Peju asked the District Court to discharge the bond. ECF No. 522 (S.D.N.Y.). And Peju has proven, time and again, that it will not satisfy even the smallest of judgments against it. Ordered to reimburse $2,697.75 in discovery costs it never appealed, Peju wrote, "We won't be paying the invoice" — and three years of accruing interest have not changed its mind. ECF No. 480-4 (S.D.N.Y.). Should this Court grant certiorari and reverse, the reversal would restore the judgment; nothing would restore the bond. Money loss is irreparable where it "cannot be recouped." *Philip Morris USA Inc. v. Scott*, 561 U.S. 1301, 1304 (2010) (Scalia, J., in chambers). Last Term, the full Court found irreparable harm where the recipients of funds merely "do not state that they will repay," *Nat'l Insts. of Health*, 145 S. Ct. 2658, as it has where a creditor is deprived of payments "with no guarantee of eventual recovery." *Alabama Ass'n of Realtors v. HHS*, 594 U.S. 758, 765 (2021) (per curiam). Peju does not merely fail to state that it will pay; it states, in writing, that it will not. A party that for three years has refused to pay an unappealed award of $2,697.75 will not pay a $1.35 million judgment once the security for it is gone. And what Cesari faces is not difficulty of recoupment but impossibility — a bond discharged "in its entirety" and "of no further force and effect," with the instrument returned to Peju's counsel, does not revive, and Cesari cannot restore it. ECF No. 522-1 (Peju's proposed order). This Court has granted exactly this relief before. In *Leegin*, this Court recalled and stayed an issued mandate on terms that kept the supersedeas bond posted below in effect pending certiorari — an order whose condition protected the judgment creditor's security while the debtor pursued review; the interest is the same here, where the creditor itself asks that the security remain. And courts of appeals have recalled their own issued mandates for the same purpose. *Hercules Inc. v. United States*, 309 F.3d 781 (Fed. Cir. 2002) (recalling and staying an issued mandate to permit a certiorari petition, conditioned on the supersedeas bond "remain[ing] in effect . . . for the course of any further proceedings").

2. The right not to relitigate. Under *B&B Hardware*, Cesari holds an adjudicated right to preclusion, which this Court describes not as a convenience of litigation but as "a rule of fundamental and substantial justice, 'of public policy and of private peace,' which should be cordially regarded and enforced by the courts." *Federated Department Stores, Inc. v. Moitie*, 452 U.S. 394, 401 (1981) (citation omitted). That language, this Court added, "is even more compelling in view of today's crowded dockets." *Ibid.* The content of that right is freedom from a second adjudication of the same issue, and it cannot survive its own denial: once relitigation of the very issue subject to preclusion begins, its benefits "would be irretrievably lost — even if" this Court "later concluded" the issue was precluded "all along." *Coinbase*, 599 U.S. at 743. Being subjected to a proceeding one has a right not to undergo is "a here-and-now injury" that is "impossible to remedy once the proceeding is over." *Axon Enterprise, Inc. v. FTC*, 598 U.S. 175, 191 (2023). This is not the ordinary "expense and annoyance of litigation" attending a first adjudication no party has a right to avoid, *FTC v. Standard Oil Co.*, 449 U.S. 232, 244 (1980); it is the destruction of the very right the petition asks this Court to

restore. And the relitigation makes no sense even on the Order's own terms: its stated ground reaches at most three of the thirty-three LIANA wines found infringing, yet because the mandate vacates the entire judgment, the District Court must readjudicate preclusion for the other thirty — on the same record, under the Order's new test, while this Court considers whether that test may stand. Preclusion exists to prevent precisely this: "the expense and vexation attending multiple lawsuits" and the risk of "inconsistent decisions." *B&B Hardware*, 575 U.S. at 147.

3. The efficacy of this Court's review. Remand will not wait for certiorari. The District Court must take up preclusion anew under the Order's test — the very question the petition will present — and rulings entered while the petition is pending would recast the case's posture and arm Peju with objections to review that it does not now have. "[F]oreclosure of certiorari review . . . would impose irreparable harm." *Garrison v. Hudson*, 468 U.S. 1301, 1302 (1984) (Burger, C.J., in chambers); see *John Doe Agency*, 488 U.S. at 1309.

IV. The Equities Overwhelmingly Favor Relief.

A stay "simply suspend[s] judicial alteration of the status quo." *Nken v. Holder*, 556 U.S. 418, 429 (2009). The status quo, for the entire two years of Peju's appeal, was a judgment entered, execution forborne, and a bond in place. Recall restores that status quo and works no prejudice to Peju whatsoever: its only consequence for Peju is that the bond Peju itself posted, for its own benefit, remains in effect. Justice Scalia, granting a comparable stay of money judgments, was "aware of no irreparable harm that granting the stay would produce." *Barnes v. E-Systems, Inc.*, 501 U.S. 1301, 1305 (1991) (Scalia, J., in chambers). Denial, by contrast, costs Cesari everything at once: the judgment, the security for it, and the adjudicated right not to relitigate — spent before this Court can decide whether to review the decision that took it away. The public interest runs the same way, for preclusion "serves vital public interests beyond any individual judge's ad hoc determination of the equities in a particular case." *Moitie*, 452 U.S. at 401. Cesari will file its petition promptly, will notify the Court immediately upon filing, and asks that relief be framed, as in *Leegin*, so that the supersedeas bond remains in effect. See 28 U.S.C. § 2101(f); Sup. Ct. R. 23.4.

CONCLUSION

The application should be granted. Cesari respectfully requests an immediate administrative recall and stay preserving the status quo while this application is under consideration. Cf. *Turtle Mountain Band of Chippewa Indians v. Howe*, No. 25A62 (U.S. July 24, 2025) (staying issuance of the mandate pending certiorari, following an interim administrative stay). Cesari further requests an order recalling and staying the mandate of the United States Court of Appeals for the Second Circuit, and staying its judgment, under 28 U.S.C. §§ 1651(a) and 2101(f). That order would suspend the effect of the vacatur: the judgment of the District Court, and the supersedeas bond securing it, would remain in place pending the filing and disposition of Cesari's petition for a writ of certiorari and, if the petition is granted, pending this Court's judgment. Cesari further requests such other relief as may be just and proper.

Respectfully submitted,

/s/ *Valeria Calafiore Healy*

VALERIA CALAFIORE HEALY
Counsel of Record
HEALY LLC
82 Nassau Street #60253
New York, NY 10038
(212) 810-0377
vch@healylex.com

Counsel for Applicant Cesari S.R.L.

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