

SUPREME COURT OF THE UNITED STATES

IN THE SUPREME COURT OF THE UNITED STATES

ABITRON AUSTRIA GMBH, ET AL.,)
 Petitioners,)
 v.) No. 21-1043
HETRONIC INTERNATIONAL, INC.,)
 Respondent.)

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9
10 Washington, D.C.
11 Tuesday, March 21, 2023

12
13 The above-entitled matter came on for
14 oral argument before the Supreme Court of the
15 United States at 10:06 a.m.

16
17 APPEARANCES:

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19 of the Petitioners.

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22 United States, as amicus curiae, supporting
23 neither party.

24 MATTHEW S. HELLMAN, ESQUIRE, Washington, D.C.; on
25 behalf of the Respondent.

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P R O C E E D I N G S

(10:06 a.m.)

CHIEF JUSTICE ROBERTS: We will hear argument first this morning in Case 21-1043, Abitron Austria GmbH versus Hetronic International.

Mr. Walker.

ORAL ARGUMENT OF LUCAS M. WALKER

ON BEHALF OF THE PETITIONERS

MR. WALKER: Mr. Chief Justice, and may it please the Court:

The Lanham Act does not apply to Petitioners' use of trademarks in foreign countries because nothing in the Act provides the clear, affirmative, and unmistakable indication needed to overcome the presumption against extraterritoriality, especially as to foreign defendants, like Petitioners.

The text of the statute never says it applies to uses of trademarks outside the United States. And it is a foundational principle of both U.S. and international trademark law, embodied in multiple treaties, that trademark protections are inherently territorial and do not extend beyond the borders

1 of the country granting protection.

2 Any argument that the Act extends --
3 departs from that longstanding principle would
4 have to be based on especially compelling
5 evidence. But, here, Hetric International
6 offers only the text definition of commerce, and
7 this Court has repeatedly rejected the notion
8 that commerce language is enough to extend the
9 law to foreign conduct, even if that language
10 otherwise invokes the full scope of a
11 constitutional commerce power.

12 International also invokes this
13 Court's decision in Steele. But Steele, by its
14 terms, addressed only the Act's application to
15 U.S. citizens acting abroad. There is no reason
16 to discard that self-imposed limit and extend
17 Steele to reach foreign defendants like
18 Petitioners.

19 To the contrary, extending the Lanham
20 Act's reach into foreign countries would create
21 the very risk of international friction that
22 this Court's current extraterritoriality
23 doctrine seeks to avoid. That leads to the
24 suggestion that imposing liability for foreign
25 sales to foreign buyers by foreign companies

1 somehow qualifies as a domestic application of
2 the Act.

3 But, as International itself concedes,
4 applying U.S. law to conduct abroad based on
5 effects in the United States is an
6 extraterritorial application of the law. It is
7 not a way of applying a nonextraterritorial law
8 domestically. Both the text and the focus of
9 the Lanham Act require a domestic use of the
10 mark in commerce. Because Petitioners' foreign
11 sales involve only uses outside the
12 United States, they fall outside the Act's
13 scope.

14 I welcome the Court's questions.

15 JUSTICE THOMAS: Could you imagine any
16 set of circumstances where a sale that involves
17 an international transaction could also involve
18 conduct in the United States that violates the
19 Lanham Act?

20 MR. WALKER: So I think one example
21 here would be the -- the 202,000 euros worth of
22 direct sales to U.S. customers. So those sales
23 involved foreign buyers, the Petitioners, who
24 were overseas at the time, but they were sold
25 into the United States to foreign buyers. And I

1 think, in that situation, the mark is being used
2 on those goods in commerce within the territory
3 of the United States. And so we have not
4 disputed that that's permissible domestic
5 application of the Lanham Act here.

6 JUSTICE SOTOMAYOR: I don't understand
7 what that difference is from the sales to people
8 in foreign countries who designated the
9 United States as the mailing address. You know
10 that they're buying it to ship it into the U.S.
11 Why aren't you aiding and abetting? And isn't
12 that an effect as direct as the Lanham Act can
13 ask for? You're interfering with commerce in
14 the United States.

15 MR. WALKER: So two points on that.
16 So the -- the -- the 3 percent of sales of the
17 goods that may eventually reach the
18 United States --

19 JUSTICE SOTOMAYOR: No, no, no. There
20 was a bunch of goods in that second category --

21 MR. WALKER: Mm-hmm.

22 JUSTICE SOTOMAYOR: -- that you sold
23 to foreign buyers delivered -- for delivery to
24 an address in the United States.

25 MR. WALKER: So the -- the delivery

1 was actually in the foreign country. They
2 delivered to the buyers in the foreign country.
3 The -- the delivery address on there actually
4 meant that it had to be compatible with, say,
5 FCC regulations so it could be used in the
6 United States. And so it was being sold to, for
7 example --

8 JUSTICE SOTOMAYOR: You're begging the
9 question.

10 MR. WALKER: But -- so -- so even
11 apart from that, I -- I -- I think what you
12 would have there is the use of the mark in the
13 United States is going to be when that is
14 imported or maybe resold in the United States,
15 when it reaches the territory of the United
16 States.

17 JUSTICE SOTOMAYOR: So, even if you
18 know that it's going to the U.S., you're not
19 responsible?

20 MR. WALKER: I think, in that
21 situation, it might be a question -- you -- you
22 could definitely reach the person who brings it
23 into the United States, but, if it's a foreign
24 buyer, it would have to be on a theory of
25 contributory liability, and there's been no --

1 there's been no argument here that we would be
2 responsible in a contributory liability theory
3 for people who later brought goods into the
4 United States and may have violated the Lanham
5 Act in the United States that way.

6 JUSTICE SOTOMAYOR: Doesn't your view
7 overrule Steele?

8 MR. WALKER: It -- it -- it doesn't.
9 So --

10 JUSTICE SOTOMAYOR: Explain how.

11 MR. WALKER: Yeah. So Steele, by its
12 terms, from its very first sentence and
13 throughout its rationale, addressed how the Act
14 applies to United States citizens who are acting
15 abroad and -- and also acting within the
16 United States. It did not address how it
17 applies to foreign defendants.

18 JUSTICE SOTOMAYOR: So explain to me
19 how a U.S. citizen in a foreign country who does
20 exactly what your client does, why should they
21 be responsible but you not.

22 MR. WALKER: So I think, under the
23 Court's modern extraterritoriality doctrine,
24 that's a very good question as to whether there
25 should be a difference and that U.S. citizens

1 acting abroad should get the same benefit of
2 that presumption. But Steele was decided well
3 before that current doctrine, and so it thought
4 that a U.S. citizen --

5 JUSTICE SOTOMAYOR: So you're really
6 -- you're just saying overrule it because it --

7 MR. WALKER: No.

8 JUSTICE SOTOMAYOR: -- it doesn't help
9 you.

10 MR. WALKER: No, I -- I -- I think the
11 holding of Steele is that it applies to U.S.
12 citizens because Congress has extraordinary
13 power to regulate U.S. citizens abroad and does
14 not raise issues of international law.

15 JUSTICE SOTOMAYOR: I see Steele as
16 more consistent with the SG's view. In Steele,
17 the American citizen was in America, bought
18 unnamed -- parts here, shipped them to Mexico.
19 All of the assembly of the product was in
20 Mexico. Steele -- Steele, the -- the watch
21 manufacturer, wasn't actually -- sold the marks
22 -- sold the watches in Mexico but to stores that
23 then sold it to American citizens. So I don't
24 know what the difference is.

25 MR. WALKER: Well, so we --

1 JUSTICE SOTOMAYOR: It wasn't as if
2 the American citizen was himself handing the
3 watch to buyers. Retail stores were handing the
4 watch to buyers, and they were coming across the
5 border with those watches.

6 MR. WALKER: Yeah. So Steele thought
7 it was appropriate to apply the Lanham Act to a
8 U.S. citizen where the mark was being used
9 outside of the United States based on the --
10 some conduct in the United States, essential
11 steps taken in the United States, and it
12 affects --

13 JUSTICE SOTOMAYOR: So you ignore the
14 whole part of the decision that had to do with
15 the confusion American consumers had by bringing
16 the watches to be fixed in the United States.

17 MR. WALKER: It -- the -- the Court
18 did acknowledge that one of the effects of the
19 foreign conduct, the use of the mark in Mexico,
20 was potential reputational or confusional harm
21 within the United States. And so it was sort of
22 applying one of the conduct or effects tests
23 that courts had been using for the Exchange Act,
24 for example, and this Court rejected in
25 Morrison.

1 JUSTICE BARRETT: Would Steele come
2 out the same way today?

3 MR. WALKER: I think probably not. So
4 U.S. citizens are also entitled to the
5 presumption against extraterritoriality, and
6 Steele's reasoning is really out of step with
7 how this Court deals with extraterritoriality
8 now.

9 JUSTICE BARRETT: So are you saying
10 that the cleanest thing and the way to bring our
11 cases in -- in line, to bring Steele and maybe
12 this case before us in line with our modern
13 extraterritoriality jurisprudence, is just to
14 overrule it?

15 MR. WALKER: Well, it certainly --
16 that would be --

17 JUSTICE BARRETT: I know -- I know
18 you're saying we don't have to.

19 MR. WALKER: Yes. So I -- I think the
20 -- the cleanest way to decide this case, you
21 could just say it addressed foreign defendants
22 and not U.S. defendants. The simplest, cleanest
23 way to address the -- the harmony of the law as
24 a whole may be to say that Steele has no further
25 vitality to -- to overrule.

1 JUSTICE BARRETT: So would it be fair
2 to characterize your position as saying Steele
3 would come out a different way today? It's not
4 necessarily -- not necessary to overrule that
5 case, but the best way to make sense of Steele
6 going forward would be to narrow it in the way
7 that you're proposing?

8 MR. WALKER: I -- I think that's
9 right. This Court declines to extend decisions
10 that rest on principles that it has since
11 rejected, and I think it's just important to
12 respect the limits that Steele itself placed on
13 its decision, which was we are addressing U.S.
14 citizens because of that longstanding, deeply
15 rooted principle that a country can govern its
16 citizens anywhere in the world, which is
17 something that simply does not apply to foreign
18 defendants.

19 And, here, you have the risk of
20 foreign -- conflict with foreign laws and
21 international friction that the European Union
22 has gone out of its way to catalog that it
23 thinks this is going to disrupt the
24 international trademark system, which is
25 premised on the strict territoriality of

1 trademark protections.

2 It's going to violate treaties that
3 the United States and 178 countries have joined,
4 like the Paris Convention and the Madrid
5 Protocols, which has few -- fewer members but
6 still many, and it's going to interfere with the
7 administration of other countries' abilities to
8 administer their own trademark laws within their
9 own territories.

10 And that's the conflict the -- that
11 arises from trying to regulate transactions, you
12 know, the use of marks in the marketplace, in
13 commerce, in foreign countries. That's the
14 reason why Morrison declined to apply the
15 Exchange Act extraterritorially even though
16 courts had been doing that for decades, and it's
17 the reason why it held that the focus of the Act
18 should be a clean test when we're applying it
19 domestically, where did the transaction that the
20 Act is seeking to regulate occur.

21 And, here, that transaction is the use
22 of the mark in commerce. And so it's that use
23 of the mark in commerce that needs to occur
24 within the United States for the Lanham Act to
25 be properly applied domestically.

1 JUSTICE JACKSON: But why isn't --

2 JUSTICE KAGAN: Well, why -- why --
3 why can't it also be the effects of the use of
4 the mark and where the effects took place, for
5 example, where the confusion took place?

6 MR. WALKER: So I think it would be
7 unusual for the focus of a statute just to be
8 the effects because, usually, when we're talking
9 about effects from foreign commerce that are
10 felt within the United States, we're talking
11 about applying the law extraterritorially.
12 That's how --

13 JUSTICE KAGAN: Well, Steele, of
14 course, does talk quite a bit about effects. I
15 mean, Steele is much more about effects than it
16 is about the citizenship of the defendant.

17 So we have Steele, and Steele is very
18 much about how does this -- how is this felt in
19 the United States. But there's also aspects of
20 our current law that are that. I mean, when RJR
21 talks about the injury, the injury is just a way
22 of saying effects, and it says we're looking for
23 domestic injury here.

24 MR. WALKER: Yeah. Well, so, in RJR,
25 I think that's a -- a -- a special situation

1 because, there, the Court held that the
2 substantive conduct regulating provisions were
3 themselves extraterritorial at least in part.
4 And so the conduct that was being regulated was
5 permissibly extraterritorial.

6 And so then it was saying at the
7 second step, for the cause of action, a private
8 cause of action, we need to apply the
9 presumption again, and, there, we want to make
10 really sure that we're not creating the risk of
11 friction that can -- that exists when private
12 liability is imposed for conduct occurring
13 overseas, and so that's why we're going to
14 insist on the domestic injury even if you have a
15 domestic -- or you have an extraterritorial
16 statute that's been violated. And so --

17 JUSTICE KAGAN: And when -- when I
18 look at the -- the cases that we've done on --
19 in -- in our modern regime, there's a good deal
20 of flexibility actually in how we go about
21 picking what the focus is.

22 And you might say, well, that's a
23 downside of our modern regime because it's a
24 little bit amorphous and you don't quite know
25 whether the focus is on the Act that you're

1 regulating or instead the focus is on the people
2 and the interests that you're protecting.

3 But it's also the virtue of our modern
4 law, which is we get to sort of look at a
5 particular statutory regime and say, you know,
6 what makes sense with respect to
7 extraterritorial -- or with respect to domestic
8 applications of extra -- of -- of -- of conduct
9 occurring abroad.

10 And -- and so there's a good deal of
11 flexibility, and why shouldn't the flexibility
12 be used in this context to say, look, this whole
13 regime is about confusion. The question is, is
14 it causing domestic confusion?

15 MR. WALKER: So I -- I -- I have three
16 responses to that. First, I think the regime is
17 really about the use of the mark in commerce.
18 The use of the mark in commerce is how you
19 make -- you register a trademark, it's how you
20 maintain a trademark, it's how you infringe a
21 trademark. The registered trademark protects
22 the exclusive right to use the trademark in
23 commerce.

24 And I think the entire backbone of the
25 statute focuses on that use, and I also think

1 context is important. And, here, we have the
2 longstanding internationally recognized
3 principle that trademark protections are
4 territorial in nature and that foreign trademark
5 protections don't apply within the United
6 States. United States trademark protections do
7 not apply in foreign countries.

8 And so the way you can administer that
9 is -- is -- is through looking at a clear test,
10 this is -- and this is my third point. Morrison
11 asks for a clear test to avoid the confusion and
12 haziness that you might have when you're kind of
13 balancing factors to figure out whether
14 something applies to foreign conduct. And I
15 think that --

16 JUSTICE JACKSON: Can I ask you, do --
17 do you dispute that there's no trademark
18 violation if the use of the mark in commerce
19 doesn't cause customer confusion?

20 I mean, you continue to say that what
21 the statute cares about and what Congress is
22 trying to regulate is the use of the mark in
23 commerce. But it was my understanding from the
24 statutory scheme that even using a mark, you
25 know, another -- a registered trademark in

1 commerce is not going to be sufficient to
2 trigger liability under the statute.

3 MR. WALKER: That's true. So the
4 right is defined, the mark-holder's right is
5 defined as the exclusive right to use it in
6 commerce. An infringe -- an intrusion on that
7 right by someone else using the mark is only
8 actionable, it's only can give rise to liability
9 if it's likely to cause confusion. So that --

10 JUSTICE JACKSON: All right. So then
11 --

12 MR. WALKER: -- that is -- that's a
13 condition.

14 JUSTICE JACKSON: I understand. So
15 then how can it be then that you say that the
16 focus of this statute is only on the use of the
17 mark?

18 I mean, don't -- so, if there is
19 domestic confusion about products that are being
20 used in commerce in the United States, they're
21 used in commerce because they're circulating in
22 the United States, people are buying them, we're
23 not just talking about a product that is, you
24 know, in someone's basement or something,
25 they're being used in commerce in the

1 United States.

2 I guess I don't understand why that
3 wouldn't -- and, excuse me, confusing people --
4 why isn't that enough?

5 MR. WALKER: Well, I think, if the --
6 if the mark -- if the goods that are marked with
7 the protected mark are being used in the
8 United States, that would be a domestic use.

9 JUSTICE JACKSON: But I guess your
10 test suggests that the maker, if they're
11 overseas, would have to be the one to put it
12 into commerce or it would have to be -- you
13 know, in order for it -- for it to -- them to be
14 liable, we'd have to have some idea that the
15 maker themselves is using them in commerce in
16 the United States directly shipping them in.

17 And I'm not sure I understand why
18 that's the case, because I'm sort of
19 hypothesizing, you know, we -- we -- we're
20 walking down the street in Manhattan and we see
21 all of these, you know, fraudulent or fake --
22 fakely branded goods, and if they are made
23 overseas and we can figure out who made them,
24 wouldn't that be sufficient?

25 MR. WALKER: I -- I -- I wouldn't

1 think so. So any -- obviously, anyone who is
2 bringing it into the United States, importation
3 is banned under Section 42 of the Act and under
4 43(b). Anyone who is selling them in the United
5 States, you can absolutely get them. Anyone
6 who's outside of the United States, you'd have
7 to have a vicarious or contributory liability
8 theory that hasn't been asserted here.

9 But going after, you know, counterfeit
10 is a serious problem, but going after people in
11 foreign countries is something that is fraught
12 with foreign affairs --

13 JUSTICE JACKSON: But why is that
14 extraterritorial? That's all I'm asking. If --
15 so fine. Under the contributory liability
16 theory, which you appear to think is something
17 that can be done here although not alleged here,
18 why is it extraterritorial to go after the
19 manufacturer of fraudulent goods that are in
20 commerce in the United States?

21 MR. WALKER: Well, it does raise some
22 additional difficult questions as to when
23 contributory or aiding and abetting qualifies as
24 a domestic application. So it -- it's happy
25 that it's not raised here because the Court

1 doesn't have to get into those questions, but
2 in, you know, Nestle USA, you know, whether
3 aiding and abetting depended on where the aiding
4 and abetting happened or where the underlying
5 tort happened was a difficult question the Court
6 didn't decide.

7 And so I -- I'm not saying the
8 contributory liability would necessarily count
9 as a domestic application, but that would have
10 to be the theory of it for a person who is not
11 themselves using it in commerce.

12 And two other points on the use. So
13 not every use of a mark has to be confusing for
14 it to be subject to liability under the Lanham
15 Act, Olympic emblems, for example. This is 36
16 U.S.C. 220506(c) and was addressed in this
17 Court's decision in *San Francisco Arts and*
18 *Athletics* in 483 U.S. 522. Just using them in
19 commerce without any likelihood of confusion is
20 enough to be liable.

21 JUSTICE KAGAN: But the core of the
22 Act is certainly confusing uses, uses that
23 confuse, and that's, you know, not a purposive
24 question. It's right there in the text of the
25 statute repeatedly.

1 So you're saying that, well, the focus
2 of the statute is uses of the trademark. That
3 doesn't seem right. The focus of the statute is
4 uses of the trademark that confuse. And if the
5 uses of the trademark that, you know, confuse in
6 the domestic market, that seems as though it
7 should be enough under Morrison.

8 MR. WALKER: Well, I -- I -- I think,
9 in that situation -- I -- I -- I think the
10 confusion is certainly a condition for it to be
11 liable, but the use is itself defined as the
12 relevant infringement. That's in Section
13 33(b)(5) and (6) of the Lanham Act. It talks
14 about the use of a mark being charged as an
15 infringement.

16 And the other question -- you know,
17 the other thing that Morrison was really
18 concerned about was having a clear test that is
19 not going to create a lot of confusion.

20 JUSTICE KAGAN: Well, Morrison did not
21 create a clear test. I mean, if -- if you --
22 you know, our -- our most recent version of the
23 test is the -- the statute's focus is the object
24 of its solicitude, which can include the conduct
25 that seeks to regulate as well as the parties in

1 interests it seeks to protect or vindicate.

2 So, in fact, Morrison created a quite
3 flexible test, is that we're allowed to look at
4 a statute and say what's really the purpose.
5 Sometimes that will be conduct. Sometimes it
6 will be effects. Sometimes it will be one
7 person's conduct. Sometimes, as Morrison shows,
8 it will be an entirely different person's
9 conduct.

10 So, you know, there's a good deal of
11 flexibility in this test, and the question is,
12 why in this case, when we stare at the Lanham
13 Act, isn't the focus of the statute confusing
14 uses?

15 MR. WALKER: Well, I -- I think one
16 other thing that Morrison thought was really
17 important is that -- so the -- the focus itself
18 may be a little unclear, but, for each statute,
19 having a clear administrable test was really
20 important, which is why it chose a
21 transaction-based test.

22 And if you're looking to where the
23 likelihood of confusion exists, that's a pretty
24 inadministrable test. It's not even where did
25 confusion exist; it's where, hypothetically,

1 confusion could have existed. That's not a
2 question that's asked under the current
3 likelihood-of-confusion test.

4 And even likelihood of confusion is
5 governed by a 13-factor test before the PTO.
6 Here, the jury was instructed on seven
7 nondispositive factors that it could give
8 whatever weight it wanted to figure out whether
9 there was a likelihood of confusion.

10 And I think, if you have a test that
11 requires juries or courts to balance seven or 13
12 factors to decide whether a likelihood of
13 confusion exists in the United States, that's
14 the sort of very-difficult-to-apply test that
15 Morrison said should not be how we apply U.S.
16 laws to foreign conduct.

17 And the trade show example, I think,
18 is a good example -- may I finish?

19 CHIEF JUSTICE ROBERTS: Sure.

20 MR. WALKER: If -- if trade shows held
21 overseas can lead to domestic confusion when
22 U.S. travelers come back to the United States
23 and every country in the world followed that
24 approach, you'd have U.S. law applies to a
25 Berlin trade show when a U.S. customer walks by,

1 Swiss law when a Swiss customer walks by, and a
2 Chinese law when a Chinese customer walks by.
3 And that's no way to administer an international
4 trademark system premised on territoriality.

5 CHIEF JUSTICE ROBERTS: Thank you,
6 counsel.

7 Justice Thomas?

8 Justice Alito?

9 Justice Sotomayor?

10 JUSTICE SOTOMAYOR: It seems to me
11 that your position in this world of the internet
12 makes very little sense. Foreign buyers today
13 do what almost all buyers do, which is advertise
14 their goods on the internet, and they purposely
15 target American customers in America. The fact
16 that they choose to deliver those goods at the
17 border, outside the United States, or into the
18 U.S., to me, should make no difference. They
19 are competing with the trademark owner in the
20 U.S. to secure U.S. customers.

21 And so I just can't see your
22 territoriality rule making any sense because the
23 case I gave is a version of Steele, frankly, and
24 I don't see why overturning Steele or making it
25 depend on the citizenship of the defendant is

1 important. I think the SG is right. The issue
2 is whether or not these acts are intended to
3 cause confusion in the U.S., and that internet
4 sale, to me, is clearly intended to violate the
5 Act.

6 MR. WALKER: So insofar -- once those
7 goods come to the border, the importation, the
8 sale in the United States absolutely falls
9 within the Lanham Act, but if --

10 JUSTICE SOTOMAYOR: But not by you,
11 the manufacturer. You advertised it. You
12 delivered it to the border and said to the
13 customer: Come with your truck, or pay a
14 freight forwarder to bring it to you across the
15 border.

16 MR. WALKER: Well --

17 JUSTICE SOTOMAYOR: That's -- you're
18 saying to me that's not actionable.

19 MR. WALKER: -- barring some
20 contributory liability, vicarious liability, I
21 think that's right. The fact is if --

22 JUSTICE SOTOMAYOR: Why does that make
23 sense?

24 MR. WALKER: Well, if --

25 JUSTICE SOTOMAYOR: Given the purposes

1 of the Lanham Act?

2 MR. WALKER: So the -- the Lanham Act
3 was enacted in 1946, and if it doesn't perfectly
4 match with how the internet works today, that's
5 understandable. Congress has actually updated
6 it in certain ways to address the internet.

7 JUSTICE SOTOMAYOR: Well, but -- but
8 that's -- but what Congress did was say it's not
9 just the use of a -- of a mark; it's the use of
10 the mark with the intent to confuse or confusing
11 people.

12 This is a clear case of intending to
13 confuse, the example I gave, of intending to
14 confuse and actually doing it.

15 MR. WALKER: Yeah. Well, so I -- I do
16 think, if it's ever going to reach someone who
17 is only using the mark outside the
18 United States, it would have to be because there
19 is that domestic effect of confusion. So we --

20 JUSTICE SOTOMAYOR: Well, that's part
21 of --

22 MR. WALKER: Yeah.

23 JUSTICE SOTOMAYOR: -- your brief.
24 You pretty much --

25 MR. WALKER: Yeah.

1 JUSTICE SOTOMAYOR: -- accept -- you
2 say as an alternative --

3 MR. WALKER: Yeah.

4 JUSTICE SOTOMAYOR: -- don't rule for
5 them, the other side, but accept the SG's test
6 basically.

7 MR. WALKER: That -- that -- that
8 would be the outer bound. Yes.

9 JUSTICE SOTOMAYOR: Okay. Thank you.

10 CHIEF JUSTICE ROBERTS: Justice Kagan,
11 anything further?

12 Justice Gorsuch?

13 Justice Kavanaugh?

14 Justice Barrett?

15 JUSTICE BARRETT: No.

16 CHIEF JUSTICE ROBERTS: Justice
17 Jackson?

18 JUSTICE JACKSON: Can I just ask you
19 about a hypothetical because I'm just trying to
20 understand what it is that you're saying.

21 So we have a German manufacturer of
22 handbags who makes his own handbags but then
23 also starts making knockoffs of Coach handbags,
24 putting the mark on it just like Coach, and he
25 has no intent of ever giving them -- or getting

1 them to the United States, he sells only locally
2 in Germany, and none of the bags ever get to the
3 United States. Would it be an extraterritorial
4 application of this statute if Coach tried to
5 sue them?

6 MR. WALKER: If I'm understanding
7 correctly, yes. The use of the -- the mark is
8 entirely outside of the United States.

9 JUSTICE JACKSON: All right. Same
10 facts, except a group of American students,
11 college students, spend a semester abroad in
12 Germany, they buy the handbags, knockoffs of
13 Coach, they come back to the United States, and
14 people who see them with these bags are really
15 confused because they look like Coach bags, and
16 it starts actually diminishing Coach's brand
17 because the bags are shoddy, and people are
18 confused, and Coach is unhappy because people
19 think they're their bags. If Coach sues, is
20 that an extraterritorial application or no?

21 MR. WALKER: There, it would be. The
22 use of the mark is occurring outside of the
23 United States. Coach's remedy, as the Court
24 explained in Microsoft versus AT&T, is to get
25 German trademark protection, EU trademark

1 protection, and enforce those rights there.

2 JUSTICE JACKSON: Even though the
3 confusion and the damage to goodwill is in the
4 U.S., still extraterritorial?

5 MR. WALKER: Yes. And I think one
6 reason why that's the right answer is it would
7 have U.S. liability, potential treble damages,
8 something most of the world rejects, turn on how
9 likely do we think it is that American students
10 are going to be coming to this town in Germany
11 and buying handbags and taking them --

12 JUSTICE JACKSON: So you'd -- you'd
13 have the same answer with the third version of
14 this hypothetical, which is the American
15 students are themselves very entrepreneurial and
16 they take \$100,000 and they buy a bunch of these
17 bags, and then they bring them back to the
18 United States and they put them into commerce in
19 the United States. They're on the street
20 selling them. They're creating their own
21 websites selling them. Coach figures out that
22 these students aren't the ones that are really
23 making the bags. The bags are being made in
24 Germany by this company. Same result for you,
25 no extraterritory -- that would be

1 extraterritorial if Coach tries to sue the
2 manufacturer?

3 MR. WALKER: The manufacturer in
4 Germany, yes. The -- the -- the students who
5 are selling and advertising the bags in the
6 United States, they can go after them. That's a
7 domestic use of the mark in commerce.

8 JUSTICE JACKSON: Thank you.

9 CHIEF JUSTICE ROBERTS: Thank you,
10 counsel.

11 Ms. Hansford.

12 ORAL ARGUMENT OF MASHA G. HANSFORD
13 FOR THE UNITED STATES, AS AMICUS CURIAE,
14 SUPPORTING NEITHER PARTY

15 MS. HANSFORD: Mr. Chief Justice, and
16 may it please the Court:

17 The court of appeals was mistaken in
18 giving the Lanham Act sweeping extraterritorial
19 reach. At the first step of the two-step
20 framework, the provisions here contain no clear
21 affirmative indication of extraterritorial
22 application. And at step two, the focus of each
23 provision is consumer confusion, which is the
24 touchstone of trademark infringement.

25 A use of a trademark that causes a

1 likelihood of confusion in the United States is
2 actionable just like a misrepresentation made
3 abroad about a security listed on a U.S. stock
4 exchange is actionable under Morrison. That
5 interpretation best makes sense of Steele, and
6 it leads to a common-sense result. A defendant
7 is not liable for transactions that confuse only
8 foreign customers, but a defendant who causes
9 confusion in the United States, misappropriating
10 U.S. goodwill, is liable.

11 And although the difference between
12 the government's position and Petitioners' is
13 small, it is meaningful. As Justice Sotomayor
14 observed, Petitioners would exclude from the
15 Lanham Act's coverage here \$2 million worth of
16 products they knew would be used in the
17 United States, confusing U.S. consumers, simply
18 because the purchasers, rather than Petitioners,
19 arranged for the particular shipment of those
20 goods into this country.

21 I welcome the Court's questions.

22 JUSTICE THOMAS: So, in order to reach
23 your conclusion, would you have to use an
24 effects test, or -- or would you be relying on
25 the conduct of Petitioner?

1 MS. HANSFORD: We would be viewing the
2 confusion as the focus of the Act, and we -- we
3 think that the thing to be protected, the
4 interest to be protected, can be the focus under
5 the framework. And we don't think that
6 confusion is an abstract mental state. We think
7 that confusion is actions by consumers.

8 So -- we think it's -- you -- you can
9 read the Act as likely to cause consumers to act
10 confused. And the question is, are consumers
11 acting confused in the United States?

12 JUSTICE THOMAS: So you're not
13 focusing at all on the conduct of the Petitioner
14 except to the extent that Petitioner sold the
15 product that causes the confusion?

16 MS. HANSFORD: That's correct. Our
17 test is not -- the Petitioners' conduct is not
18 the focus. It's the -- the effect or the thing
19 to be protected.

20 JUSTICE THOMAS: So how proximate does
21 that have to be?

22 MS. HANSFORD: And --

23 JUSTICE THOMAS: How far -- what if
24 Petitioner sold it to one person who sold it to
25 another who sold it to another who sold it to

1 the students who sold it to someone else who
2 then brought it in the United States?

3 MS. HANSFORD: Proximate cause is an
4 important limitation in our theory. We think,
5 under this Court's decision in Lexmark,
6 proximate cause under the Lanham Act is the
7 injury, the confusion, has to flow directly from
8 the use. So, in a situation like that,
9 proximate cause likely would not be satisfied.

10 JUSTICE THOMAS: Have we -- have we
11 used this -- have we applied this approach in --
12 internationally in a Lanham Act case, or is this
13 a new test?

14 MS. HANSFORD: I -- I think it's
15 the -- the standard two-step framework. I don't
16 think this Court has considered the Lanham Act.
17 The -- the -- the -- I -- I -- I guess I'm not
18 aware of a -- of a case in which this Court has
19 applied the -- this test.

20 CHIEF JUSTICE ROBERTS: Would listing
21 the product or the products' appearance on the
22 internet anywhere always constitute causing
23 confusion?

24 I mean, you have to assume somebody's
25 going to look at it at some point and might be

1 confused. I -- I'm trying -- I don't quite know
2 the extent to which your test has any limits at
3 all.

4 MS. HANSFORD: No, I don't think
5 listing it on the internet in -- in general
6 would be actionable because it needs to be --
7 there needs to be a proximate link to particular
8 U.S. confusion.

9 CHIEF JUSTICE ROBERTS: Well --

10 MS. HANSFORD: So just the possibility
11 --

12 CHIEF JUSTICE ROBERTS: I'm sorry.

13 MS. HANSFORD: -- that somebody might
14 see it and become confused is not enough. It
15 needs to be that this particular use directly --
16 that -- that confusion will flow directly from a
17 particular use.

18 CHIEF JUSTICE ROBERTS: Well, your
19 distinction, I think you said two things that
20 sound exactly the -- the same to me. I mean,
21 let's say there is an appearance on the
22 internet, somebody looks at it, and that person
23 thinks, oh, that's a nice Bulova watch, or that
24 doesn't look too good. Is that enough?

25 MS. HANSFORD: No, I don't think so.

1 And I think, in the -- in the internet context,
2 I think even under Petitioners' test, if a
3 website is targeting U.S. consumers so U.S.
4 consumers can purchase the good from the website
5 or the website will ship the goods into the
6 United States, that is -- that -- that is
7 actionable, but just the possibility that
8 somebody might see something on the internet
9 would not satisfy any proximate cause standard.

10 CHIEF JUSTICE ROBERTS: Well, but, I
11 mean, let's say it's, you know, an influencer,
12 what -- whatever that is, but --

13 (Laughter.)

14 CHIEF JUSTICE ROBERTS: -- you know,
15 somebody -- some people -- a lot of people look
16 at it, and -- and they see the watch. Is that
17 enough?

18 MS. HANSFORD: So --

19 CHIEF JUSTICE ROBERTS: A hundred
20 thousand people see the ad. It doesn't say
21 here's how you can get it or we'll ship it to
22 you. It just is featured on somebody famous,
23 you know, and that causes a lot of people to not
24 like it or like it, whatever.

25 MS. HANSFORD: Absolutely. So, in a

1 hypothetical where it is foreseeable and
2 sufficiently direct that consumers in the
3 United States will be confused, we do think that
4 would be actionable. And we think that's --

5 CHIEF JUSTICE ROBERTS: Tell me those
6 --

7 MS. HANSFORD: -- a virtue, not a
8 problem, of our test.

9 CHIEF JUSTICE ROBERTS: What are those
10 adjectives again?

11 MS. HANSFORD: That I -- I think
12 it's -- the Court has not explicated exactly
13 what the proximate cause test would be --

14 JUSTICE KAGAN: You said foreseeable
15 and direct.

16 MS. HANSFORD: -- but I think
17 foreseeable and direct. Exactly. That's --
18 that's a little bit of my gloss, but I think
19 that that's the -- the -- the gist of it.

20 And -- and -- but I think a key
21 limitation on that would be what relief would be
22 available. And the injunctive relief, in order
23 to enjoin that, it would need to be injunctive
24 relief specific to the Lanham Act violation,
25 which is the confusion of U.S. consumers. So

1 you could tell the website, you cannot ship
2 these goods to U.S. consumers, but you can't
3 tell it not to ship the goods to anybody.

4 And if there's no relief, if U.S.
5 consumers are 5 percent of the people who see
6 this and so there's really no injunction that
7 would prevent the harm to U.S. consumers without
8 being overbroad, there wouldn't be any relief
9 that's available.

10 But I do think we want that situation
11 to be covered by the Lanham Act because,
12 otherwise, it is just a license for people to go
13 to the other side of the border or go in -- in
14 any other country and put things online that are
15 impairing the goodwill of U.S. products, and
16 because their physical actions are -- are
17 occurring abroad, they would be immune.

18 And I -- I -- I don't think that's --
19 I don't think that's the best reading.

20 JUSTICE ALITO: Under your test, does
21 it matter whether the mark is validly registered
22 in the country where it's used? Suppose it was
23 validly registered in that country, but it does
24 have -- it is likely to cause confusion in the
25 United States and does, in fact, cause confusion

1 in the United States. Would you say there's
2 liability there?

3 MS. HANSFORD: Justice Alito, there
4 would be liability under the Lanham Act, but we
5 think that is precisely the situation where
6 international comity would come in and take care
7 of it, and I think that the exact same --

8 JUSTICE ALITO: Well, how would that
9 work, international comity would come in and
10 take care of it?

11 MS. HANSFORD: So international comity
12 would be a reason for the Court to abstain from
13 hearing the action, and I -- and the exact same
14 situation would apply to Petitioners' test
15 because, on Petitioners' test, conduct in
16 Germany that ships directly into the
17 United States is actionable.

18 But suppose that Petitioners did have
19 a valid trademark in Germany. That act in
20 Germany of shipping it to the United States
21 would be actionable under the Lanham Act under
22 Petitioners' theory but also would be exercising
23 a right the Petitioners have under German law.

24 And so I -- I think that has to be
25 resolved by comity. There's going to be some

1 small amount of overlap where the different
2 nations' interests could come out differently
3 that would have to be resolved by comity under
4 any test.

5 JUSTICE ALITO: The -- the European
6 Union has filed a very strongly worded brief,
7 and they certainly don't think that your
8 position or the decision below was consistent
9 with international comity. What is the reaction
10 of the United States to that strong protest from
11 the European Union?

12 MS. HANSFORD: So I -- I -- I -- I
13 disagree with your reading of that brief,
14 Justice Alito. We completely agree with the
15 European Union that the decision below is deeply
16 problematic and that it gives extraterritorial
17 reach over foreign goodwill.

18 But the European Union's brief is in
19 support of neither party, and it asks for no
20 extraterritorial application, no application
21 under Step 1. We view the European Union's
22 brief as aligned with us in not taking a
23 position between our position and Petitioners'
24 because, of course, what we're doing in a Step 2
25 inquiry is trying to figure out which -- we

1 agree that the Act applies only domestically,
2 only domestic applications are actionable, and
3 then Petitioner, and we are just arguing about
4 what constitutes a domestic application in this
5 context, and we don't see the European Union as
6 taking a position on that.

7 JUSTICE ALITO: What would be your
8 answer to the third hypothetical offered by
9 Justice Jackson? That was the -- that was the
10 hypothetical where the American students go to
11 Germany and they buy these knockoff Coach bags
12 and they bring them back to the United States
13 and they sell them in the United States.

14 Would you say that the maker of those
15 bags in Germany is liable?

16 MS. HANSFORD: We -- it would depend
17 on whether the maker -- whether it was --
18 whether the maker had any reason to know that
19 the students were doing this. If the students
20 came to him and said we want to buy \$100,000
21 worth of handbags to resell in the United
22 States, yes, we think the maker would be liable.

23 If the maker just sells handbags and
24 has no reason to know that these are Americans
25 and this is to be used in the U.S., we don't

1 think the proximate cause link to the confusion
2 in the United States would be happening.

3 JUSTICE ALITO: Well, what if they
4 bought 50 and they didn't speak any German --
5 (Laughter.)

6 JUSTICE ALITO: -- and they had --
7 they were wearing a T-shirt with the name of an
8 American college on it?

9 MS. HANSFORD: Yes, I -- I -- in -- in
10 that situation, I think that the -- the
11 proximate cause -- it would be foreseeable that
12 this would cause confusion in the United States
13 and the Lanham Act would apply.

14 Of course, there would be a question
15 whether there's personal jurisdiction over the
16 seller in Germany, which I think is normally
17 a -- a major limitation. And then another
18 limitation would be the particular relief --

19 JUSTICE ALITO: What if they bought --

20 MS. HANSFORD: -- that would be
21 available.

22 JUSTICE ALITO: -- what if they bought
23 10?

24 MS. HANSFORD: Same answer, but if
25 there's -- but -- but there -- it's --

1 JUSTICE JACKSON: But wait. Why does
2 it turn on what the seller intends in that way?
3 I mean, I had understood that at least in
4 some -- that some commentators thought this --
5 that this statute, the Lanham Act statute, was
6 sort of a strict liability statute.

7 So, if the 10 turn up on the street in
8 Manhattan and they're being sold and causing
9 customer confusion, does it matter whether the
10 manufacturer knew that, intended that, thought
11 that? Why -- why does that matter?

12 MS. HANSFORD: Because a particular
13 use needs to proximately cause the confusion,
14 and I think, if it's not foreseeable to somebody
15 sitting in Germany that if they sell something,
16 it's going to end up on the streets of the
17 U.S. in a way that's --

18 JUSTICE GORSUCH: But, counsel -- but
19 counsel --

20 JUSTICE JACKSON: I don't understand
21 that at all, why the foreseeability has anything
22 to do with whether there's proximate cause,
23 meaning a link between the manufacturer of these
24 knockoff bags and the confusion in the
25 United States.

1 I mean, if they're on the street -- it
2 would be one thing if the students came back
3 with the 50 bags and they just gave them to
4 their parents or, you know, their friends or
5 whatever and they were never in commerce here in
6 the United States, right? Then it -- I think
7 you would agree that that's not causing the
8 kinds of confusion, use in commerce that the
9 statute cares about.

10 But, if the students buy the 50 bags,
11 what -- whatever the manufacturer thinks, brings
12 them back to the United States and they're
13 actually being injected into commerce here,
14 causing confusion, why isn't that covered by the
15 statute?

16 MS. HANSFORD: I don't think it's a
17 subjective question of what the manufacturer
18 thinks, but, if it's -- if it's not foreseeable
19 that they're going to end up on the streets of
20 the U.S. and injected in commerce here because
21 then --

22 JUSTICE GORSUCH: So -- so, counsel,
23 you -- you -- you -- yeah, I had a similar
24 question. It seemed like you're importing a
25 mens rea requirement into a causation

1 requirement. Are you now withdrawing that?

2 MS. HANSFORD: No, I -- I did not
3 mean to import a mens rea requirement. I -- the
4 -- the test is, is there confusion in the
5 United States, is the confusion linked --
6 directly flowing from the use? And --

7 JUSTICE GORSUCH: And that's a
8 proximate cause question --

9 MS. HANSFORD: That's a proximate
10 cause question.

11 JUSTICE GORSUCH: -- that is going to
12 go to a jury and they're going to decide what
13 they're going to decide about the reasonable
14 foreseeability?

15 MS. HANSFORD: That --

16 JUSTICE GORSUCH: And it has nothing
17 to do with the manufacturer's knowledge or
18 intent?

19 MS. HANSFORD: That -- that's right.
20 Knowledge and intent is not required. It is
21 required for remedies. But, again, to -- to be
22 clear, the relief that would be available in
23 that circumstance would only be limited to sales
24 to Americans. And I think the flip side is,
25 otherwise, a company can, from abroad, flood the

1 market in the United States in a way that
2 entirely -- that diminishes or drastically
3 misuses U.S. goodwill, and just the fact that
4 the -- the physical actions occur abroad should
5 not be dispositive.

6 And Petitioner recognizes that part of
7 the way but would draw the difference between
8 the seller in Germany who is shipping directly
9 into the United States, as opposed to the seller
10 in Germany who is selling to students who know
11 or don't know but will foreseeably resell.

12 JUSTICE GORSUCH: What should we do
13 about Steele?

14 MS. HANSFORD: So we think that our
15 interpretation lets the Court makes sense of
16 Steele and its further precedents, and that's
17 both because the result in Steele would come out
18 the same way under our test and because we do
19 view a significant part of the reasoning in
20 Steele to focus on consumer confusion, which is
21 the right way to get there.

22 We think the problem with Petitioners'
23 approach of just limiting Steele to U.S.
24 defendants is that that is not a rule that makes
25 any sense. There's no U.S. defendant

1 requirement in the statute, whereas our reading
2 of Steele makes sense of it in that it ties it
3 to something in the statute, consumer confusion.

4 JUSTICE GORSUCH: It would seem like
5 Petitioners were conceding to -- to the Court
6 that their first best solution would be to apply
7 our modern extraterritoriality jurisprudence and
8 be done with Steele. What does the government
9 think of that?

10 MS. HANSFORD: We agree that you
11 should apply the modern jurisprudence, and we
12 think you can do that without overruling Steele,
13 both because it's consistent with the result,
14 the key aspect of the confusion reasoning, and
15 just because of how amorphous Steele was, we do
16 think it would be different if Steele had set
17 out something that was a specific test. Then
18 that test itself would have stare decisis force.

19 But given -- given how Steele was
20 actually reasoned and the ability to kind of
21 replicate it using this Court's modern
22 framework, we do think that's what the Court
23 should do.

24 JUSTICE GORSUCH: Let me -- let me put
25 it in my own words and see if you agree with it.

1 And you don't have to. That there's no
2 impediment in Steele, as you read it, to
3 applying our modern jurisprudence?

4 MS. HANSFORD: I -- I agree with that.
5 And I do think that our approach is more
6 consistent than Petitioners'. It -- it is -- it
7 is more true to Steele, but -- but I -- I -- I
8 agree fundamentally that there's not an
9 impediment in Steele to applying the modern
10 jurisprudence.

11 CHIEF JUSTICE ROBERTS: Thank you,
12 counsel.

13 Justice Thomas?

14 Justice Alito?

15 JUSTICE ALITO: Under your test,
16 citizenship is irrelevant, right?

17 MS. HANSFORD: That's correct.

18 JUSTICE ALITO: But, in Steele, it
19 seems to have been quite relevant. The very
20 first sentence of the opinion points out that --
21 it -- it defines the issue, and it refers to a
22 citizen and resident of the United States.

23 So you are really asking us to
24 overrule Steele in part, are you not?

25 MS. HANSFORD: We -- we do disagree

1 with that aspect of Steele. Now it's not
2 presented here, so you don't need to opine on
3 it. We think the better reading is that it's
4 not that -- that it's not a relevant factor, but
5 there are -- for instance, Steele also reached
6 its conclusion as a matter of subject matter
7 jurisdiction. It thought this was a question
8 of subject matter jurisdiction. It's pellucid
9 under this Court's precedents that's not
10 correct. And I don't think the Court would have
11 any hesitation in saying, well, that -- that
12 piece of the reasoning was incorrect.

13 And so we view the citizenship as a
14 little bit of something you can set aside just
15 given -- given the ability to apply the modern
16 framework and replicate kind of the heart of
17 Steele in terms of the confusion.

18 JUSTICE ALITO: Well, I'm not sure how
19 that links with the issue of stare decisis. So
20 you -- are you saying that Steele has already
21 been essentially overruled, or are you saying
22 that we should partially overrule it by getting
23 rid of the citizenship element?

24 MS. HANSFORD: I guess I think of
25 stare decisis as attaching to the holding of the

1 case because -- particularly because it doesn't
2 set out a particular test; it just sets out
3 these three amorphous factors without saying how
4 they should apply. The courts of appeals have
5 taken themselves as free to form different tests
6 based on Steele because of how amorphous it --
7 it is. So I don't think anything needs to be
8 overruled even though there are aspects of
9 Steele that the Court would not bring forward.

10 But, again, on the citizenship in
11 particular, while we don't see a principled
12 reason in the text that citizenship should be
13 relevant and so it's hard to turn on that as a
14 distinction of Steele, the Court does not need
15 to opine that in this case because this is not a
16 U.S. citizen case.

17 JUSTICE ALITO: Well, if I were
18 looking for the holding in Steele and I were
19 back in law school, I might look at the first
20 sentence of the opinion, which says the issue is
21 whether a United States district court has
22 jurisdiction to award relief to an American
23 corporation against acts of trademark
24 infringement and unfair competition consummated
25 in a foreign country by a citizen and resident

1 of the United States.

2 So you say it's not a jurisdictional
3 issue and it doesn't matter whether it's a
4 citizen or -- or a resident of the
5 United States. It sounds to me like you're
6 asking us to overrule Steele in part.

7 MS. HANSFORD: Justice Alito, if you
8 read that as the holding in Steele, then I think
9 that this is just a situation where Steele
10 presents no impediment because it's not a U.S.
11 citizen issue. And then you would kind of take
12 Steele out of consideration in deciding between
13 us and Petitioners' position. And we think that
14 our position about what the focus of the statute
15 is is the correct one for first principles. The
16 core of trademark is -- trademark infringement
17 is consumer confusion, and if ever there were an
18 object of solicitude, I think this is a really
19 good example, in addition to being really
20 parallel to the structure in Morrison.

21 CHIEF JUSTICE ROBERTS: Justice
22 Sotomayor?

23 JUSTICE SOTOMAYOR: Counsel, Justice
24 Alito talked about the European brief. I am
25 reading from page 21 of that brief, and the

1 brief says: "Substantively, the union law," --
2 they mean European Union law -- "test for
3 infringement is similar to the U.S.'s likelihood
4 of confusion test. A court in any member
5 country, including Germany, that is competent to
6 rule on trademark infringement would assess
7 whether there exists a likelihood of confusion
8 on the part of the public."

9 And it goes on to say that the test
10 for that for -- in these member countries
11 concerns use that occurs in the union or in
12 individual member countries. Consumer confusion
13 includes acts of targeting customers in the
14 territory of the union, but it excludes the mere
15 accessibility on a website of the territory
16 covered by the trademark.

17 MS. HANSFORD: That's right, Justice
18 Sotomayor.

19 JUSTICE SOTOMAYOR: So that's very
20 consistent with what you're saying, correct?

21 MS. HANSFORD: Yes, I think that is
22 consistent. The European Union itself seems to
23 define consumer confusion in a way that reaches
24 acts abroad, putting up a website, taking down a
25 website, as long as it has particular effects.

1 And the German professors' brief also gives the
2 example of negligent causation of a patent -- of
3 patent infringement within the German territory,
4 if you're causing it from abroad, but the
5 infringement is within. So I do think that --
6 I'm not saying that our law is on all fours with
7 the laws of European countries, but this
8 question of exactly what acts from outside that
9 reach the goodwill within the country, I think
10 that -- I think we're, on a big-picture level,
11 using similar approaches.

12 CHIEF JUSTICE ROBERTS: Justice Kagan?

13 JUSTICE KAGAN: Ms. Hansford, I think
14 everyone might be underselling Steele here. I
15 mean, it's true what Justice Alito says about
16 this first sentence sets up the question in an
17 odd way. But the actual holding and heart of
18 the opinion is on page 286, and that's where the
19 Court says -- it says, okay, we deem the Lanham
20 Act's scope to encompass Petitioners' activities
21 here, and then it says why. Why do we deem it
22 that way? His operations and their effects
23 weren't confined within the territorial limits
24 of a foreign nation. He brought component parts
25 of his wares in the U.S. and Bulovas filtered

1 through the Mexican border into this country.
2 His competing goods reflected adversely on
3 Bulova's trade reputation in markets cultivated
4 here as well as abroad.

5 So, in some ways, I mean, what Steele
6 says here on page 286, it doesn't use the
7 two-step terminology that we've developed, but
8 this is basically the second step as we've
9 understood it.

10 MS. HANSFORD: I -- I -- I agree with
11 that, Justice Kagan. I think the best reading
12 of Steele is that it's -- that the -- the test
13 is remarkably consistent with the test that you
14 would reach under the modern framework, so this
15 is not a situation where you need to, now that
16 you're considering how to interpret the Lanham
17 Act, reject this Court's modern precedents and
18 adopt some atextual, amorphous approach, because
19 Steele reaches the right result. It says that
20 consumer --

21 JUSTICE KAGAN: And for the right
22 reasons.

23 MS. HANSFORD: -- confusion is the
24 focus.

25 JUSTICE KAGAN: For exactly the

1 reasons that you're suggesting we ought to apply
2 under what has now become a structured second
3 part of a two-part test.

4 MS. HANSFORD: Yes. So we think that
5 Steele is -- is consistent with our approach and
6 is a great reason to -- to rule for us and to
7 pick our position over Petitioners'. But we
8 also think you can get there various other ways.

9 CHIEF JUSTICE ROBERTS: Justice
10 Gorsuch?

11 JUSTICE GORSUCH: The focus of a
12 statute is pretty -- I'm not sure how structured
13 that really is, our test. And -- and -- and
14 I -- I think of it this way, that -- that the
15 question is when -- when does the legal action
16 accrue, and under the Lanham Act, you have to
17 have consumer confusion for -- for you to have a
18 cause of action generally speaking.

19 What's wrong with thinking about the
20 focus of a statute as when it accrues?

21 MS. HANSFORD: And the result in this
22 case is that consumer confusion is the focus
23 because it's --

24 JUSTICE GORSUCH: Right. It -- it
25 doesn't change the outcome.

1 MS. HANSFORD: Yes.

2 JUSTICE GORSUCH: It's just, instead
3 of asking kind of a metaphysical question about
4 a statutory -- a statute's focus, which seems to
5 me to kind of call for a legislative séance --

6 (Laughter.)

7 JUSTICE GORSUCH: -- what were they
8 really up to, we could just ask when the cause
9 of action accrues. Is there any -- is there any
10 daylight there in your mind?

11 MS. HANSFORD: So there does not seem
12 to be any daylight in this particular case.
13 Standing here, I can't -- I'm not entirely sure
14 whether it would cause problems in other cases.
15 It seems -- it seems like a reasonable approach,
16 though one thing I would say is I do think that
17 there's some flexibility in the -- in the
18 inquiry because you're trying to understand what
19 it was that -- that is the object of the
20 statute's solicitude such that that's the part
21 that Congress wanted to apply abroad.

22 JUSTICE GORSUCH: That legislative
23 séance thing, yeah. Okay.

24 MS. HANSFORD: The legislative séance
25 thing.

1 JUSTICE GORSUCH: Okay.

2 MS. HANSFORD: But I -- I do think,
3 though, what you're saying about when the cause
4 of action accrues in many ways tracks what the
5 Court did in Morrison because it emphasized that
6 it wasn't just a misrepresentation, it's the
7 subset of misrepresentations in connection with
8 the securities markets.

9 So that does seem consistent with the
10 mode of reasoning in Morrison and precisely the
11 mode of reasoning we think determines this case
12 in -- in our favor. It's just that I -- I --
13 I -- I don't want to -- I don't want to commit
14 to that position without --

15 JUSTICE GORSUCH: I understand.

16 MS. HANSFORD: -- thinking through all
17 the implications.

18 JUSTICE GORSUCH: Thank you.

19 CHIEF JUSTICE ROBERTS: Justice
20 Kavanaugh?

21 JUSTICE KAVANAUGH: In how you would
22 deal with Steele, I think you're saying that it
23 would be a mistake to leave the law after we
24 decide this case in a place where there's a
25 different rule for U.S. defendants and foreign

1 defendants.

2 MS. HANSFORD: Yes. I think that
3 would be one technical way of getting around
4 Steele, but it's -- it's not ideal because it
5 does not make a lot of -- it does not make a lot
6 of sense why that would be a distinction.
7 There's just nothing in the statute that
8 distinguishes between the different types of
9 defendants.

10 JUSTICE KAVANAUGH: I agree with that.
11 And then can you add to that? Would there be
12 problems created by having one rule for U.S.
13 defendants and a different rule for foreign
14 defendants in how the statute applies?

15 I get your point about the logic. I'm
16 wondering if the logic translates into
17 real-world problems as well if you left the law
18 in that place after we try to deal with Steele.

19 MS. HANSFORD: Well, I -- I -- I
20 think -- I think, if you allow the statute to
21 have extraterritorial reach where U.S.
22 defendants are involved, the problem is still
23 that that allows the U.S. to regulate consumer
24 confusion in other countries and to regulate
25 misappropriations of foreign goodwill anytime

1 you have a U.S. defendant, and so the comity
2 considerations in that circumstance may be a
3 little bit less because it's a U.S. defendant,
4 but we still think it's a problem to have U.S.
5 law be governing the -- the -- the -- the --
6 effectively, the trademark rights under their --
7 the territoriality principle in other countries.

8 JUSTICE KAVANAUGH: Thank you.

9 CHIEF JUSTICE ROBERTS: Justice
10 Barrett?

11 Justice Jackson?

12 JUSTICE JACKSON: So I, like Justice
13 Gorsuch, are trying to figure out what's really
14 going on here in terms of, you know, whether it
15 makes sense to talk about the statute's focus in
16 this way, and I guess I'm struggling with what
17 appears to be your reticence to have use in
18 commerce be a part of the focus. I thought of
19 it as use in domestic commerce meaning these
20 items are circulating in domestic markets in a
21 way that causes customer confusion.

22 And if you think of it in that way, I
23 think that you avoid some of these hypotheticals
24 about internet, you know, manufacturer
25 overseas -- advertising overseas that are just

1 confusing people in the abstract in the
2 United States, that the items have to be here,
3 being used in commerce domestically, and that
4 that's causing confusion.

5 Is that a problematic way to think
6 about this?

7 MS. HANSFORD: So we would disagree
8 that -- I -- I -- I -- I think that that would
9 be kind of having two focuses --

10 JUSTICE JACKSON: Yes.

11 MS. HANSFORD: -- and require -- but
12 it's not -- I guess it's not clear in that
13 situation -- the Court has never had two focuses
14 before.

15 JUSTICE JACKSON: Not in Morrison?
16 You didn't read Morrison as having more than one
17 focus?

18 MS. HANSFORD: No, we think the
19 misrepresentation can happen abroad. And I
20 think there are different focuses for different
21 parts of the statute, but, at any particular
22 time, there's just one.

23 And I guess, to give you a more
24 concrete reason, I -- I think that on our view,
25 if there's confusion in the U.S., that's true

1 even if there is no commerce in the U.S., so in
2 this case, if the purchasers -- if the
3 purchasers bring in goods just for their own
4 use, but they're -- they're bringing in the
5 Bulova watches for their own use and they're
6 breaking and they're forming a bad impression of
7 Bulova here in a way that impacts their future
8 sales, we don't think that it matters that the
9 purchasers weren't reselling the watches or that
10 there wasn't additional commerce going on in the
11 United States.

12 JUSTICE JACKSON: I see. That's my
13 step two hypothetical. You think it still
14 covers. I mean, that's my second hypothetical,
15 the -- the -- the students are bringing the bags
16 back just for themselves, and they're breaking
17 down and people are going, ugh, we don't want to
18 buy Coach bags as a result. You still think the
19 statute covers that?

20 MS. HANSFORD: We still think that's
21 covered. Exactly.

22 JUSTICE JACKSON: Thank you.

23 CHIEF JUSTICE ROBERTS: Thank you,
24 counsel.

25 Mr. Hellman?

1 ORAL ARGUMENT OF MATTHEW S. HELLMAN
2 ON BEHALF OF THE RESPONDENT

3 MR. HELLMAN: Thank you, Mr. Chief
4 Justice, and may it please the Court:

5 Since 1952, this Court has held and
6 repeatedly reaffirmed that the Lanham Act's
7 uniquely broad language reaches infringement of
8 U.S. marks that is carried out overseas.

9 And during those 70 years, Congress
10 has amended the Act 36 times, and it has never
11 pulled back on the Act's extraterritorial reach.

12 This Court should maintain the status
13 quo. It should maintain it as a matter of
14 precedent. The Lanham Act has been this Court's
15 go-to example of a statute whose "sweeping
16 language reaches to the limits of Congress's
17 powers" and differentiates it from other
18 "boilerplate statutes."

19 What this Court said in *Steele*, in
20 *Aramco*, and in *Morrison* should not be cast
21 aside.

22 The Court should also maintain the
23 status quo because Petitioners' policy arguments
24 fail on their own terms. As of 2018, there were
25 72 cases considering the Act extraterritorially

1 as to foreign defendants. For all of
2 Petitioners' predictions of conflict, not one of
3 them granted relief under the Act where the
4 defendant possessed superior foreign rights.

5 Instead, what the Act has done is to
6 protect U.S. mark-holders with a much-needed
7 remedy in cases just like this one against
8 foreign trademark pirates who market knockoff
9 goods that siphon the goodwill and sales of U.S.
10 trademark holders.

11 Seventy years of experience shows that
12 the floodgates haven't opened and that the
13 Lanham Act has instead served as a bulwark
14 against infringement that has an obvious and
15 substantial and, in this case, a decidedly
16 intended effect on U.S. commerce just as
17 Congress provided.

18 Petitioners' demand that the Act
19 should now be weakened should be addressed to
20 Congress, not this Court.

21 But even if the Court were to conclude
22 that the Act applies only domestically, it
23 should still affirm because Petitioners'
24 infringement implicated both concerns of the Act
25 here: harm to mark-holders and harm to

1 consumers.

2 Hetriconic suffered from infringement
3 right here in the United States, and Petitioners
4 obtained their ill-gotten gains from a web of
5 infringing uses, all of which were likely to
6 confuse American consumers.

7 And with that, I'd be happy to answer
8 the Court's questions.

9 JUSTICE THOMAS: What are the limits
10 of your argument? Let's -- you know, the --
11 consider the application of your rule to purely
12 foreign transactions.

13 MR. HELLMAN: Yes.

14 JUSTICE THOMAS: But you think it has
15 an effect on your company?

16 MR. HELLMAN: Yes.

17 JUSTICE THOMAS: The -- is there any
18 limit -- is there a proximate cause limit?

19 MR. HELLMAN: Yes.

20 JUSTICE THOMAS: Is -- is there --
21 would you explain?

22 MR. HELLMAN: Sure. There are going
23 to be multiple barriers to relief, which is one
24 reason why I think you see a relatively few
25 number of cases.

1 First of all, in the real world, if
2 you'll allow me, personal jurisdiction is going
3 to be an absolute bar to many, many cases. But
4 then, just with respect to the Lanham Act
5 itself, there are multiple considerations,
6 multiple bars. The effect needs to be
7 substantial. Insubstantial effects don't count.

8 Secondly, the nature of the Lanham Act
9 likelihood-of-confusion test distinguishes
10 between uses, between marks that don't look the
11 same that aren't for the same products, where
12 the petitioner -- where the plaintiff's mark
13 isn't well-known in the area, where the
14 defendant acts in bad faith.

15 If I -- if I just may, what those
16 factors work out to in practice is, you know,
17 one vision of this is somebody's out there in a
18 foreign country using the same mark that happens
19 to be the same as a U.S. mark. But there's no
20 competition between those goods. There's no
21 confusion between those goods. Those claims are
22 going to fail at the liability stage.

23 But where there's an -- often an
24 intentional attempt to siphon that goodwill from
25 a well-known mark, as we had in this case, that

1 is where the courts have generally found there
2 to be liability under the Lanham Act
3 extraterritorially.

4 JUSTICE THOMAS: I think I'm -- I
5 think I'm a bit more interested in your effects
6 test. You said substantial effects. And we see
7 how extensive and how broadly that test is used
8 in domestic commerce clause cases.

9 MR. HELLMAN: Yes.

10 JUSTICE THOMAS: Is that -- are you
11 importing that line of reasoning or that
12 approach? Because I don't see -- beyond your
13 jurisdictional point, I don't see what the outer
14 limits are.

15 MR. HELLMAN: So substantial effects
16 in the foreign commerce clause area hasn't been
17 defined by this Court. The Court has called it
18 a broad power. The Court has called it a
19 plenary power. But even if you think that that
20 is a modest limit on the -- here, you still have
21 the nature of the Lanham Act inquiry itself,
22 along with proximate cause and everything else
23 my friends have been talking about this morning.

24 But, again, the likelihood-of-
25 confusion test distinguishes by its very nature

1 those kinds of uses of the mark that are
2 incidental, that aren't particularly close,
3 versus the ones that are intended to get
4 something very valuable from that plaintiff
5 mark-holder.

6 And, again, we're not writing on a
7 blank slate here. The question of whether or
8 not the Act overcomes the presumption was
9 expressly addressed by the Court in Steele. It
10 was the subject of the dissent, which said the
11 Lanham Act isn't explicit enough to overcome the
12 presumption. That was the dissent's position in
13 that case. And the majority found the other
14 way.

15 And that's not a revisionist reading
16 of the -- of Steele. It's exactly what this
17 case said in Aramco. In Aramco, the government
18 took the position that Title VII must apply
19 extraterritorially just like the Lanham Act
20 does. And the Court said, no, that's not right,
21 and not because it found the Lanham Act wanting.
22 What it emphasized instead was that the sweeping
23 language unique in the Civil Code, there is no
24 other commerce power defined in the same way
25 that the Lanham Act does, unique in the Civil

1 Code made the Lanham Act different from other
2 kinds of boilerplate statutes.

3 Justice Kagan referred to perhaps we
4 were underselling Steele. I -- I agree that
5 what we heard this morning does undersell it,
6 but I think you can go even a little bit further
7 with what Steele says.

8 Steele, as Justice Kagan quoted,
9 talked about the infringement harming Bulova's
10 reputation not just in the United States but in
11 markets abroad. And there's been a lot of
12 discussion this morning about, can you limit
13 Steele just to U.S. defendants?

14 I don't think that's giving the case a
15 coherent reading. I do -- I do not believe the
16 Court said in Steele -- it would be quite
17 surprising if it did say -- that U.S. statutes
18 apply extraterritorially so long as there's a
19 U.S. defendant. That's not something the
20 Court's ever said, and I don't think that makes
21 the best sense of what Steele said.

22 What Steele, again, pointed to the
23 sweeping language of the commerce clause or the
24 commerce provision of the statute as giving rise
25 to the overcoming the presumption.

1 JUSTICE KAVANAUGH: What would you say
2 to the EU brief?

3 MR. HELLMAN: I would say to the EU
4 brief, one, no one suggests that we've been
5 violating our treaties for 70 years. I don't
6 even think the EU brief says that.

7 Two, I almost feel uncomfortable
8 talking about the geopolitical consequences of
9 this. These are arguments that should be
10 addressed to Congress. This Court has said for
11 70 years that the Act applies
12 extraterritorially. We -- we could -- we could
13 disagree about whether or not that was the right
14 ruling in Steele, but it is inarguable that
15 that's what the -- how the Court's decision has
16 been understood by this Court and by lower
17 courts.

18 If there is a -- if a different
19 balance of trademark law is called for, that is
20 a question for Congress, which is, again, has
21 tended to the Lanham Act with great care, 36
22 amendments, including ones in response to
23 decisions from this Court in the Trademark
24 Modernization Act of just a few years ago.
25 Those are arguments that are best addressed

1 across the street. We're not writing on a blank
2 slate.

3 JUSTICE ALITO: Do you agree that the
4 world takes a territorial approach to trademark
5 law?

6 MR. HELLMAN: The world takes a -- I
7 -- I do agree with that, but I don't agree with
8 what that means for this case.

9 The territorial approach to trademark
10 law -- and the Paris Convention predates Steele,
11 so this territorial approach that everyone is
12 talking about simply means that each nation is
13 the ultimate arbiter of its own trademark laws.
14 The Germans decide what a German mark is, and
15 the U.S. decides what a U.S. mark is.

16 But that doesn't mean -- in fact, it
17 means the opposite -- U.S. -- the U.S. is
18 allowed to decide that where foreign conduct has
19 a substantial effect on U.S. commerce and -- and
20 harms goodwill, et cetera, that is actionable
21 under the Lanham Act. And that's how it's been
22 for 70 years.

23 There's a little bit of a -- with
24 respect to my friends on the other side -- a
25 touch of -- an air of unreality to the

1 discussion this morning. We're not trying to
2 predict how the Act would work
3 extraterritorially. It has been working
4 extraterritorially for 70 years.

5 And, again, I -- I hear my friends on
6 the other side saying maybe that wasn't the
7 right decision. We certainly think it was, but
8 no one can dispute that has been the law. And,
9 normally, when this Court is pressed with an
10 argument that says it ought to reinterpret a
11 statute based on intervening elements, that's
12 where it usually says go to Congress, not --

13 JUSTICE ALITO: Do you -- do you think
14 that the Lanham Act reaches every act that
15 Congress could regulate on the ground that it
16 was a regulation of foreign commerce?

17 MR. HELLMAN: I think -- I'm a -- I'm
18 a textualist. It says all commerce that
19 Congress may lawfully regulate. That is the
20 only time Congress has used that language in any
21 -- any statute. So, yeah.

22 JUSTICE ALITO: Yeah. No, and I --
23 what I'm asking, is does -- is that equivalent
24 to the full scope of the foreign commerce
25 clause? Anything that occurs in Germany or any

1 other foreign country that Congress could
2 regulate with -- would -- would be within
3 Congress's constitutional power to regulate,
4 that's what the Lanham Act reaches?

5 MR. HELLMAN: That's what the -- that
6 is the best reading of the text. It's what this
7 Court said it meant. And I'd also point out
8 this wasn't an accidental happenstance holding
9 in Steele. Steele pointed to the Morris case
10 and the Vacuum Oil case as examples of earlier
11 trademark laws being applied to foreign
12 defendants.

13 JUSTICE ALITO: But how does that fit
14 with your substantial effects and proximate
15 cause test?

16 MR. HELLMAN: Sure. Substantial
17 effects is baked into the test of what
18 Congress -- when you ask how far can Congress
19 go, substantial effects is a -- is a
20 constitutional limitation on that, as I
21 understand it, from this Court's cases. So you
22 need to have substantial effects.

23 Then the Lanham Act just talks about
24 the regulation of commerce to that extent. But
25 there -- there remain background principles,

1 including the text of the statute talking about
2 the remedial principles for what it would mean
3 for when you can get certain remedies and when
4 you're entitled to relief. This is a liability
5 question in the -- in the first instance.

6 So there's no inconsistency there.
7 And, again, this is how the Act has worked
8 for -- I -- I -- I -- I hesitate to repeat
9 myself, but it's important. It's pretty rare
10 for this Court to have 70 years of experience
11 with a statute, Congress's acquiescence in that,
12 and then to say -- I think my friends on the
13 other side are suggesting that you give Steele a
14 much narrower reading than what it actually
15 said.

16 JUSTICE JACKSON: So can I ask you
17 just in terms of your liability principles here
18 --

19 MR. HELLMAN: Yes.

20 JUSTICE JACKSON: -- are you saying
21 that you view Steele and the existing law with
22 respect to extraterritoriality to allow for a
23 trademark infringement claim to be brought
24 against a foreign company that is using a mark
25 in the foreign country to make goods that never

1 leave that country, never come to the
2 United States?

3 MR. HELLMAN: It would be harder to
4 have a substantial effect on U.S. commerce in
5 that -- in that case, but I -- I -- my test is
6 the following, and I follow the text of the Act
7 to come up -- this is -- this is how I reach
8 this result.

9 The question is, is it a use in
10 commerce, meaning a use in commerce that
11 Congress can regulate, that is likely to
12 confuse? That --

13 JUSTICE JACKSON: But Congress can't
14 regulate foreign commerce, correct? I mean, if
15 -- if these products are just being bought and
16 sold in a foreign country, our Congress would
17 not be able to regulate that.

18 MR. HELLMAN: I think that's probably
19 right, Your Honor.

20 JUSTICE JACKSON: All right. So even
21 if that use in commerce in a foreign country is
22 causing domestic confusion somehow, let's say
23 people see it through the internet, they see it
24 on television, they're somehow confused, I don't
25 know, I can't --

1 MR. HELLMAN: Right. Sure.

2 JUSTICE JACKSON: -- think of a -- a
3 way, but let's say that's the case, is it your
4 view that even if we can determine that there is
5 a substantial effect, people stop buying the
6 original product in the United States based on
7 the fact that there is a mark being made on this
8 product in another country, but those items
9 never reach the United States, your view is the
10 Act applies?

11 MR. HELLMAN: The Act can apply if,
12 for example -- this case is a good example, but
13 there -- I can -- I could give you other
14 scenarios in which it would apply.

15 So, again, for there to be any
16 application, you need to have likelihood of
17 confusion. If the plaintiff's mark and the
18 defendant's mark never meet, no one -- no one's
19 ever confused, there's not going to be --

20 JUSTICE JACKSON: Right, but my
21 hypothetical assumes confusion.

22 MR. HELLMAN: But your hypothetical
23 assumes confusion?

24 JUSTICE JACKSON: Right.

25 MR. HELLMAN: So --

1 JUSTICE JACKSON: I'm just saying
2 confusion caused by products that are made and
3 kept overseas.

4 MR. HELLMAN: Yes. And this case is a
5 -- is an example of a substantial line of cases
6 that hold, for example, where the plaintiff can
7 prove diverted sales, sales that would otherwise
8 go from the United States to a foreign country
9 --

10 JUSTICE JACKSON: Yes.

11 MR. HELLMAN: -- that that is commerce
12 that Congress can regulate. It's done it for a
13 hundred years in the antitrust context. Foreign
14 collusive behavior that harms U.S. exporters,
15 long been actionable in this country.

16 So even if the -- the goods stay in
17 Europe, which they don't necessarily do in this
18 case, but, just on your hypothetical, even if
19 they do, what we showed in this case and what
20 other plaintiffs have shown is that where you
21 have that likelihood of confusion and you
22 have that -- those diverted sales, that is an
23 effect on U.S. commerce. It -- it -- it -- it
24 absolutely is.

25 JUSTICE JACKSON: But, of course, that

1 wasn't really the facts in Steele, right? So we
2 don't get that from Steele. You're getting that
3 from what?

4 MR. HELLMAN: I -- I -- I -- I do get
5 it from Steele, Your Honor. Steele does have
6 the genesis of this, because Steele talked
7 about --

8 JUSTICE JACKSON: But the watches made
9 their way into the United States.

10 MR. HELLMAN: Some did and some --
11 some -- some goods here did as well.

12 JUSTICE JACKSON: And then went into
13 repair shops here that -- and that was in
14 commerce here, right?

15 MR. HELLMAN: That was part of Steele,
16 Your Honor, but there's more to Steele.

17 Steele also explains in that core
18 passage that Justice Kagan referred to as the
19 heart of the decision, this -- the claim is good
20 because his competing goods could well reflect
21 adversely on Bulova Watches' trade reputation in
22 markets cultivated by advertising here as well
23 as abroad.

24 The Court understood, as I think it
25 faithfully would, consistent with the nature of

1 the commerce provision in the case, if -- if
2 Hetric, my client, isn't able to sell to those
3 German customers, notwithstanding the fact that
4 it has spent a lot of time and effort to become
5 well-known to them due to infringing conduct,
6 that's exactly what Steele was talking about,
7 and that's exactly how Steele has been
8 interpreted in the intervening 70 years.

9 The -- I would also point -- you know,
10 there's been a lot --

11 JUSTICE ALITO: Why didn't -- why
12 didn't you sue in Germany? You had a strong
13 declaration from the -- you had a declaration
14 from the European Union that the Petitioners
15 didn't have rights to the marks they were using.

16 MR. HELLMAN: That's correct. The --
17 the -- the defendants here don't have the rights
18 in Europe as well. We have brought suit in the
19 European courts. A couple points on that.

20 To the extent this Court is thinking
21 that it's always going to be available to -- to
22 bring any sort of action in a foreign court,
23 that's not going to be the case with many
24 countries that don't have intellectual property
25 rights, that are not signatories to the treaties

1 that my friends have been talking about.

2 And it's also the case that the Lanham
3 Act -- Congress made the decision in the Lanham
4 Act to provide an additional remedy. We have
5 sued in the German courts. We are able to get
6 some relief there. But we're also able to get
7 other relief under the U.S. laws.

8 And, again, if that balance is out of
9 whack, I really, I submit it's not this Court's
10 job, having found the Act applies
11 extraterritorially, to try to adjust it itself.

12 And I -- you hear the troubles that
13 the other side have had -- had articulating what
14 should you do with Steele in light of what it
15 said. I've heard it should be limited to U.S.
16 defendants only.

17 That's not giving Steele credit for
18 what Steele said. It's also not -- it doesn't
19 lead to a coherent opinion.

20 You -- the -- Congress may have the
21 ability to regulate Americans doing things
22 overseas, but the question is does the Lanham
23 Act overcome the presumption that Congress
24 usually doesn't require -- doesn't -- doesn't
25 allow that.

1 Here it did, not on the basis of the
2 citizenship test alone but on the basis of that
3 uniquely broad commerce provision. And, again,
4 the very fact that Steele is citing foreign
5 defendant cases tells you that it's not a --
6 it's not -- it wasn't just limiting itself to
7 U.S. defendants.

8 And that's exactly what the Court said
9 in *Aramco* and again in *Morrison*. We've talked
10 about the modern framework. The very case that
11 inaugurates the modern framework holds onto
12 Steele as saying that is an example of a statute
13 that applies extraterritorially and not in a
14 passing observation. It made the -- it made the
15 point affirmatively to rebut an argument by the
16 government that the Lanham Act wasn't, in fact,
17 an extraterritorial statute.

18 So, again, *Zelig*-like, the Lanham Act
19 appears in your Court's cases to say where this
20 Court is pointing to is it being different and
21 special, and I submit, with 70 years of
22 experience behind -- behind us with it, the
23 right course is to allow Congress to change it
24 if Congress see -- so sees fit.

25 The other point I'd make about the

1 international nature of -- of this -- of this
2 question is there's one entity that submitted an
3 amicus brief that represents both U.S. and
4 international interests in this case. That is
5 the INTA brief, the International Trademark
6 Association's brief. They, along with the other
7 trademark associations in this case, all say
8 that the Act should apply extraterritorially.
9 All of them hold -- hold to that.

10 So, again, with 70 years behind us,
11 the proper course for -- for this Court is to --
12 to continue to allow the Act to apply
13 extraterritorially.

14 If I may, I'd like to talk a little
15 bit about the domestic focus aspect of the case
16 as well. We certainly agree with the United
17 States that uses that pose a likelihood of
18 confusion to American consumers fall within the
19 Act that -- under that kind of domestic focus
20 theory. But that's really only half the story
21 in terms of what the Act is concerned with.

22 The Act is also concerned with harm to
23 mark-holders. That's right there in the intent,
24 the enacted intent statement or purpose of the
25 Act. It's also what this Court has said time

1 and again when talking about the purposes of the
2 Lanham Act, its double focus, double -- doubly
3 concerned, both harm to the mark-holders and
4 confusion.

5 Justice Gorsuch, I heard your
6 suggestion that perhaps you look to when the Act
7 or when a claim accrues as understanding when
8 the focus might come into -- come into focus.

9 Well, that likelihood of consumer
10 confusion is simultaneous with the harm to --
11 to -- to goodwill. Those two things are two
12 sides of the same coin. And so we suggest that
13 if the Court is going to look to a domestic --
14 treat the Act domestically, it should not limit
15 itself to just one focus but both focuses that
16 are mentioned right there in the stated purpose
17 of the Act and capture what the Act is concerned
18 with.

19 Loss to goodwill, harm to goodwill is
20 just as important under the Act as consumer
21 confusion. In fact, it's so important that
22 consumers aren't allowed to bring lawsuits under
23 the Act for their confusion. The only entity
24 that's allowed to sue under the Lanham Act is
25 the mark-holder. It's a mark holder-only --

1 that's what the Court said in Lexmark. Only the
2 mark-holder has standing to bring suit.

3 And if the Court understands the
4 Lanham Act in that domestic way, it should
5 affirm because the -- the evidence here showed
6 that there was harm to the mark-holder right
7 here in the United States with Hetriconic losing
8 diverted sales and reputational harm.

9 Again, you know, the -- we had a whole
10 trial in this case along with injunctive
11 findings by the -- by the trial court. The
12 record in this case shows that Hetriconic was
13 plagued with complaints about devices that its
14 customers thought were Hetriconic's when, in fact,
15 they were the infringing devices. That kind of
16 harm to reputation evinces both consumer
17 confusion and -- and harm to the mark-holder.

18 Both of them are uses of the -- are --
19 are -- are foci of the Act and both of them
20 should be considered to the extent that the
21 Court has -- treats the Act as in terms of the
22 domestic application.

23 JUSTICE SOTOMAYOR: I should have gone
24 through the record more carefully, but I thought
25 that the Petitioners' product looked like your

1 product but had a different name on it, correct?

2 MR. HELLMAN: It -- it -- it looks
3 like our product, and what they -- it has a
4 different name, but what they said was
5 Hetronic -- the Hetronic you know, it's now us.

6 JUSTICE SOTOMAYOR: So it's not the
7 product that caused confusion, it was the acts
8 of the Petitioner, because the Petitioner was
9 representing they were you, is that it?

10 MR. HELLMAN: It -- it -- it's both.
11 I mean, the -- the similarity of the devices --

12 JUSTICE SOTOMAYOR: They look the
13 same, but they had different names.

14 MR. HELLMAN: Yes. Yes.

15 JUSTICE SOTOMAYOR: All right. But
16 I -- I think that two -- if a consumer sees
17 those things, the next question is, are they the
18 same product, because I know many consumers go
19 abroad and know that the counterfeit items are
20 knockoffs. They want to pay the lesser price to
21 have the value of the mark. So there's no
22 consumer confusion in that.

23 MR. HELLMAN: Right. So one
24 clarification. There were some -- some of them
25 did have the same product names. The Nova had

1 the same name for --

2 JUSTICE SOTOMAYOR: Oh, okay.

3 MR. HELLMAN: -- for both ours and --
4 and -- and the -- and the competitor's.

5 Now, again, in terms of whether or not
6 there was likelihood of confusion in this case,
7 the jury found that there was. So, in -- in
8 this case -- maybe perhaps not in every --

9 JUSTICE SOTOMAYOR: I -- I -- I guess
10 I didn't fully understand your point. Your
11 point is, if they hadn't told the world that
12 they were you, those customers would have come
13 to you?

14 MR. HELLMAN: Yes, because they --
15 they -- they -- they were our customers. And
16 that gets to another textual point that I think
17 is important that may have gotten not the time
18 it deserves this morning so far.

19 The Lanham Act reaches infringing uses
20 of a mark. A use is not just a sale. A use is,
21 to quote the statute, "the offering for sale,
22 the distribution or advertising of the good."

23 So the Lanham Act -- if -- if the
24 Court believes that uses that are likely to
25 confuse Americans fall within the Act, then it

1 should -- then it should follow the Act's text
2 and recognize that advertising, offering for
3 sale, those are the kinds of uses Congress was
4 concerned with just as much as the sale.

5 And so, when you have something like
6 a -- a trade show in this case where literally
7 there are -- there's our booth and the -- the
8 other side's booth and they're saying that
9 they're us and they're offering their product
10 for sale, it's that use that is the -- the evil
11 that the Lanham Act looks to in the first
12 instance, and then, if there's consumer
13 confusion and loss of goodwill from that use
14 because it's infringing, that's when you have a
15 violation that accrues.

16 JUSTICE JACKSON: And even if that
17 trade show is in Germany?

18 MR. HELLMAN: Even if that trade show
19 is in Germany, because, otherwise, you're going
20 to be setting up a system where you -- you
21 really will be giving a recipe to infringers to
22 target Americans, to flood foreign markets with
23 foreign goods, but, again --

24 JUSTICE JACKSON: Oh, I understand,
25 but -- but you're saying that Steele actually

1 goes as far as saying that if there's a trade
2 show in Germany where you're there with your
3 products and Arb -- Arbi -- what's the name of
4 this -- Arbitron?

5 MR. HELLMAN: Abitron.

6 JUSTICE JACKSON: Abitron is there
7 with their products in two adjoining booths,
8 that that's a violation of the Act just because
9 they're advertising products that are using your
10 marks?

11 MR. HELLMAN: It's -- it could be a
12 violation and was in this case because of the
13 likelihood of confusion that resulted from --
14 from that use.

15 It's not going to be the case -- I
16 don't know what marks are being used around
17 Europe or in other countries right now. Most of
18 them aren't, you know, marketed side by side
19 with the real thing with someone claiming that
20 they're the -- the actual -- the actual
21 mark-holder. That's what this case is, and
22 that's why that use was likely to confuse
23 Americans.

24 And if -- and even under the
25 government's test, if it's likely to confuse

1 Americans, then that is the kind of use that --
2 that the Act prohibits.

3 And I don't think it should make a
4 difference if the trade show is in Denver versus
5 Berlin for that because --

6 JUSTICE JACKSON: But I think it has
7 to, right? I mean, in -- in terms of the
8 presumption of extraterritoriality, this trade
9 show is in Germany, and, fine, there's a
10 confusing thing happening with the marks. But
11 are -- are you saying because Americans could be
12 there, then that would be the basis for the
13 application of the Lanham Act in that
14 circumstance? What if there were no Americans
15 at this trade show?

16 MR. HELLMAN: If -- if -- if there's
17 no -- under the government's view, under --
18 under the test the government is offering, the
19 question is likelihood of American confusion.

20 We're just asking for normal trademark
21 law to be applied. Normal trademark law
22 recognizes three kinds of confusion. There's
23 initial interest confusion, there's confusion
24 attendant with the sale, and there's post-sale
25 confusion where the -- the good is, you know,

1 circulating around. Those are -- any of those
2 uses that -- that lead to, in a -- in a causal
3 way, those kinds of confusions are actionable
4 under the Act.

5 So we're -- we're just -- in -- in
6 this part of the case, we're -- we're just
7 simply saying apply trademark law as it's -- in
8 fact, in every part of this case, we're saying
9 apply trademark law as it has been applied, but
10 particularly in this instance, yes, if someone
11 is out there targeting Americans or -- such that
12 there's a substantial effect on U.S. commerce
13 due to that confusion with Americans, that is
14 actionable.

15 Otherwise, if -- if you don't -- if
16 you don't hold that, you are really giving a
17 license for all sorts of manipulation of -- of
18 the -- of the kind that I think Petitioners were
19 talking about, someone doesn't sell directly to
20 Americans but knows that Americans will see it.

21 The Lanham Act should be available,
22 has been available. If anybody's going to say
23 that the Lanham Act doesn't reach that kind of
24 thing, it should be Congress, not this Court,
25 given the -- the -- the -- the -- the -- the

1 history of the Act in this Court to date.

2 CHIEF JUSTICE ROBERTS: Justice
3 Thomas?

4 Justice Alito?

5 Justice Gorsuch?

6 Justice Kavanaugh?

7 Justice Barrett?

8 Justice Jackson?

9 Thank you, counsel.

10 MR. HELLMAN: Thank you.

11 CHIEF JUSTICE ROBERTS: Mr. Walker,
12 rebuttal?

13 REBUTTAL ARGUMENT OF LUCAS M. WALKER

14 ON BEHALF OF THE PETITIONERS

15 MR. WALKER: Thank you.

16 A few quick points on the record. The
17 -- the only complaint that Hetronic
18 International actually received from a customer
19 was a European customer, and they actually, as
20 soon as they saw the genuine Hetronic part, they
21 said, oh, that's not the product that I have.
22 They told them apart on site. That's JA 34.

23 The goods that eventually reached the
24 United States, this was not handing someone to a
25 messenger to carry across the border. They were

1 selling to foreign manufacturers of cranes and
2 other heavy equipment. We sold the remote
3 controls. They incorporate them with the
4 cranes. The cranes were sold into the
5 United States or were used by the foreign buyer.
6 It's not even clear that the controls would be
7 seen by any consumer in the United States. JA 5
8 and 6 talk about that.

9 The -- the letters that purportedly
10 said that we are the real Hetronic, they said:
11 We parted ways with the other Hetronic
12 locations. We are Abitron now. We're the same
13 company. Hetronic Germany began operating as
14 Abitron Germany. But they said we are not
15 Hetronic. Those are other guys. That's JA 15.

16 Now there was some dissatisfaction
17 with the focus test, and so I think there is
18 another way to say that the Court -- that the
19 statute requires a domestic use in commerce, and
20 that's just looking at the text itself.

21 So Sections 32 and 43, the causes of
22 action, they require the use of the mark in
23 commerce. And now, as the government correctly
24 recognizes, the commerce definition does not
25 overcome the presumption against

1 extraterritoriality. So that means it's talking
2 about domestic commerce. It requires a domestic
3 use of the mark in commerce within the
4 United States.

5 And that ends up reading the "use in
6 commerce" consistently throughout the entire
7 statute because the use in commerce of a mark is
8 also required under Section 1 to register a
9 mark. It's also required under Section 8 to
10 maintain a mark. The PTO has -- for the entire
11 existence of the Act, correctly recognizes that
12 that's a domestic use in commerce.

13 It wouldn't make any sense to allow a
14 U.S. trademark right to be based on uses of the
15 mark outside of the United States. And that's
16 why the statute itself says in Section 2(d) that
17 when the PTO is examining trademark registration
18 applications, it has to consider resemblance to
19 other marks previously used in the United
20 States. If it was going to be affording
21 protection outside of the United States, you'd
22 want the PTO to be examining against uses
23 outside of the United States.

24 A couple other textual points to make
25 very quickly. The amendments, I think my friend

1 said there were about 38 amendments to the
2 Lanham Act. There are no relevant amendments
3 except for two. Section 7 was amended to say
4 that filing the application gives a right that
5 is -- a right of priority that is nationwide in
6 effect. It wouldn't make any sense for that to
7 be a nationwide right of priority if it was
8 purporting to give rights that apply outside of
9 this nation.

10 Congress also amended the Act to
11 implement the Madrid Protocol, and that is all
12 about territorial extension of trademark
13 protections that exist in one country into the
14 territory of another country. And the way it
15 does that is not by projecting the first
16 country's laws into the second country's
17 territory by its own force but by obtaining
18 rights under the domestic law of the second
19 country. That's the way the territorial
20 trademark regime that the United States and 178
21 other countries have signed on to works.

22 Going to the -- the -- the other
23 proposed foci of the -- the Act, International's
24 test ends up applying the Act the same if it's
25 extraterritorial and the same if it's domestic,

1 which I think is a good sign that that's not
2 really a domestic application of the Act. When
3 we're talking about foreign conduct with an
4 effect in the United States, that's historically
5 been an extraterritorial application of the Act.

6 But International will go a step
7 further and essentially allow any U.S. citizen
8 plaintiff to bring a suit because it feels any
9 harm suffered abroad at its home. And that not
10 only gives it an overwhelming protectionist
11 scope; it also violates the nondiscrimination
12 principle of the Paris Convention, which
13 requires the same remedies be given to both U.S.
14 citizens with U.S. trademarks and foreign
15 citizens with U.S. trademarks.

16 Going to the government's test, I
17 originally thought from their briefing that they
18 said use the likelihood-of-confusion test that
19 we already use to determine liability, that
20 13-factor or seven-factor test. But now they
21 say it actually needs to be actual confusion,
22 not just a likelihood of confusion. I'm not
23 sure how they reconcile that with the text of
24 the statute, but that's yet another test
25 departing from current law. It's not just an

1 off-the-shelf test.

2 And it also says, well, if there's any
3 problems, we can go to comity. But comity has
4 never been a substitute for rigorously enforcing
5 this Court's extraterritoriality doctrine, and
6 it adds another seven judge-made nondispositive
7 factors to figure out whether U.S. law ends up
8 governing conduct and transactions that occur in
9 the territories of foreign countries.

10 The focus test might be flexible, but
11 it favors an administrable test.

12 CHIEF JUSTICE ROBERTS: Thank you,
13 counsel. The case is submitted.

14 (Whereupon, at 11:34 a.m., the case
15 was submitted.)

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