

SUPREME COURT OF THE UNITED STATES

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JACK DANIEL'S PROPERTIES, INC.,)
 Petitioner,)
 v.) No. 22-148
VIP PRODUCTS LLC.,)
 Respondent.)
- - - - -

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9
10 Washington, D.C.
11 Wednesday, March 22, 2023

12
13 The above-entitled matter came on for
14 oral argument before the Supreme Court of the
15 United States at 10:05 a.m.

16
17 APPEARANCES:

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19 the Petitioner.

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23 Petitioner.

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25 behalf of the Respondent.

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P R O C E E D I N G S

(10:05 a.m.)

CHIEF JUSTICE ROBERTS: We'll hear argument this morning in Case 22-148, Jack Daniel's Properties versus VIP Products.

Ms. Blatt.

ORAL ARGUMENT OF LISA S. BLATT

ON BEHALF OF THE PETITIONER

MS. BLATT: Mr. Chief Justice, and may it please the Court:

This case involves a dog toy that copies Jack Daniel's trademark and trade dress and associates its whiskey with dog poop. After a four-day trial, the district court found both infringement and dilution. The Ninth Circuit erroneously reversed both holdings.

As to infringement, the Ninth Circuit did not disturb the trial court's finding of likelihood of confusion. It instead reversed by applying an exception to the Lanham Act that the Second Circuit in *Rogers versus Grimaldi* invented for movie titles.

Under *Rogers*, an expressive work is allowed to confuse as long as the use of a mark is artistically relevant and not explicitly

1 misleading. But the Lanham Act has no
2 exceptions for expressive works. It bars using
3 marks for any goods when likely to cause
4 confusion as to origin, sponsorship, or
5 approval. Artistic relevance has nothing to do
6 with confusion, and both implicit and explicit
7 uses can confuse. Nor does constitutional
8 avoidance justify Rogers. Rogers doesn't
9 plausibly construe any text, and there are no
10 First Amendment issues to avoid.

11 Trademarks are ancient property rights
12 that necessarily restrict speech to protect
13 investment in goodwill and prevent consumer
14 confusion, and parodies can be confusing. Now,
15 as a practical matter, parodies won't confuse
16 when differences in marks, markets, or message,
17 typically ridicule, signal that the brand
18 company didn't make the joke.

19 But absent these features, pervasive
20 copying and trading off a brand's goodwill tends
21 to confuse. And survey results showing consumer
22 confusion indicate that the parodist did too
23 much copying and not enough distinguishing.

24 As to dilution, the Ninth Circuit held
25 that the exclusions for noncommercial use mean

1 noncommercial speech. That holding renders
2 neighboring exclusions superfluous, and it
3 nullifies Congress's decision to limit the
4 parody exclusion to uses other than as a
5 designation of source.

6 This Court should give noncommercial
7 use its ordinary meaning, a use not involving
8 the buying and selling of goods.

9 I welcome your questions.

10 JUSTICE THOMAS: Could a statement
11 be -- could it fail Rogers and be misleading yet
12 not be confusing under the Lanham Act?

13 MS. BLATT: Well, the statutory test
14 is likely to confuse --

15 JUSTICE THOMAS: Yeah.

16 MS. BLATT: -- as to sponsorship --

17 JUSTICE THOMAS: I understand that,
18 but I'm just wondering if the Rogers -- they're
19 two ships passing in the night, that it could be
20 misleading yet have nothing to do with confusing
21 --

22 MS. BLATT: Well --

23 JUSTICE THOMAS: -- likelihood to
24 confuse.

25 MS. BLATT: -- so, if it's misleading

1 as to the sky being blue, you're right. That
2 has nothing to do with confusion. But, if it's
3 misleading as to the origin, sponsorship, or
4 approval of the goods, then absolutely. Or
5 services. So it's not -- you're right,
6 misleading in the abstract is irrelevant under
7 the Lanham Act. It's confusion as to origin,
8 source, or sponsorship.

9 So, if you just have a -- I mean, I
10 can go on with examples, but there's lots of
11 explicitly misleading speech that doesn't
12 violate the Lanham Act.

13 JUSTICE THOMAS: So would we have to
14 dispose of or overrule Rogers in order to focus
15 more clearly on likelihood of confusion under
16 the Lanham Act, or can they coexist?

17 MS. BLATT: No, obviously not, since
18 every case recognizes that the -- the -- this is
19 a -- the test involves a non-application of the
20 Lanham Act because the Second Circuit thought
21 the Lanham Act struck the wrong balance.

22 JUSTICE THOMAS: So there's no way to
23 keep Rogers and for you to win this?

24 MS. BLATT: No, we can win this case
25 on narrow grounds. There's no way to keep

1 Rogers and be faithful to the text. We can win
2 this case by the Court assuming there's an
3 atextual exception, and this Court can go on and
4 invent an atextual break to that exception.
5 It's unorthodox for this Court to do it, but you
6 can certainly do that. And we've offered a
7 bunch of distinctions.

8 The problem is the text doesn't make
9 any of these, and it's particularly --
10 particularly unorthodox for this Court to create
11 exceptions as to parody and fair use when
12 Congress put in two fair use explicit exceptions
13 in the Act for both infringement and dilution
14 and didn't see fit to do so here.

15 JUSTICE THOMAS: So what would you do
16 with the argument that Respondent makes that,
17 well, the Lanham Act presents difficulties for
18 the not-so-well-heeled defendant or accused
19 infringer?

20 MS. BLATT: Yeah. Well, I mean, the
21 consequence of having a property right is
22 property owners are going to protect them, and
23 the consequence of their position is they would
24 say, if you have a -- an intentionally hundred
25 percent confusing as to customers but as long as

1 there was no overt lie, that they should have to
2 get out and avoid the Lanham Act.

3 If you're concerned about the First
4 Amendment, someone can -- I don't see how it
5 would be valid, but someone could bring an
6 as-applied First Amendment challenge. It just
7 would border on frivolous because it's confusing
8 speech and it's a property right.

9 I just don't think --you know, a
10 property right by definition in the intellectual
11 property area is one that restricts speech.
12 It's part of the bundle of sticks that you have
13 a limited monopoly on a right to use a name
14 that's associated with your good or service.

15 JUSTICE KAGAN: Ms. Blatt, I'm just
16 wondering why you are making such a broad
17 argument when there are pretty obvious narrower
18 arguments available to you. So, for example,
19 one could say that whether the Rogers test
20 should exist, whatever its scope should be, this
21 is an ordinary commercial product using a mark
22 as a source identifier. In that case, whatever
23 we might think about the Rogers test, that's far
24 from the heartland of the Rogers test. The
25 Ninth Circuit just made a mistake as to this.

1 The end.

2 Why wouldn't that be sort of the
3 obvious or appropriate way to resolve this case
4 if we were coming out your way?

5 MS. BLATT: It's a totally obvious and
6 appropriate way, but, as a lawyer, we have a
7 quandary that usually we're up here saying I
8 need a legal principle and I don't want you
9 answering my hypotheticals of, well, that's not
10 this case. So I've got a dog toy --

11 JUSTICE KAGAN: No, I think that's a
12 pretty good legal principle. It's like -- it's
13 an ordinary commercial product using a mark as a
14 source identifier. That doesn't get any special
15 protection. There's a legal principle for you.

16 MS. BLATT: So that legal principle
17 looks a lot like the fair use exclusions that
18 Congress didn't write in. But, here -- I'm fine
19 with the commercial product. Here's the
20 problem, is once you acknowledge or assume
21 Rogers, you immediately get into the situation
22 of you're saying I will allow a confusing short
23 film but not a confusing commercial; I'll allow
24 a confusing painting, but I won't allow a
25 confusing wallpaper; I'll allow a confusing

1 video game, but I won't allow a confusing board
2 game; I will allow a confusing --

3 JUSTICE KAGAN: Well, you know --

4 MS. BLATT: -- tapestry but not a
5 confusing rug.

6 JUSTICE KAGAN: -- you know, as I
7 said, this is not to suggest that there is a
8 secure Rogers heartland. I'm just saying it's
9 totally unnecessary in this case to think about
10 that question or to get there.

11 And I'll just add a little bit. The
12 reason why every court of appeals has -- that
13 has thought about this question has adopted
14 something like Rogers is because there are cases
15 which look really different from this case.

16 There are -- you know, an art
17 photographer does photographs using a Barbie
18 doll, which is clearly meant to have some kind
19 of expressive meaning and is -- is not an
20 ordinary commercial product like this one and
21 doesn't use the Barbie doll as a source
22 identifier.

23 And what the courts have been groping
24 towards -- maybe they've been right, maybe
25 they've been wrong -- all I'm saying is, like,

1 why should we decide that case when we decide
2 this case?

3 MS. BLATT: You don't have to. And
4 the Barbie case is a classic case, that example,
5 of where there's a explicit fair use exception
6 for dilution. We're fine with your dog toy
7 case, but we're just -- it's just so obvious
8 that someone's going to ask about a dreidel or a
9 Halloween costume or a coloring book or a
10 tchotchke, ceramic pottery. There's just all
11 kinds of goods out there that are ordinary
12 commercial goods that you're sort of
13 head-scratching about, well, I don't know how
14 that fit in.

15 And I just think the video game versus
16 a board game -- Scrabble comes in a board game
17 and a video game. A 20-minute commercial looks
18 a lot more expressive to me than a four-minute
19 short film.

20 JUSTICE JACKSON: So -- so can I ask
21 it this way? I -- I guess I'm trying to
22 understand why it's atextual in your view to
23 focus on this idea of use of a mark as a source
24 identifier, because it seems to me that what
25 you're describing as the problem is courts

1 grappling with the degree of expressiveness of
2 various items in terms of determining whether or
3 not this art, Rogers, exception should apply.

4 But I wonder whether the cleaner, more
5 sort of consistent with the statute way of
6 looking at it is to ask, is the artist using
7 this mark as a source identifier, as the
8 threshold, and, if they aren't, then I guess the
9 Lanham Act doesn't apply because, as you said,
10 the Lanham Act worries about confusion that
11 arises from use of a mark as a source
12 identifier.

13 So, if they're not doing that, then
14 there's no trademark problem. But, if they are,
15 if they are doing that, if it's being used as a
16 source identifier, then I suppose we get into
17 all of the questions under the Lanham Act test
18 as to whether or not there's trademark -- what's
19 -- infringement.

20 What's wrong with that?

21 MS. BLATT: Well, unfortunately, a
22 lot. And with respect, that literally -- you're
23 taking language in the text of parody and in the
24 text of 1115(b)(4), which you had a Supreme
25 Court case on, KP Permanent Makeup, saying other

1 -- designation of a source are actually
2 exceptions under two statutory provisions that
3 don't appear in infringement. So I'm fine with
4 you making up stuff.

5 JUSTICE JACKSON: No, but I'm not
6 making it up. I mean, you said here this
7 morning, and I wrote it down, that the whole
8 confusion issue -- do you agree that confusion
9 is the heart of the Lanham Act --

10 MS. BLATT: Confusion has --

11 JUSTICE JACKSON: -- infringement?

12 MS. BLATT: -- nothing to do with
13 designation of source. So, no, you're just --
14 sorry, but, in trademark law, you can have a
15 very confusing use of a trademark that's not --

16 JUSTICE JACKSON: But I'm sorry,
17 Ms. Blatt, you said a few minutes ago that it's
18 misleading as to origin of source or
19 sponsorship, that that's the confusion that we
20 care about, that -- that -- that a part -- that
21 what the Lanham Act is trying to do is say, are
22 consumers confused as to the origin, source, or
23 sponsorship of this product.

24 And I agree with you, but I'm
25 wondering then, why isn't that --

1 MS. BLATT: So let me --

2 JUSTICE JACKSON: -- the threshold
3 question?

4 MS. BLATT: Yeah, just let me give you
5 an example. The famous film pre-Rogers case,
6 the Dallas Cowboy Cheerleaders involving 12
7 minutes of graphic sex involving a trademark,
8 was not a source identifier. It was just a very
9 confusing use of a trademark.

10 Source -- let me just explain what a
11 source identification means. It means a
12 consistent and persistent origin of source even
13 if the source is unknown. So like iPhone, even
14 though there's not a company called iPhone that
15 makes the phone, it's Apple, iPhone is a
16 trademark.

17 But you can infringe iPhone's marks or
18 any mark without indicating it's a source. You
19 can put it on a T-shirt, you can put it in a
20 movie, you can sell lots of products. It's just
21 not being used as a trademark. And the
22 statutory definition of infringement has nothing
23 to do with use as a source. It's any use of a
24 mark likely to cause confusion.

25 And I know that I'm right about this

1 because designation of a source is an explicit
2 carveout under infringement and dilution.

3 JUSTICE JACKSON: All right. Like, it
4 could cause confusion in what way? So, fine,
5 you put the Apple mark not on something that
6 looks like an iPhone so that people are confused
7 about the source of that product, you put it on
8 a T-shirt. So likely to -- how is that a
9 trademark infringement in the sense of origin of
10 source?

11 MS. BLATT: Sure. If you just put a
12 T-shirt that says Apple Sucks, that is a
13 diluting -- you know, it's a use of the
14 trademark. It doesn't indicate a source. It's
15 just a statement.

16 If you have your -- put your favorite
17 cartoon character in a movie. That's not a
18 designation of source unless you -- I'll put it
19 this way. A title is not a designation of
20 source. "Gone With the Wind" is not a
21 designation of source. It has to be -- Harry
22 Potter might be, but just standard trademark
23 law, and you can look at any case or any
24 McCarthy, and it'll tell you that you can
25 violate the trademark law even though you're not

1 engaged in --

2 JUSTICE SOTOMAYOR: Ms. Blatt --

3 MS. BLATT: -- trademark use.

4 JUSTICE SOTOMAYOR: -- can I get you
5 back to a question that Justice Thomas asked,
6 okay, and in part that Justice Kagan did.

7 I have some hesitation doing away with
8 the Rogers test because without knowing that the
9 likelihood-of-confusion test is sufficiently
10 flexible itself.

11 By the way, you talk about making
12 things up, the Polaroid test, the Steel Craft
13 test, it's all judicially crafted. These tests
14 have to be because the statute talks about
15 likelihood-of-confusion, and what judges have to
16 do is figure out how do -- how do we get to
17 that, how do we decide whether it's confused.

18 So we've got to create some
19 principles. I don't -- I think you're right
20 about it can't be just commercial products
21 because then you get into can you use it in one
22 setting but not another. It can't be just
23 designation of origin because that doesn't have
24 to do with improper use.

25 I think it's contextual, and I think

1 that all -- you're shaking your head yes.

2 MS. BLATT: Yes, absolutely.

3 JUSTICE SOTOMAYOR: If you look at all
4 of the factors, I call them the Polaroid factors
5 because you know I'm from the Second Circuit, so
6 I'm most intimately familiar with those.

7 MS. BLATT: Yeah.

8 JUSTICE SOTOMAYOR: What they're
9 trying to get at is whether the use of this
10 trademark in this context can or is confusing.

11 And so I see the Rogers test perhaps
12 not as -- as articulated, but all of the
13 circuits have some form of it and it's all
14 different, but I see them all doing something
15 where they're saying there are certain contexts
16 of use that are less likely or not likely to
17 confuse.

18 What the Second Circuit said with
19 respect to titles is, when you're talking about
20 a title use, the context of a movie, you can't
21 decide whether it's confusing until you look at
22 the movie and you decide whether or not the
23 movie uses the title in an aesthetically
24 pleasing way.

25 I think they did add something to the

1 likelihood-of-confusion standard that's not
2 there, because they said it has to have -- I
3 don't remember the words -- but something
4 greater than just a likelihood of confusion.

5 MS. BLATT: Artistic relevance?

6 JUSTICE SOTOMAYOR: Artistic
7 relevance. That may have gone too far, okay?

8 But my point simply is I would limit
9 this to parody and not to anything else because
10 parody as a context does ask not all of the
11 Polaroid factors, it asks something very
12 different. And that's what I would limit the
13 likelihood-of-confusion test to, but I want you
14 to answer these hypotheticals.

15 MS. BLATT: Of course.

16 JUSTICE SOTOMAYOR: All right? And I
17 want you to answer them in view of what Justice
18 Thomas said. Assume that I think that there are
19 some uses that, in context, on their face,
20 should not require a litany of Polaroid factors
21 with surveys and everything else for a court to
22 be able to decide this on a motion to dismiss or
23 summary judgment.

24 An activist takes a political party's
25 trademark animal logo --

1 MS. BLATT: I'm sorry, animal -- I
2 missed that last part.

3 JUSTICE SOTOMAYOR: Takes an animal
4 logo --

5 MS. BLATT: Animal?

6 JUSTICE SOTOMAYOR: -- a donkey or --
7 yes -- or an elephant, okay?

8 MS. BLATT: Oh, elephant.

9 JUSTICE SOTOMAYOR: Yeah, you know,
10 whatever.

11 MS. BLATT: I got it. I got it.

12 JUSTICE SOTOMAYOR: One of the
13 political party's animal logos, and makes a
14 T-shirt where the animal looks drunk, a company
15 by its slogan, Time to Sober Up America, and
16 they wear that proudly at a protest or here in
17 court.

18 MS. BLATT: Do you want my answer?

19 JUSTICE SOTOMAYOR: She sells these
20 T-shirts on Amazon.

21 MS. BLATT: Okay.

22 JUSTICE SOTOMAYOR: The -- the
23 political party gets a consumer survey
24 purportedly showing that 15 percent, 20, 25, 10,
25 whatever number we make up, okay, think the

1 activist needs the party's permission to copy
2 the logo.

3 So I'm a judge. I know what I would
4 do. But tell me what you would do, and do they
5 have to go through a full political -- a full
6 trial under the Polaroid factors to decide this
7 case?

8 MS. BLATT: Okay. So, I mean, first
9 of all, that's funny, your example. I'm going
10 to give you that.

11 (Laughter.)

12 MS. BLATT: Second of all, if I could
13 go back to the point about Polaroid, there is --
14 the fact that a product, including your T-shirt
15 example, is funny or it has a parody is not
16 relevant. What is extremely relevant is any
17 character --

18 JUSTICE SOTOMAYOR: Is whether the
19 person viewing it would get the joke.

20 MS. BLATT: No, whether --

21 JUSTICE SOTOMAYOR: And so isn't that
22 the issue that we're dealing with in confusion?

23 MS. BLATT: Well, I'd like to get this
24 answer out. It's not whether you get the joke.
25 You get that somebody other than the brand was

1 making the joke because it's -- that's what --
2 that's all that matters. Not -- ha, ha, ha is
3 not a standard under the Lanham Act. It's
4 whether it's confusing as to source.

5 Now, in your Republican -- I'm
6 sorry -- elephant example --

7 JUSTICE SOTOMAYOR: Well, that's going
8 back to Justice Kagan -- Justice Jackson's
9 point, and you said it's not only about source,
10 so what else is it about?

11 MS. BLATT: Right. Okay. On your
12 elephant example, in terms of if there's a
13 mistaken idea that, oh, well, you had to copy,
14 okay, first of all, on consumer surveys, they're
15 capturing, for whatever reason, because
16 consumers are dumb or they're confused about the
17 law or just the way they make marketing
18 decisions, surveys are picking up the real-world
19 marketplace that a judge, who has hindsight bias
20 and is highly analytical, is not going to
21 represent the purchasing public.

22 The reason we have surveys in the
23 first place is pretty amazing. In 1948, Jerome
24 Frank on the Second Circuit had a case involving
25 teenage girls' underwear and he said, you've got

1 to be kidding me. I'm a man. Everyone on this
2 court is a man. How am I supposed to know this?
3 Couldn't somebody do a survey?

4 And surveys were born, and that was in
5 1948. So it's just a little bit rich to trash
6 surveys when the whole point that they came out
7 was to help consumers.

8 Now, on that bit about there's a
9 mistake in perception, it's not a mistake in
10 perception. You do have to get permission if
11 it's confusing.

12 Now your example on the T-shirts. If
13 it's -- if there's a survey on 15 percent, and I
14 also heard in there some sort of implicit thing
15 that 15 percent was too low, if this Court had a
16 rule saying advocates, please do not have briefs
17 that are likely misleading, and if you want us
18 to say advocates, that can go up to 50 percent
19 because it's okay if only 20 percent of judges
20 found it deceptive or even 40 percent, it has to
21 be more than half.

22 So I think what you're --

23 JUSTICE SOTOMAYOR: Well, no, no, no.
24 That -- but that's the basic problem, which is
25 the percentage. At some point, it's a political

1 statement. It has First Amendment rights. And
2 even if 20, maybe even if 75, it's very clear
3 that at a certain point --

4 MS. BLATT: Yeah. So --

5 JUSTICE SOTOMAYOR: -- those people
6 may be wrong on the law.

7 MS. BLATT: So -- yeah.

8 JUSTICE SOTOMAYOR: They don't need
9 permission to make a political joke. They don't
10 need permission to make a parody.

11 MS. BLATT: You can -- well, you need
12 to get permission if it's a confusing parody.

13 Now, in terms of your -- I do want to
14 get this point out. There are three very
15 important Sleekcraft factors that bear on the
16 specifics of parody. And the other dog toy case
17 involving Chewy -- Chewy Vuiton, it was a play
18 on Louis Vuitton and Chewy Vuiton, the contrast
19 with that case and this case I think tells you
20 everything you need to know about likelihood of
21 confusion.

22 In the Chewy Vuiton case, it was on
23 substantial similarity in marks, the uses in the
24 mark, and is there some sort of dispelling
25 characteristics that says -- you know, the

1 definition of a parody is that you have to
2 conjure up enough similarity, but then you
3 immediately simultaneously distinguish and say
4 but this is not -- someone else is telling the
5 joke.

6 And in the Chewy Vuiton case, the --
7 the court said I'm immediately struck by how
8 different. Our court said I'm immediately
9 struck by how similar. There were nine
10 virtually identical things that were unchanged.
11 In the Chewy Vuiton case, he said almost all the
12 designs were different.

13 In the uses of the markets in the
14 Louis Vuitton case, Louis Vuitton makes dog
15 products, but they're \$1200. They're complete
16 luxury products. They only sell in boutique
17 stores or in boutiques and department stores.

18 In the Jack Daniel's case,
19 Jack Daniel's makes dog products and sells
20 licensed merchandise, like hats and bar stools
21 and what have you, in the same markets that Bad
22 Spaniels was selling its dog toys.

23 And when you have a consumer survey
24 that tells you that consumers didn't get the
25 joke -- they could have thought it was funny.

1 And, by the way, only seven people said they
2 thought there was a confusion as to who owned it
3 -- I mean who needed permission, and that still
4 left 25 percent confusion, which is still, you
5 know, a massively high consumer survey.

6 So it is -- not all the Sleekcraft
7 fact -- I don't know how to -- Polaroid factors
8 will be relevant, but -- and the other thing I
9 want to say before the government gets up here,
10 for 30 years, what I've been saying is what the
11 PTO has been doing. They've been finding parody
12 after parody either confusing or not confusing
13 based on the same thing that this trial court
14 did. It looked at how similar and famous the
15 mark is, and is there something that kind of
16 says, whoa, it's so obvious. I think in the
17 Republicans go around drunk and need to sober
18 up, your average consumer is going to think the
19 RNC didn't do that, but I -- I could go on and
20 on and on.

21 And the other thing I just wanted to
22 say about your aesthetically pleasing, the movie
23 "Debbie Does Dallas" was not aesthetically
24 pleasing. It infringed a trademark. It
25 infringed someone's property rights, and it was

1 diluting.

2 So the other side wants to talk about
3 the uses they like. They don't want to talk
4 about the pornographic and poisonous things that
5 could be done when you infringe someone's
6 trademark.

7 CHIEF JUSTICE ROBERTS: Thank you,
8 counsel.

9 Justice Thomas, anything further?

10 Justice Alito?

11 JUSTICE ALITO: I take it your short
12 answer to Justice Sotomayor's hypothetical
13 where, let's say, the -- the survey shows 25
14 percent -- let's say it shows 30 percent, your
15 answer is that has to go to a jury.

16 MS. BLATT: Well, the -- we cited the
17 Dark Knight case, the Fordist case that was
18 resolved on Twombly.

19 JUSTICE ALITO: Would it go to the
20 jury or not? Can you give me an answer?

21 MS. BLATT: I think it would probably
22 -- I mean, it just depends if there was
23 something wrong about the survey, but it -- I
24 don't know if it would go -- no, no, it would
25 not go to a jury. It could go to summary -- it

1 would -- could be resolved on summary judgment.

2 JUSTICE ALITO: It would go on summary
3 judgment --

4 MS. BLATT: Yeah.

5 JUSTICE ALITO: -- in favor of -- in
6 favor of the Republican Party or the Democratic
7 Party?

8 MS. BLATT: Well, it depends. Unless
9 it meets 12(b)(6), it survives a motion to
10 dismiss. I mean, that's --

11 JUSTICE ALITO: Let me give you some
12 other -- let me -- let me give you some other
13 examples that are in -- in the briefs. I'm sure
14 you're familiar with it. So this is from the
15 Electronic Frontier Foundation's brief.

16 So here's a -- a poster. Let's say
17 this is on a T-shirt. It says "Diamonds." It's
18 got a picture of two hands. One has a diamond
19 ring on it. And at the bottom, it says, your
20 purchase of diamonds will make it -- will enable
21 us to donate a prosthetic to an African who lost
22 his hands in diamond conflicts. And at the
23 bottom, it says De Beers, From Her Fingers to
24 His. Let's say that's on a T-shirt.

25 What about that?

1 MS. BLATT: Well, I don't think that's
2 going to be likely confusing. If it's diluting,
3 it will have an exception for fair use unless --
4 that does not look like a trademark use. But,
5 if you start -- if that becomes a line of books,
6 movies, TV shows, and you're selling all kinds
7 of mugs and coffees, then you would not have the
8 fair use exclusion.

9 But, yeah, if it's -- so you've got --
10 the more it says something ridiculous or
11 condescending about the brand, it's so likely to
12 not be confusing.

13 You always run a chance that you might
14 have a dilution -- dilution -- yeah, dilution
15 claim, but there's a fair use exception and a
16 noncommercial use exception that are pretty
17 robust.

18 JUSTICE ALITO: Could any reasonable
19 person think that Jack Daniel's had approved
20 this use of the mark?

21 MS. BLATT: Absolutely. That's --
22 that's why we won below.

23 JUSTICE ALITO: Really?

24 MS. BLATT: Yes, because --

25 JUSTICE ALITO: All right. Let me

1 envision this scene. Somebody in Jack Daniel's
2 comes to the CEO and says, I have a great idea
3 for a product that we're going to produce. It's
4 going to be a dog toy, and it's going to have a
5 label that looks a lot like our label, and it's
6 going to have a name that looks a lot like our
7 name, Bad Spaniels, and what's going to be in --
8 purportedly in this dog toy is dog urine. Do
9 you think the CEO is going to say that's a great
10 idea, we're going to produce that thing?

11 MS. BLATT: No, but Nationwide ran a
12 Super Bowl commercial with a dead child in it,
13 and they had to pull it because it was such a
14 bad idea. I don't know who approved that one.
15 It was really embarrassing for them.

16 JUSTICE ALITO: So a reasonable person
17 would --

18 MS. BLATT: People make dumb
19 commercials.

20 JUSTICE ALITO: -- a reasonable person
21 would not think that Jack Daniel's had approved
22 this.

23 MS. BLATT: I think, if you're selling
24 urine, you're probably going to win on a motion
25 to -- I mean, on a 12(b)(6), but you're probably

1 also violating some state law. But, sure, the
2 --

3 JUSTICE ALITO: Oh, no, it -- you're
4 not selling urine. It's exactly --

5 MS. BLATT: Oh, I thought you --

6 JUSTICE ALITO: -- this toy.

7 MS. BLATT: Oh, I'm sorry, I thought
8 it was --

9 (Laughter.)

10 MS. BLATT: Oh, it says the names
11 there.

12 JUSTICE ALITO: No. It's exactly this
13 toy --

14 MS. BLATT: I'm sorry.

15 JUSTICE ALITO: -- which purportedly
16 contains --

17 MS. BLATT: Oh.

18 JUSTICE ALITO: -- some sort of dog
19 excrement --

20 MS. BLATT: Oh, I'm sorry.

21 JUSTICE ALITO: -- or urine.

22 MS. BLATT: Okay. My bad.

23 (Laughter.)

24 JUSTICE ALITO: The CEO -- the CEO is
25 going to say this is a great idea.

1 MS. BLATT: Well, just showing how
2 confused I was suggests that I would be your
3 perfect consumer.

4 (Laughter.)

5 MS. BLATT: Justice Alito, I don't
6 know how old you are, but you went to law
7 school, you're very smart, you're analytical,
8 you have hindsight bias, and maybe you know
9 something --

10 JUSTICE ALITO: Well, I went to a law
11 school where I didn't learn any law --

12 MS. BLATT: Okay. But --

13 JUSTICE ALITO: -- so don't --

14 (Laughter.)

15 MS. BLATT: -- it's just a little rich
16 for people who are at your level to -- to say
17 that you know what the average purchasing public
18 thinks about all kinds of female products that
19 you don't know anything about or dog toys that
20 you might not know anything about. And so I
21 just think --

22 JUSTICE ALITO: I don't know. I had a
23 dog. I know something about dogs.

24 MS. BLATT: Okay.

25 JUSTICE ALITO: The question is not

1 what the average person would think. It's
2 whether there should be -- this should be a
3 reasonable person standard --

4 MS. BLATT: Oh.

5 JUSTICE ALITO: -- to simplify this
6 whole thing.

7 MS. BLATT: So, since 1976, you've had
8 this appreciable or substantial number of
9 confusion. And, again, I think the best example
10 is just you can enact a rule that says
11 likelihood of confusion by judges or likelihood
12 of deception. And if you think that's the
13 average reasonable judge, okay, but I don't know
14 how you would do a survey on that. And if you
15 think there's something wrong with the survey,
16 you can dismiss it. The Court in *Booking* said
17 surveys have to be done with careful design and
18 careful reading, and the Court can reject the
19 survey.

20 JUSTICE ALITO: Well, I -- I'm
21 concerned about the First Amendment implications
22 of -- of your position, and you began by
23 saying -- by stressing that *Rogers* is atextual,
24 it was made up. You know, there is a text that
25 says that Congress shall make no law infringing

1 the freedom of speech. That's a text that takes
2 precedence over the Lanham Act. And you said
3 there are no constitutional issues.

4 But your answer to Justice Sotomayor's
5 hypothetical tells me there are important
6 constitutional issues.

7 MS. BLATT: Well, allow me to push
8 back with the founding. Trademarks have been
9 around since the 1500s. They predated the First
10 Amendment. They -- same way with copyrights.
11 And this Court has had four cases, the
12 San Francisco case, the Zubini or Zucchini --
13 Zacchini, and then your Eldred, and Harper and
14 Row. And you said on all four of those cases,
15 even it didn't involve confusing speech, it
16 didn't involve any kind of intent, it didn't
17 involve any kind of -- I mean, those were all
18 harder cases.

19 And so it's a property right. I agree
20 when you don't have property rights, but the
21 definition of a property is it's going to
22 infringe someone's speech. It is a limited
23 monopoly as long as alternative --

24 JUSTICE ALITO: Well, is it your
25 argument that anything that is -- that -- so

1 long as something is protected by the Lanham
2 Act, there is no First Amendment issue?

3 MS. BLATT: Well, when you say --
4 yeah, I think that unless you're going to bring
5 an as-applied, you have to -- yeah, I mean, it's
6 confusing speech and it goes to the dilution.
7 But, yes, I think the Lanham Act is clearly
8 constitutional. You all but held that in the
9 San Francisco case.

10 JUSTICE ALITO: Well, the question
11 isn't whether it's constitutional. The question
12 is whether it should be interpreted, and this is
13 where Rogers may come from, in a way that does
14 not bring it into conflict with the First
15 Amendment.

16 MS. BLATT: Well, then you should
17 strike the statute as either facially invalid or
18 as applied to a dog toy. It just seems that
19 you're overturning centuries and billions of
20 dollars of brand investment as to confusing.

21 I -- what I hear you saying is that
22 you're worried about -- you think are
23 non-confusing uses, but courts have been -- I
24 think we cited it on page 25 -- case after case
25 that rejected parodies. Notably, none of those

1 had survey cases.

2 There are lots of famous cases where
3 the Court rejected likelihood of confusion. And
4 as to dilution, again, I mean, there is a
5 Supreme Court case on point, the San Francisco
6 Athletic Association case.

7 JUSTICE ALITO: All right. Thank you.
8 Thank you.

9 CHIEF JUSTICE ROBERTS: Anything
10 further, Justice Sotomayor?

11 Justice Kagan?

12 Justice Gorsuch?

13 JUSTICE GORSUCH: I just want to make
14 sure I understand your position with respect to
15 the First Amendment.

16 As I understand it, your -- your
17 primary position is a trademark is consistent
18 with the First Amendment, it predated it, it was
19 thought to be consistent by the founders at the
20 time.

21 MS. BLATT: Well, and it doesn't --
22 and it doesn't protect confusing speech.

23 JUSTICE GORSUCH: Fine. You're not,
24 though, opposed to the possibility that there
25 may be as-applied cases in which trademark law

1 does butt up against the First Amendment.

2 MS. BLATT: And that's the appropriate
3 place to -- yes, to say, as applied, it's
4 unconstitutional, yeah.

5 JUSTICE GORSUCH: And that -- that
6 could happen. And that could have happened
7 here. It just didn't.

8 MS. BLATT: Yeah, and that's the end
9 of that. Yeah.

10 JUSTICE GORSUCH: Yeah. One -- one
11 further question. Your -- your friend or your
12 amicus, I should say, the -- the federal
13 government's about to get up, but I'm not sure
14 how much of a friend they really are to you.

15 MS. BLATT: I agree.

16 (Laughter.)

17 JUSTICE GORSUCH: And -- and -- and
18 their argument is that the district court here
19 failed to, even under the appropriate test that
20 you are arguing for, consider parody and
21 confusion in this case, and we should remand for
22 reconsideration of that issue under existing
23 standards, forget about the Rogers gloss.

24 And I just wanted to give you a chance
25 briefly --

1 MS. BLATT: Yeah, okay, fair.

2 JUSTICE GORSUCH: -- to -- to talk
3 about that.

4 MS. BLATT: Yeah. So, Justice
5 Gorsuch, we agree you remand, and VIP has lots
6 of arguments that we didn't meet the
7 likelihood-of-confusion test, so that'll be on
8 remand. We'd have to win that.

9 But, as to the government's argument,
10 which is that there was a weighing of the
11 capital -- capitalizing on the goodwill and not
12 enough weighing as to the need to copy, we're
13 relying on 30 years of PTO case law that said --
14 has never mentioned -- they -- they mentioned
15 trading off of goodwill is a factor for
16 confusing because it tends to confusion, and not
17 once in 30 years has a PTO case rejecting
18 registration based on parody has it said, well,
19 we're going to discount the similarity. They're
20 just looking at likelihood of confusion.

21 JUSTICE GORSUCH: You agree, though,
22 that we would vacate and remand and --

23 MS. BLATT: Yes.

24 JUSTICE GORSUCH: -- and the Ninth
25 Circuit will do what it will do?

1 MS. BLATT: Yes. And they -- they did
2 brief -- it's fully -- all those issues are
3 fully preserved, the other side.

4 JUSTICE GORSUCH: Yes.

5 MS. BLATT: So they have all those
6 arguments on remand.

7 JUSTICE GORSUCH: Thank you.

8 CHIEF JUSTICE ROBERTS: Justice
9 Kavanaugh?

10 Justice Barrett?

11 Justice Jackson?

12 JUSTICE JACKSON: So going back to
13 Justice Gorsuch's point, isn't trademark
14 consistent with the First Amendment because of
15 trademark infringement's limited scope?

16 And by that, I mean, if the -- isn't
17 the point of having a trademark to identify the
18 mark owner's own goods or services and to
19 prevent others from passing off their goods and
20 services as the mark owner? So the confusion
21 that we care about is that people in the
22 marketplace are going to be looking at these
23 items and think they are the mark owner's
24 because of the way they're labeled rather than
25 the person who actually created them.

1 If I'm right about that, then I guess
2 I'm trying to understand why -- shouldn't the
3 defendant have to be using the mark in a way
4 that identifies who is responsible for it in
5 order for trademark infringement to even apply?

6 MS. BLATT: So passing off was in the
7 1920 Act. It started getting extending past
8 that in the 1946 and then in 1988. So it's just
9 always been extended past passing off. And it's
10 never been limited to designation of a source
11 since the first trademark act of 1881.

12 So you've had trademark law since the
13 late 1800s, you struck the first one for being
14 unconstitutional. But, if you just --

15 JUSTICE JACKSON: All right. So, if
16 it's broader than that, then don't we start
17 really worrying about what Justice Alito and
18 others have brought up? If it's broader than
19 that, then I think we start being concerned
20 about impairing artists who are referencing the
21 mark from doing that in their work.

22 And I guess my thought was, all right,
23 we have these artists with First Amendment
24 rights or parodists or whoever, and the way we
25 prevent infringing their rights is by making

1 sure that trademark holders are only able to
2 come in and accuse them of problems if they --
3 they, the artists -- are -- are trying to
4 designate the source of their products by using
5 the mark.

6 MS. BLATT: I think that's a
7 reasonable policy proposal, but here would be my
8 response to Congress, is that when you -- the
9 Rogers --

10 JUSTICE JACKSON: Isn't that what the
11 statute was trying to do? That's the --

12 MS. BLATT: No.

13 JUSTICE JACKSON: -- point of
14 confusion. That's the -- that's the area of
15 confusion that you keep saying is what the
16 statute is all about.

17 MS. BLATT: So Rogers was not even
18 applied past titles until 2003 and not to the
19 substance of movies until 2008. We've had a
20 very vibrant film and artistic community
21 since -- I don't know since when.

22 So the -- the arts have flourished --

23 JUSTICE JACKSON: All right. One last
24 question.

25 MS. BLATT: Sure.

1 JUSTICE JACKSON: I'm sorry. All
2 right. Let's say that's my view, okay?

3 MS. BLATT: Of course.

4 JUSTICE JACKSON: If I think that the
5 Lanham Act only kicks in if we have an item that
6 is being passed off, as you say, or an item that
7 is creating confusion as to the source or origin
8 or sponsorship, all right, do you have an
9 argument in this case with respect to this
10 item --

11 MS. BLATT: Yes.

12 JUSTICE JACKSON: -- that it's
13 confusing in that way as to origin or
14 sponsorship or source?

15 MS. BLATT: Yeah, that was the -- I
16 mean, that's on page 5, but that was the survey.
17 That was the finding. And on page 5 of our
18 reply brief, we have six ways to Sunday on why
19 this was a designation of source, including the
20 admission in their complaint.

21 JUSTICE JACKSON: All right. Great.
22 Thank you.

23 CHIEF JUSTICE ROBERTS: Thank you,
24 counsel.

25 Mr. Guarnieri?

1 ORAL ARGUMENT OF MATTHEW GUARNIERI
2 FOR THE UNITED STATES, AS AMICUS CURIAE,
3 SUPPORTING THE PETITIONER

4 MR. GUARNIERI: Mr. Chief Justice, and
5 may it please the Court:

6 I'd like to begin by just addressing
7 some of the questions that have already been
8 propounded this morning and particularly the
9 hypothetical about the T-shirt depicting an
10 elephant and -- and the De Beers example drawn
11 from the --

12 JUSTICE SOTOMAYOR: I said either
13 political party.

14 (Laughter.)

15 MR. GUARNIERI: Excuse me, Justice
16 Sotomayor.

17 JUSTICE SOTOMAYOR: Let's be clear.

18 MR. GUARNIERI: Unspecified political
19 party parody on the T-shirt.

20 You know, I think a lot of the
21 intuition driving some of those difficult
22 questions is that reasonable people are not
23 likely to be confused about the source of those
24 products or whether the -- the target of the
25 parody sponsored or approved the product.

1 And I -- I think that intuition is
2 fully captured by the likelihood-of-confusion
3 test, and that's the statutory standard that we
4 think should be applied in all of those cases.

5 Rogers and the position that
6 Respondent is defending in this case is very
7 different. That -- that view says that you
8 should be allowed for various vague First
9 Amendment policy concerns, you should be allowed
10 to engage in this behavior even if it is likely
11 to confuse consumers about the source of your
12 goods or about the senior mark holder's
13 sponsorship or approval. And -- and I think
14 that view just can't be squared with the Lanham
15 Act itself and is not compelled by the First
16 Amendment.

17 I welcome the Court's questions.

18 JUSTICE THOMAS: So what exactly would
19 you do with Rogers?

20 MR. GUARNIERI: Well, we think that
21 Rogers was incorrectly decided, and Rogers --
22 the Rogers standard is inconsistent with the
23 text of the Lanham Act, and I think you can see
24 that for at least three reasons.

25 First, as -- as applied by the Ninth

1 Circuit, Rogers is an antecedent test that the
2 infringement plaintiff has to satisfy in order
3 to even invoke the Lanham Act.

4 The -- the Court reiterated that at
5 Footnote 2 of its opinion on page 33a of the
6 petition appendix. You have to get over Rogers
7 and then also show likelihood of confusion,
8 and -- and that's just plainly inconsistent with
9 the way the statute was designed to operate.

10 The second point is that Rogers is
11 substantively inconsistent with the Lanham Act.
12 Rogers requires a showing either of a complete
13 lack of artistic relevance or that the use of
14 the trademark is explicitly misleading. But, of
15 course, as Ms. Blatt explained, you can have
16 confusing uses of marks that are implicitly
17 misleading.

18 So, you know, Rogers currently is
19 operating to protect a lot of behavior that
20 could cause -- it's actually likely to cause
21 confusion to consumers, and the Lanham Act makes
22 that kind of trademark use actionable as
23 infringement.

24 And then the third point is that
25 Rogers was not conceived of as an application or

1 an interpretation of the text of the Lanham Act,
2 and, indeed, the case was decided under a
3 predecessor version of the Lanham Act that
4 didn't even explicitly contain the
5 likelihood-of-confusion standard that should
6 govern in this case.

7 JUSTICE SOTOMAYOR: I always have
8 hesitation in doing away with something that
9 circuits have been relying on, virtually all of
10 them, but applying it in different contexts.
11 And we have amicus briefs from different
12 stakeholders, some saying it may not apply in
13 parody, but it could apply in movie titles, it
14 might apply in something else and not this, in
15 novels, et cetera.

16 Why should we rule broadly? And if we
17 rule narrowly, on what basis? You heard earlier
18 at least three alliterations, one, the --
19 Justice Kagan's, one Justice Jackson, one me,
20 limit this just to parodies, because parodies
21 really do rely on is this a joke that people are
22 going to get.

23 MR. GUARNIERI: Sure. Justice
24 Sotomayor, let me make a couple of points in
25 response to those concerns.

1 First, just to address the status quo,
2 it -- it's not the case that all circuits have
3 applied the Rogers test. There are many
4 circuits that have never adopted Rogers. There
5 are many circuits, including the Fourth, Fifth,
6 and Seventh Circuits, that I think address
7 parodies the correct way, the way that we
8 advocate, which is you can take the parodic
9 nature of the use into account under the
10 existing likelihood-of-confusion standard, which
11 is actually the statutory standard.

12 The second point is, I mean, I will
13 grant you that there are a number of courts of
14 appeals that have followed Rogers, but many of
15 those cases involved titles as Rogers involved a
16 title.

17 The Ninth Circuit has really
18 dramatically expanded the scope of Rogers to
19 include --

20 JUSTICE SOTOMAYOR: Well, that begs my
21 question.

22 MR. GUARNIERI: Sure.

23 JUSTICE SOTOMAYOR: Why don't we just
24 decide on parody rather than everything else?

25 MR. GUARNIERI: Well, I -- I think

1 Rogers, at least as conceived by the Ninth
2 Circuit, is not limited to parody. So I think
3 the Court would -- if -- if you're saying that
4 Rogers is inapplicable to the circumstances of
5 this case, I think you would probably logically
6 be saying it shouldn't be applied not just in
7 cases involving parody but in other --

8 JUSTICE SOTOMAYOR: I don't know why
9 that -- that's logical, because we're not
10 dealing with titles, movies, or anything else.

11 JUSTICE KAGAN: I think, Mr. --

12 JUSTICE SOTOMAYOR: Fiction.

13 JUSTICE KAGAN: I -- I'm sorry.

14 JUSTICE SOTOMAYOR: Go ahead.

15 MR. GUARNIERI: Well, I -- I -- I
16 mean, I think our principal response is that if
17 the rationale for the decision that the Court
18 adopts is that Rogers can't be squared with the
19 Lanham Act, it's hard to understand how that
20 would be limited to parodies. It wouldn't apply
21 equally to other supposedly expressive uses of
22 marks that are currently covered by the Rogers
23 test in the Ninth Circuit.

24 JUSTICE GORSUCH: Counsel, I --

25 CHIEF JUSTICE ROBERTS: Counsel, if --

1 if -- is the government's position that in a
2 case of likelihood of confusion, the Rogers test
3 is out of the picture or that the First
4 Amendment across the board is out of the
5 picture?

6 MR. GUARNIERI: I think it's just the
7 former. We just think the Rogers test is the
8 wrong way to approach these cases. It has no
9 sound basis in trademark law or, indeed, in the
10 First Amendment.

11 But, you know, as Justice Gorsuch's
12 questions to Ms. Blatt illustrated earlier, I
13 think you could still have an as-applied
14 challenge. I think, if the Court gets rid of
15 Rogers and -- and tells the lower courts that
16 Rogers is not the correct way to do this, the
17 correct way is to apply the
18 likelihood-of-confusion standard, that doesn't
19 foreclose an as-applied First Amendment
20 challenge in an appropriate case.

21 But Rogers is not itself an
22 application of any established First Amendment
23 principles. I cannot think of any area of this
24 Court's First Amendment jurisprudence which
25 requires courts to make judgments of artistic

1 relevance or in which the government's authority
2 to regulate turns on judgments of artistic
3 relevance.

4 The "explicitly misleading" prong of
5 Rogers also has no sound basis in this Court's
6 First Amendment precedent. There are areas of
7 false and misleading speech in which the
8 government can regulate, but those -- you know,
9 including fraud, defamation, perjury. In those
10 areas of unprotected speech, it has never
11 mattered whether the deceit is explicit or
12 merely implicit. I mean, that's just a
13 distinction that is -- was made up by the Second
14 Circuit in Rogers, and I think it's time to put
15 an end to it.

16 JUSTICE GORSUCH: And, counsel, I'd
17 like to understand what you would have us do
18 with respect to the remand, because you do argue
19 that even under the Lanham Act's text, always a
20 place to start, likelihood of confusion, that
21 the district court erred and it didn't fully
22 account for the parody nature of -- of this
23 product.

24 So exactly what instructions and --
25 and how would you -- how would you articulate

1 that?

2 MR. GUARNIERI: Sure. Well, in our
3 view, the district court committed legal error
4 in failing to take account of the parodic nature
5 of Respondent's use when applying the
6 likelihood-of-confusion factors that are applied
7 in the Ninth Circuit. I think that is primarily
8 apparent in the district court's consideration
9 of the similarity of the marks factor, which is
10 a factor that all the court of appeals consider
11 relevant to evaluating the likelihood of
12 confusion.

13 The district court -- you know, in our
14 view, the way that parody enters into the
15 picture in -- in most of these cases is that
16 ordinarily you would think that the -- the more
17 similar two marks are, the more likely consumers
18 are to be confused. And a fact-finder could
19 conclude that that's not the case in a -- in a
20 parody case because the parody, by its nature,
21 is going to be drawing some humorous contrast
22 with the original, and that contrast will itself
23 serve to distinguish the two in the minds of
24 consumers. And -- and I think the Court could
25 make that clear in its opinion.

1 And Petitioner -- Petitioner and the
2 government have a disagreement about how best to
3 read the district court's opinion, whether the
4 district court actually made the legal error
5 that we think the court made. That -- that's
6 really a question for the Ninth Circuit to
7 resolve.

8 JUSTICE GORSUCH: Let me -- let me see
9 if I have it, okay?

10 MR. GUARNIERI: Certainly.

11 JUSTICE GORSUCH: And I may not. But
12 that the similarity of the marks was a great
13 emphasis in the district court's opinion and
14 perhaps too much, to the point where there are
15 some parodies in which the marks are going to be
16 very similar, but everybody or most everybody or
17 a reasonable person -- and I guess the question
18 is which of those -- would understand that the
19 whole point of the joke is that it isn't the
20 trademark holder's product, it's somebody
21 else's.

22 MR. GUARNIERI: Yes, Justice Gorsuch.
23 I think that's exactly right.

24 JUSTICE GORSUCH: Okay.

25 JUSTICE KAGAN: Mr. Guarnieri, going

1 --

2 JUSTICE ALITO: Well, which of those
3 is it, some percentage or a reasonable person?

4 MR. GUARNIERI: It's an appreciable
5 number of ordinary consumers exercising ordinary
6 care. That's a longstanding standard. It's
7 derived from this Court's cases that predated
8 the Lanham Act.

9 JUSTICE ALITO: And what about the
10 fact that a lot of people surveyed may think
11 that as a matter of law, it was necessary to get
12 the approval of the mark holder?

13 MR. GUARNIERI: Well, that's a hard
14 case. It's a hard question. There are, you
15 know, certainly some amici supporting Respondent
16 who say that that's a kind of legal mistake that
17 should just be dismissed in the
18 likelihood-of-confusion analysis.

19 I think that's hard to say because the
20 Lanham Act itself -- one theory of trademark
21 infringement is that consumers are confused
22 about whether the mark holder has granted its
23 permission to use its marks, that is, whether it
24 has granted legal permission to the allegedly
25 infringing junior mark. If the surveyed

1 consumers think, yeah, you couldn't do this
2 without getting Jack Daniel's permission, I
3 think that's -- that's evidence of likelihood of
4 confusion in -- now I will say --

5 JUSTICE KAGAN: If I --

6 MR. GUARNIERI: -- just to step back a
7 second --

8 JUSTICE KAGAN: -- could --

9 MR. GUARNIERI: -- surveys are just --
10 I mean, it's one piece of the puzzle here, but
11 it's not the whole thing. They are meant to be
12 an approximation of consumer perceptions in the
13 marketplace.

14 JUSTICE KAGAN: The point is that
15 these surveys are expensive and they're in a
16 test that is a multifactor test which is
17 confusing, which doesn't provide a lot of
18 guidance in particular situations. It's an
19 extremely kind of expensive litigation to go
20 through.

21 So, when you look at these
22 hypotheticals that were given to you, whether
23 they're political or whether they're artistic
24 speech, and your first-line defense of this and,
25 as I conceive it, your second- and third-line

1 defense too, is don't worry, you'll win on
2 likelihood of confusion, I think that what this
3 Rogers test is all about is to say that there
4 are some things, the political hypotheticals,
5 the artistic speech hypotheticals, that
6 shouldn't have to go through this whole analysis
7 and that we can get rid of in the first instance
8 on a motion to dismiss without surveys, without
9 a lot of fuss and bother.

10 MR. GUARNIERI: Well, Justice Kagan,
11 you -- you can adjudicate a trademark
12 infringement suit on a motion to dismiss at the
13 12(b)(6) stage if the allegations in the
14 complaint do not plausibly allege infringement,
15 if they do not plausibly allege a likelihood of
16 consumer confusion. That's the ordinary
17 standard that applies in every other context in
18 federal litigation. It is --

19 JUSTICE KAGAN: Well, every other
20 context in federal litigation doesn't involve
21 the kinds of clearly First Amendment-protected
22 speech that these hypotheticals are about.

23 So the point of these hypotheticals is
24 to say that every other context in litigation
25 really doesn't cut it when you're talking about

1 protected political and artistic speech.

2 MR. GUARNIERI: Well, if you were to
3 raise -- in any other context, if you were the
4 defendant in one of these cases in a
5 non-trademark case and you were, you know, the
6 subject of a statutory claim and you wanted to
7 raise as a defense that the First Amendment
8 protected your contact -- your conduct, you
9 would have to litigate that defense. You don't
10 get a special off-ramp at the beginning of the
11 litigation just because it might be expensive to
12 litigate the defense that you'd like to raise.

13 And I think, in general, the costs of
14 litigating a trademark infringement suit are not
15 a compelling reason to displace the statutory
16 standard with this Rogers standard that is not
17 itself based in trademark law or, indeed, based
18 in, you know, established First Amendment
19 principles.

20 The other thing I would point out, I
21 mean, I take the point in some of the briefing
22 on the other side that, you know, there is a
23 possibility or a threat of abusive litigation
24 tactics that could -- could show legitimate
25 non-confusing uses of marks. And I think the

1 Congress already addressed that concern to some
2 extent by providing for fee-shifting in the
3 Lanham Act, which is itself an unusual feature
4 in -- in federal law. In an appropriate case, a
5 district court that, you know, found that a case
6 was brought in bad faith to chill speech that is
7 not confusing, you could award attorneys' fees,
8 and that serves as a deterrent to some extent.

9 JUSTICE ALITO: Some of the
10 hypotheticals and actual cases that are
11 highlighted in the briefing in this case do seem
12 to me to present serious First Amendment issues.
13 And you seem not to be very concerned about the
14 free speech implications of the position that
15 you're taking.

16 Here's another example. This is a
17 real-life example in one of the briefs. There's
18 a college, I won't say what it was, let's say
19 it's ABC College, and a professor -- and there's
20 a website called ABC -- has ABC in it, and it's
21 -- it is dedicated to criticism of the college
22 for corruption and mismanagement. And the
23 college brings suit, claiming that that's an
24 infringement of the mark.

25 MR. GUARNIERI: Well, it's very

1 difficult to imagine in a case like that that an
2 ordinary consumer exercising ordinary care would
3 be confused about whether this website that is
4 highly critical of the college -- whether the
5 college was the source of that website or
6 otherwise sponsored or approved it. So I -- I
7 think the likelihood of confusion --

8 JUSTICE ALITO: And you think that
9 could be dismissed under 12(b)(6) --

10 MR. GUARNIERI: Well --

11 JUSTICE ALITO: -- if they plead that
12 there was a likelihood of confusion?

13 MR. GUARNIERI: -- you'd have to know
14 more about the complaint and -- and you'd
15 have -- the fact-finder would have to be making
16 a judgment about whether the allegations of
17 confusion are plausible.

18 I mean, that -- that's -- I think that
19 you do have some cases that are dismissed at the
20 12(b)(6) stage in this area, so it's not
21 impossible, but, you know, again, I mean, I
22 think the likelihood-of-confusion standard can
23 capture that -- that case.

24 And -- and, indeed, I don't take a lot
25 of the amici who favor Rogers to be saying that

1 the cases would really come out differently.
2 The -- the claim is just that they don't want to
3 have to go through the process of demonstrating
4 that consumer confusion is not likely, and --
5 and I don't think that itself is a sufficient
6 basis for maintaining Rogers.

7 CHIEF JUSTICE ROBERTS: Thank you,
8 counsel.

9 Justice Thomas?

10 Justice Kavanaugh?

11 Justice Barrett?

12 Oh, I'm sorry. Justice Jackson?

13 Mr. Cooper?

14 ORAL ARGUMENT OF BENNETT E. COOPER

15 ON BEHALF OF THE RESPONDENT

16 MR. COOPER: Mr. Chief Justice, and
17 may it please the Court:

18 In our popular culture, iconic brands
19 are another kind of celebrity. People are
20 constitutionally entitled to talk about
21 celebrities and, yes, even make fun of them.

22 Jack Daniel's advertised in its
23 self-serious way that Jack is everyone's friend,
24 and Bad Spaniels is a parody playful in
25 comparing Jack to man's other best friend.

1 It's clear in this case that what
2 Jack Daniel's is complaining about is not Bad
3 Spaniels as a designation of source. They're
4 complaining about the speech, the parody, the
5 comparison to dog poop and a Bad Spaniel, not
6 the mark.

7 Parodies on noncompetitive goods like
8 Bad Spaniels aren't likely to cause confusion as
9 to source or approval. As this Court recognized
10 quite properly in Campbell, companies simply do
11 not license lampoons of their own products.

12 The circuits developed the Rogers test
13 to protect expressive works generally. And it
14 keeps the thread of extended litigation from
15 silencing speech. That's particularly true when
16 well-heeled celebrities go after parodists.

17 The Solicitor General agrees that the
18 general multifactor test that is usually applied
19 does not work for parodies and that the district
20 court misapplied the factors here.

21 More broadly, a test that convicts
22 pure parodic speech like Mutant of Omaha Nuclear
23 Holocaust Insurance or Michelob Oily in a humor
24 magazine is broken. A test that requires
25 significant resources to vindicate obvious

1 parodies like Wal-Qaeda or Walocaust or Chewy
2 Vuiton is simply the wrong tool for the job.

3 If the Court is inclined toward the
4 Solicitor General's position, the Court should
5 provide more guidance to lower courts than
6 simply, hey, keep that it's a parody in mind,
7 because the burden of litigating the irrelevant
8 or inverted factors itself chills speech.

9 Stripping out those factors, a more
10 focused version of the general test would ask
11 three questions: One, can the Court reasonably
12 perceive the product's parodic character?
13 That's taken from Campbell.

14 Two, what is the proximity and
15 competitiveness of the party's goods? That's
16 taken from the standard test.

17 And third, does the parody otherwise
18 fail to differentiate itself from the parodied
19 mark? This test protects speech while denying a
20 free pass to knock off the counterfeits.

21 But, fundamentally, the First
22 Amendment is not a game show where the result is
23 survey says I'm confused, stop talking.

24 I welcome your questions.

25 JUSTICE THOMAS: So is your concern --

1 are you as much concerned about the test itself
2 or the location of the test? So what if your
3 test and the factors that are concerning you are
4 rolled into the multifactor test?

5 MR. COOPER: Your Honor, the -- the --
6 I think the Rogers test, if I understand your
7 question --

8 JUSTICE THOMAS: Yes. And --

9 MR. COOPER: -- the Rogers test is a
10 simpler way of addressing --

11 JUSTICE THOMAS: Well, I understand
12 that. But what I'm trying to get -- I'm trying
13 to understand is whether or not you are more
14 concerned about the fact that Rogers preempts
15 the Lanham Act multifactor approach up front as
16 opposed to your having the exact same test but
17 at the multifactor stage.

18 MR. COOPER: Your Honor, we think that
19 the Rogers test functions best as a screen that
20 takes out all the expressive works at the
21 beginning so you never have to get there.

22 JUSTICE THOMAS: So, in other words,
23 you -- your -- you prefer the Rogers test
24 because it precludes the application of the full
25 Lanham test?

1 MR. COOPER: Well, at -- at least the
2 multifactor test as that's conceived of --

3 JUSTICE THOMAS: Yes.

4 MR. COOPER: -- as a application.

5 JUSTICE THOMAS: Yeah, I --

6 MR. COOPER: Yes, because the
7 multifactor test, as -- as this Court recognized
8 in Wisconsin Right to Life, that kind of
9 rough-and-tumble open-ended inquiry itself
10 chills speech --

11 JUSTICE THOMAS: So now, with that,
12 what is your best textual hook for Rogers and
13 for the off-ramp that you're proposing and that
14 the Ninth Circuit applied?

15 MR. COOPER: We -- we think that
16 the -- the -- the broad standard of likely to
17 confuse or perceive is fine. There is an entire
18 edifice built under the Lanham Act to try to
19 reconcile that with First Amendment text,
20 whether it's fair use doctrines, which are
21 nonstatutory, whether it's nominative fair use,
22 whether it's the Rogers test.

23 There are ways of meshing that and
24 understanding that the text does not provide a
25 standard for -- for the quantum or the mechanism

1 or the means of causing confusion or identify
2 what kind of confusion that's --

3 JUSTICE THOMAS: Well, but -- but the
4 Rogers test doesn't seem to have its roots in
5 First Amendment jurisprudence, though.

6 MR. COOPER: Well, I think one has to
7 differentiate the Rogers test as it was
8 originally formulated. And I agree that it's
9 not the most well-phrased test in terms of
10 artistic relevance.

11 I think the intellectual --
12 intellectual law -- law professors brief in
13 support of neither is -- kind of approaches a
14 more accurate test to say not is it artistically
15 relevant but is it a gratuitous use for the
16 message.

17 So, as long as there's a connection,
18 it's not just throwing on a funny trademark that
19 has nothing to do with the rest of the good,
20 then that has significant relevance.

21 And I think, as applied in the parody
22 case, parody's an easy case because of the
23 nature of parodies in both saying I'm the
24 original, but I'm also not the original.

25 JUSTICE JACKSON: Can I ask you,

1 you -- you said that Rogers screens out
2 expressive works, and I think part of the
3 problem that I'm struggling with is all of the
4 uncertainty we have as to whether or not
5 something is sufficiently expressive, and
6 that -- that seems to be where there's a lot of
7 problems in the administrability of the Rogers
8 test.

9 So let me -- let me ask you one
10 question, which is, is it your view that
11 expressive works can never confuse as to source
12 or origin? Because, if an expressive work can,
13 I don't understand why it would be entitled to
14 be screened out.

15 MR. COOPER: I think it's highly
16 unlikely that, and, in fact, I haven't seen an
17 example, where you could have an expressive work
18 that was likely to confuse if it was not
19 otherwise explicitly misleading.

20 JUSTICE JACKSON: Well, what about --
21 what about the hypothetical of this very
22 scenario? So let's say VIP made a dog toy that
23 was the exact size, shape, and color of a
24 Jack Daniel's bottle. They called it Bad
25 Spaniels, but the label is identical and

1 everything is the same, and there we have it.

2 Are you saying that that scenario is
3 one in which you would still claim entitlement
4 to expressive screening out? In other words,
5 would -- if we know that these things are, you
6 know, basically identical except one says
7 Jack Daniel's and the other says -- or -- or
8 let's -- let's do it this way. What if it says
9 Jack Daniel's? That's an easier hypothetical.
10 The -- the Chewy dog toy says Jack Daniel's and
11 it's --

12 MR. COOPER: It is that --

13 JUSTICE JACKSON: -- the same color,
14 size, shape, and everything.

15 MR. COOPER: It is easy because we
16 would consider that to be explicitly misleading.
17 The parody here, though, is not putting Jack
18 Daniel's on a dog toy. There's far more to it.
19 And there is in this case --

20 JUSTICE KAGAN: Well, what is there to
21 it? What is the parody here?

22 MR. COOPER: The parody?

23 JUSTICE KAGAN: Yeah.

24 MR. COOPER: The parody is of --

25 JUSTICE KAGAN: Because maybe I just

1 have no sense of humor, but --

2 (Laughter.)

3 JUSTICE KAGAN: -- what's the parody?

4 MR. COOPER: The parody is multifold.
5 The -- the -- the testimony indicates, and it's
6 not been disputed, that the parody is to make
7 fun of marks that take themselves seriously.

8 JUSTICE KAGAN: Well, I mean, you say
9 that, but you -- you know, you make fun of a lot
10 of marks: Doggie Walker, Dos Perros, Smella R
11 Paw, Canine Cola, Mountain Drool. Are all of
12 these companies taking themselves too seriously?

13 MR. COOPER: Yes. In fact, you don't
14 see a parody as -- as a bourbon --

15 (Laughter.)

16 JUSTICE KAGAN: I mean, just like soft
17 drinks and liquor --

18 MR. COOPER: And -- and I would say
19 all --

20 JUSTICE KAGAN: -- companies take
21 themselves too seriously as a class?

22 MR. COOPER: I think there are a lot
23 of products that take them too seriously --
24 seriously and merchandise. You don't see, for
25 example, something near and dear to my heart, a

1 parody of Woodford Reserve bourbon because you
2 don't get that building up of an edifice of
3 making them into an iconic -- a cultural icon
4 and reference point.

5 When you advertise on TV incessantly
6 and you create this image of yourself as
7 something that's so important --

8 JUSTICE KAGAN: So you're just saying
9 anytime you go out after or you use the mark of
10 a large company, it's a parody just by
11 definition?

12 MR. COOPER: Well --

13 JUSTICE KAGAN: Because they must
14 be -- they must take themselves too seriously
15 because they're a big company.

16 MR. COOPER: I -- I think, as applied
17 here, there's no doubt that Jack Daniel's takes
18 itself very seriously.

19 JUSTICE KAGAN: Well, I don't know. I
20 don't think Stella Artois takes itself very
21 seriously.

22 MR. COOPER: And they would --

23 JUSTICE KAGAN: They have very funny
24 commercials.

25 MR. COOPER: Yeah, and I've seen their

1 historical commercials, and they would on our
2 parody too. But Jack Daniel's would be head of
3 the line.

4 JUSTICE KAGAN: I mean, this is --
5 (Laughter.)

6 JUSTICE KAGAN: Okay. I've made my
7 point.

8 MR. COOPER: No, and I -- I think --

9 JUSTICE GORSUCH: Counsel -- counsel,
10 I think the point has been made.

11 (Laughter.)

12 JUSTICE GORSUCH: I just have a
13 slightly different question.

14 So you -- with respect to Rogers
15 itself, you -- you've said the artistic
16 expressiveness isn't quite right. And -- and --
17 and you'd agree that judges would make for
18 pretty lousy art critics, I assume.

19 MR. COOPER: That's correct.

20 JUSTICE GORSUCH: Okay.

21 MR. COOPER: So do lawyers of all
22 kinds.

23 JUSTICE GORSUCH: Thank you.
24 Appreciate that.

25 The other part is this "explicitly

1 misleading" prong, and our First Amendment
2 doesn't -- doesn't protect speech that is
3 misleading often or it doesn't give it the same
4 protection always. And it -- I'm not sure where
5 "explicitly" comes from as opposed to
6 "implicitly misleading." That would also seem
7 to have different First Amendment implications.

8 So why is -- where -- where does that
9 come from?

10 MR. COOPER: The problem of artistic
11 use, Your Honor, or any kind of expressive
12 use --

13 JUSTICE GORSUCH: Well, we've already
14 put that aside.

15 MR. COOPER: Right. No, the problem
16 of any --

17 JUSTICE GORSUCH: So the "explicitly
18 misleading" portion --

19 MR. COOPER: Right.

20 JUSTICE GORSUCH: -- why "explicitly"?

21 MR. COOPER. Well, here's the problem,
22 is that, first of all, "explicitly misleading"
23 is a way of identifying a mechanism of
24 confusion, so it's consistent with the statute.

25 JUSTICE GORSUCH: Oh, so we're back at

1 -- so it's confusion then that's --

2 MR. COOPER: Well --

3 JUSTICE GORSUCH: -- the relevant
4 standard?

5 MR. COOPER: -- confusion caused by an
6 explicitly misleading form.

7 JUSTICE GORSUCH: But confusion is the
8 right standard?

9 MR. COOPER: Well, it factors into the
10 Rogers test. Yes.

11 JUSTICE GORSUCH: It factors into the
12 -- the statutory standard factors into --

13 MR. COOPER: It is part.

14 JUSTICE GORSUCH: -- the Rogers test
15 --

16 MR. COOPER: Yes.

17 JUSTICE GORSUCH: -- through the
18 explicitly misleading portion?

19 MR. COOPER: Yes, it brings -- as
20 we've argued in our brief, it brings the
21 confusion standard in.

22 JUSTICE GORSUCH: Okay. I -- I -- I
23 think I understand.

24 MR. COOPER: Okay:

25 JUSTICE GORSUCH: You -- you had a

1 three-part test that was -- you started with --

2 MR. COOPER: Yes.

3 JUSTICE GORSUCH: -- at the beginning
4 that's different from the Rogers test.

5 MR. COOPER: Yes, it is. It's an
6 alternative based on -- that's derived more from
7 the multifactor test if you strip out the
8 inverted or irrelevant factors --

9 JUSTICE GORSUCH: Right.

10 MR. COOPER: -- in the case of parody.

11 JUSTICE GORSUCH: Okay. And those are
12 things that are grounded in the statute and its
13 -- and its traditional interpretations?

14 MR. COOPER: Grounded in the statute
15 and in this Court's recognition in Campbell --

16 JUSTICE GORSUCH: Yeah.

17 MR. COOPER: -- the reality of
18 parodies, that people don't license lampoons of
19 their own products.

20 JUSTICE GORSUCH: Would you be okay
21 with that?

22 MR. COOPER: I -- I think --

23 JUSTICE GORSUCH: I mean, you -- you
24 argued for it in your opening, so I assume --

25 MR. COOPER: Yes.

1 JUSTICE GORSUCH: -- the answer is
2 yes.

3 MR. COOPER: I -- I think it -- it --
4 for parodies, it approaches the Rogers test as a
5 means to protect speech while not denying a free
6 pass to knockoffs and counterfeits.

7 JUSTICE GORSUCH: Okay. Thank you.

8 JUSTICE SOTOMAYOR: I've been confused
9 by your allegation in your complaint that Bad
10 Spaniels' trademark and trade dress, that you're
11 the owner of it. Can I stop -- the only
12 trademark I see on your product is on the Silly
13 Squeakers. That's --

14 MR. COOPER: Right.

15 JUSTICE SOTOMAYOR: -- the source,
16 Silly Squeakers, correct?

17 MR. COOPER: Yes.

18 JUSTICE SOTOMAYOR: That's the
19 trademark?

20 MR. COOPER: That is the actual
21 trademark.

22 JUSTICE SOTOMAYOR: And that's the
23 only thing that has an "R" on it.

24 MR. COOPER: Right. Or a "TM."

25 JUSTICE SOTOMAYOR: Okay. I'm not

1 sure how you're calling Bad Spaniels a trademark

2 --

3 MR. COOPER: We --

4 JUSTICE SOTOMAYOR: -- or why you're
5 calling how the bottle -- which you admit is the
6 Jack Daniel's trade dress because it's -- it's a
7 unique square bottle -- how you can claim it as
8 your own.

9 MR. COOPER: We're not, Your Honor,
10 but Jack Daniel's is claiming that we are using
11 that as a trademark. We're simply --

12 JUSTICE SOTOMAYOR: So why did your
13 complaint said -- say that you are the owner of
14 all rights in Bad Spaniels' trademark and trade
15 dress?

16 MR. COOPER: Your Honor, it's a form
17 allegation of legal ownership, which is a
18 conclusion. It's not, under Ninth Circuit
19 precedent, any kind of judicial admission.

20 What we were just saying, in the kind
21 of rote way you do in complaints, that we own --
22 we're Bad Spaniels. And so the question is --

23 JUSTICE SOTOMAYOR: You're not Bad
24 Spaniels; you're Silly Squeakers?

25 MR. COOPER: We're Silly -- as a

1 designation of source on the product. But, in
2 terms of identifying the --

3 JUSTICE SOTOMAYOR: Okay. I mean,
4 every designer of products that puts their trade
5 name on it -- name any famous designer -- they
6 have a logo that symbolizes them, they give each
7 design a different name. That's what you do.
8 Bad Spaniels is one among many other names
9 Justice Kagan --

10 MR. COOPER: That's right. We -- we
11 have argued throughout the case, in the district
12 court and in the court of appeals, that neither
13 Bad Spaniels nor the label and the appearance on
14 the -- on the toy are designations of source or
15 function as a trademark.

16 JUSTICE ALITO: But some of your other
17 toys are registered trademarks, aren't they?
18 Doggie Walker is registered.

19 MR. COOPER: It --

20 JUSTICE ALITO: Dos -- Dos Perros is
21 registered?

22 MR. COOPER: Only the standard
23 character mark, what used to be called the type
24 mark, only that name, not the parodic image.
25 And Jack Daniel's has made clear in this case

1 that they don't consider Bad Spaniels to be
2 infringing. It's the totality of the whole
3 look. In fact, in their confusion survey, they
4 used Bad Spaniels and the dog head as it appears
5 on the hangtag of the product as their control
6 sample.

7 JUSTICE ALITO: Did you agree with the
8 suggestion that the First Amendment does not
9 protect speech that is misleading?

10 MR. COOPER: Well --

11 JUSTICE ALITO: We wouldn't have very
12 much speech in this country if that were the
13 case.

14 (Laughter.)

15 MR. COOPER: I -- I -- I think that's
16 an overbroad statement of the law.

17 JUSTICE ALITO: And the Court held
18 that it -- it protects speech that is
19 demonstrably false in -- in Alvarez, didn't it?

20 MR. COOPER: Well, in fact, because
21 people were not relying or going to be misled,
22 something approaching fraud. In this case,
23 there's no evidence that anyone would buy the
24 Bad Spaniels toy believing that it either came
25 from Jack Daniel's or Jack Daniel's sponsored it

1 in the way that, you know, McDonald's sponsored
2 something that actually comes from its
3 franchisees. That's what the real --

4 JUSTICE JACKSON: So why isn't that
5 the threshold test? Why -- why don't we just
6 ask that at the beginning of all of this? With
7 respect to any argument about trademark in this
8 way, why don't we ask, would a customer, you
9 know, mistakenly believe that this thing came
10 from Jack Daniel's, was sponsored by
11 Jack Daniel's? Why do we need a Rogers test
12 that is importing, you know, these other kinds
13 of criteria that don't seem to be grounded
14 directly in -- in -- in the statute?

15 MR. COOPER: Because the methods in
16 which in a commercial case with parties that
17 should be operating entirely at arm's length, we
18 determine whether someone would reasonably
19 believe that there was a claim of origin or a
20 claim of sponsorship or a representation.

21 JUSTICE JACKSON: Exactly. I'm just
22 saying, so why isn't that the question at the
23 beginning?

24 MR. COOPER: Because it's so difficult
25 and so subject to misapplication in expressive

1 works, including parodies, that the standard
2 method --

3 JUSTICE JACKSON: But you said
4 parodies are clear. Parodies are the
5 paradigmatic easy answer to that question.

6 MR. COOPER: We agree, Your Honor. We
7 agree that this should have been a case
8 susceptible of resolution by a motion to dismiss
9 or a motion for summary judgment because no one
10 looking at this toy could possibly believe --

11 JUSTICE JACKSON: And it wasn't
12 precisely because we have a Rogers test that I
13 think is confusing people into doing other
14 things.

15 MR. COOPER: No, the district court
16 threw away the Rogers test and applied the
17 multifactor test and got it wrong.

18 JUSTICE GORSUCH: Well, what if --
19 what if -- what if -- what if we did remand this
20 case, as the Solicitor General suggests, and say
21 we're not sure where this Rogers thing comes
22 from, but we do think that the district court
23 may not have given adequate weight to the fact
24 that this is a parody and the proximity and the
25 -- and the differences in the label in its

1 analysis? Would -- would -- would you have any
2 objection to that?

3 MR. COOPER: Yes, Your Honor, because
4 the problem --

5 JUSTICE GORSUCH: Most -- most lawyers
6 don't stand at the lectern and -- and oppose a
7 win, but I'm -- I'm --

8 MR. COOPER: No, no.

9 (Laughter.)

10 JUSTICE GORSUCH: This will be
11 interesting.

12 MR. COOPER: I would prefer more of a
13 landslide win than --

14 JUSTICE GORSUCH: Oh.

15 (Laughter.)

16 MR. COOPER: And -- and -- and
17 something also that is --

18 JUSTICE GORSUCH: Fair enough. Who
19 wouldn't?

20 MR. COOPER: And some -- and something
21 that also in future cases would provide clearer
22 guidance from saying consider how parody plays
23 into it.

24 The problem is -- and I say this --
25 before I was an appellate lawyer, I was a

1 trademark lawyer -- when you have to litigate
2 six, seven, eight, nine, ten factors --

3 JUSTICE GORSUCH: Well -- well --

4 MR. COOPER: -- and you have to --

5 JUSTICE GORSUCH: Oh, if we're going
6 to talk about factors, you're asking us to put
7 more factors into the equation, not fewer, and
8 some that aren't in the statute, and it's an
9 antecedent door that has to be opened before you
10 can get to the statute.

11 MR. COOPER: I think -- first of all,
12 I think I've gotten it down to three factors
13 here. And I think there are things that --

14 JUSTICE GORSUCH: Well, but those --
15 those you say are in the statute. I'm talking
16 about the Rogers factors, artistic relevance,
17 we're lousy art critics and all that sort of
18 thing, has to be done before we even get to
19 those.

20 MR. COOPER: I -- I -- I think the
21 word "artistic" could be stricken from the copy
22 of Rogers. I think it's really a matter of
23 relevance rather than artistic relevance. It's
24 not -- and I think, in practice, it has not
25 proven a test that is difficult to apply on a

1 fair and reasonable basis. And courts have been
2 able to distinguish, for example, in the
3 Harley-Davidson case, someone just using a mark
4 and claiming Rogers and saying, no, there --
5 there's no -- there's no message here, there's
6 nothing here.

7 JUSTICE GORSUCH: You'd take as a
8 second best the win?

9 MR. COOPER: I would -- I would take a
10 second -- well, we'd like a win under any
11 circumstances, but I'll take it under the second
12 best. But what -- what's --

13 JUSTICE KAGAN: Mr. --

14 MR. COOPER: -- I think --

15 JUSTICE KAGAN: I'm sorry. Go ahead.

16 MR. COOPER: No, no, what's critically
17 important, Your Honors, is that whatever the
18 test is, it's something that in this case or
19 other cases can be applied simply and fairly and
20 without spending people who are -- as parodists,
21 are punching up --

22 JUSTICE KAGAN: So --

23 MR. COOPER: -- in every case.

24 JUSTICE KAGAN: -- so, for -- for me,
25 you still have to fight against a loss.

1 MR. COOPER: Okay.

2 JUSTICE KAGAN: So, I mean, whatever
3 the -- whether the Rogers test gets the question
4 exactly right, whether there should be a better
5 test to think about First Amendment issues,
6 you're -- you're sort of out of that, I think.
7 You're sort of leagues away from that. You're
8 -- this is a standard commercial product. This
9 is not a political T-shirt. It's not a film.
10 It's not an artistic photograph. It's nothing
11 of those things. It's a standard commercial
12 product.

13 I don't see the parody, but, you know,
14 whatever.

15 (Laughter.)

16 JUSTICE KAGAN: You're using this as
17 your complaint says, as your registration on the
18 other products say, as the placement of your
19 hangtag says, you're using it as a source
20 identifier.

21 It seems like just not a First
22 Amendment Rogers kind of case, and the First
23 Amendment Rogers kind of case, I think what this
24 argument suggests is, those are hard questions.
25 Why -- why don't you -- why -- I guess the

1 question is why aren't you leagues from Rogers?

2 MR. COOPER: I will agree with
3 Jack Daniel's counsel on one thing. A
4 distinction between utilitarian goods at
5 expressive works is a nonexistent standard.

6 Your Honor gave as an example a
7 T-shirt. T-shirt people buy them in order to
8 not get caught up with public nudity. They are
9 functional, utilitarian goods, but they may also
10 bear a message, whether it's a hat or -- a hat
11 we all know can be become political symbols or a
12 T-shirt or a coffee mug.

13 JUSTICE KAGAN: Okay. A dog toy, I'm
14 just going to say, is a utilitarian good.

15 MR. COOPER: Well --

16 JUSTICE KAGAN: There might be some
17 hard cases. I actually don't think that the
18 political T-shirt is a very hard case. It says
19 something, it's making a point.

20 But dog toys are just utilitarian
21 goods and you're using somebody else's mark as a
22 source identifier, and that's not a First
23 Amendment problem.

24 MR. COOPER: And if we -- Your Honor,
25 if we change the hypothetical and we said, okay,

1 put on the hangtag, not for use with real dogs,
2 and it was sold purely as a collectible, because
3 that's what the testimony was, that this -- they
4 intended that this in part would be a
5 collectible from the graphic designer who worked
6 it up.

7 Then it would not be a utilitarian
8 good, it would be soft sculpture. In copyright
9 terms, it would be an art piece. It doesn't
10 matter whether you use it with your dog or you
11 put it on a shelf, as I plan to do, and laugh at
12 it from time to time. It is still an
13 expression.

14 And what they don't -- what
15 Jack Daniel's is upset about, is not the
16 utilitarian good. They're upset about the
17 speech that's born on it.

18 JUSTICE JACKSON: But it does matter
19 whether you put it on a shelf because the Lanham
20 Act doesn't care about that. If you do -- if
21 put it on a shelf, right, then you're not using
22 it in commerce. You're not shopping it around
23 and potentially confusing people into thinking
24 that Jack Daniel's is selling this. That's the
25 whole heartland of the trademark.

1 MR. COOPER: I -- I'm sorry if I
2 wasn't clear about my hypothetical. If VIP
3 Products sold that toy, not as a toy to be used
4 with a dog, but as soft sculpture for people to
5 buy and put on their shelf to get a good laugh
6 at the joke, which at least some some people
7 get, in fact, that would take away its supposed
8 utilitarian value but it would keep its
9 expressive value, because what people laugh at
10 is not the fact that it's a dog toy, it's the
11 speech on it. And that's what --

12 JUSTICE JACKSON: Would you object if
13 Jack Daniel's was doing that to a test that
14 would say, when you were sued -- I mean, if --
15 if VIP was doing that, to a test that would say
16 is this item being used as a source identifier
17 for this product in a way that would confuse
18 people into thinking that Jack Daniel's was
19 actually sponsoring or it was made by
20 Jack Daniel's or whatever, would you object to
21 that being really the primary question that is
22 being asked?

23 MR. COOPER: Well, that -- that
24 inquiry, Your Honor, does not turn on whether
25 it's being used as a utilitarian good or not.

1 JUSTICE JACKSON: True.

2 MR. COOPER: It doesn't.

3 JUSTICE JACKSON: I'm asking --

4 MR. COOPER: Slightly different.

5 JUSTICE JACKSON: -- something
6 slightly different --

7 MR. COOPER: What the question is
8 whether people perceive -- whether a reasonable,
9 objective reasonable consumer would perceive
10 that this came from Jack Daniels, or --

11 JUSTICE JACKSON: Right, rather
12 than -- rather than does this have artistic
13 value, is it explicitly misleading, all of these
14 other questions, why isn't the question just
15 whether people in looking at this, a reasonable
16 person, et cetera, the way the Lanham Act I
17 understood directs courts to look at, are people
18 confused into believing that Jack Daniels
19 created this, sponsored this, or whatever?

20 MR. COOPER: I think Your Honor could
21 do that. The problem I think that Rogers
22 recognized is, to paraphrase my opposing
23 counsel, but we've got a survey --

24 JUSTICE JACKSON: No, I think --

25 MR. COOPER: And the Rogers court --

1 JUSTICE JACKSON: But I think the
2 problem --

3 MR. COOPER: -- said --

4 JUSTICE JACKSON: Yeah.

5 MR. COOPER: Let me just say --

6 JUSTICE JACKSON: Yeah.

7 MR. COOPER: It's -- a survey and also
8 I think as the Cliff Notes court and other
9 courts have noted that when you're dealing with
10 expressive work, you have to change -- you have
11 to accept a slightly higher degree of confusion.

12 JUSTICE JACKSON: But it sounds like
13 what you're doing is saying, when you're dealing
14 with an expressive work, we get a pass under the
15 Lanham Act. We get to, even though the standard
16 ordinarily for trademark violations in what
17 Congress cared about is people putting things
18 into the marketplace that confuse consumers into
19 believing that the mark -- that it's from the
20 mark holder or sponsored by the mark holder, if
21 it's an expressive thing, then we don't really
22 have to do that.

23 We can put our thing out there.
24 People can be totally confused, but it -- but
25 we -- we -- we didn't just scream First

1 Amendment and we get out of Lanham Act
2 liability. And I don't see that in the statute,
3 and that's what I'm worried about.

4 MR. COOPER: And I don't see that in
5 the First Amendment either. I don't think you
6 have to go that forward to accommodate the
7 First -- free speech considerations in the
8 Lanham Act test.

9 And I think a lot of those cases where
10 people say, oh, we're expressive and we're doing
11 something, the Rogers test -- test itself would
12 address through the application of the prongs,
13 either the use is gratuitous -- just --

14 JUSTICE JACKSON: And you don't think
15 that could be taken care of through the factors
16 in the Lanham Act?

17 MR. COOPER: It could -- it could be
18 --

19 JUSTICE JACKSON: Isn't that the
20 government's position in this case? They say,
21 just do it under the Lanham Act and have -- send
22 it back and have parody taken into account.

23 MR. COOPER: It could, but it won't be
24 unless this Court provides more guidance as to
25 what that means, and that's why we gave that

1 stripped-down version of the test.

2 CHIEF JUSTICE ROBERTS: Justice
3 Thomas?

4 JUSTICE THOMAS: On a separate
5 subject, could you just elaborate a bit on why a
6 product that you -- that you can buy online or
7 at Petco is noncommercial?

8 MR. COOPER: Absolutely, Your Honor.
9 We live in an age where -- and it's actually
10 true in all past stages, everything is for sale.
11 Whether something is sold or not does not make
12 it noncommercial or commercial.

13 In fact, under the Lanham Act's test,
14 under Section 1127 which has definitions, if the
15 test were whether you can buy or sell it, in
16 fact you would have the -- the noncommercial use
17 exclusion would mean you'd have to have
18 something which was not bought and sold in
19 commerce, which is defined as the ordinary
20 course of trade in the statute. So that --
21 that's just an impossibility.

22 And then I think the -- both the
23 legislative history and a textual analysis, 1125
24 and 1127 point to the use as a reference of this
25 Court's commercial speech, noncommercial speech

1 distinction. And that teaches that it's only
2 commercial if it does no more than a proposed
3 transaction.

4 And in this case, the parody is not
5 proposing a transaction of anything because
6 there is no parodic product. There is no bottle
7 of poo. It's simply making a joke and the joke
8 is noncommercial.

9 But that's what the struggle was, I
10 think, in the Ninth Circuit's MCA records case
11 looking back at the legislative history and also
12 the -- the commentary we -- we've submitted to
13 the Court of analyzing what this exclusion
14 purpose was supposed to serve and what the
15 reference was and how it fits with, Supreme --
16 not only this Court's doctrine on noncommercial
17 speech, but also how it fits with the other
18 exclusions.

19 JUSTICE THOMAS: Well, I -- I still
20 don't know what that means, but give me an
21 example of something that is commercial, then.

22 MR. COOPER: Commercial would be an
23 advertisement.

24 JUSTICE THOMAS: No, no, no.
25 Something that is commercial that -- as it sits

1 that is not noncommercial.

2 MR. COOPER: I think an advertisement
3 would be commercial speech, that it proposes a
4 transaction. And so if we were to have
5 something that advertised a product, let's say
6 Bad Spaniels Whiskey and there was an ad for Bad
7 Spaniels Whiskey, that advertisement would be
8 commercial speech.

9 You're proposing a transaction, but
10 that's not what we're doing here. We're not
11 selling a bottle of diluted dog poo which is the
12 subject of the parody that they're complaining
13 about.

14 JUSTICE SOTOMAYOR: The Ninth Circuit
15 and other -- the government is proposing in
16 Petitioner that -- that noncommercial is
17 anything you buy or sell, and you've answered
18 that, but they also make the point that saying
19 that noncommercial is anything that has speech
20 in it is too broad, that that would do away with
21 the exception for parody, and that itself would
22 undermine the trademark dilution definition.

23 You wouldn't even need noncommercial
24 because the definition says that it applies only
25 to the goods that are in commerce, so why would

1 you need the word noncommercial at all?

2 MR. COOPER: Well, you could have a
3 commercial use in commerce, but the real problem
4 is, unless you read those exclusions broadly, as
5 we think is appropriate, you run into the plain
6 fact that dilution by tarnishment is
7 unconstitutional viewpoint discrimination.
8 It's -- you're being enjoined if you tarnish but
9 not if you burnish. It's an end run about --
10 around the definition --

11 JUSTICE SOTOMAYOR: Well, but that
12 might be true if we were talking about a Mattel
13 type case, but we're not. We're talking about a
14 case with many exceptions, including a direct
15 exception for parody. So I'm not sure how it
16 runs into a nonconstitutional First Amendment
17 burden.

18 But the Ninth Circuit and other
19 circuits have relied on our commercial speech
20 doctrine.

21 MR. COOPER: Correct.

22 JUSTICE SOTOMAYOR: And analogize
23 noncommercial to that doctrine. The Ninth
24 Circuit did it for this case.

25 MR. COOPER: Yes. MCA Records was the

1 original case.

2 JUSTICE SOTOMAYOR: So why is that
3 wrong?

4 MR. COOPER: Why is that -- I'm sorry.

5 JUSTICE SOTOMAYOR: Why is that wrong?

6 MR. COOPER: It's not wrong --

7 JUSTICE SOTOMAYOR: I mean, I --

8 MR. COOPER: I think it's the
9 appropriate interpretation to compare it to
10 the --

11 JUSTICE SOTOMAYOR: But this would not
12 under our non- -- on -- on our commercial speech
13 doctrine, this would still be commerce.

14 MR. COOPER: It would not be a
15 commercial use, because the parody is doing more
16 than proposing a transaction. It's not even
17 proposing --

18 JUSTICE SOTOMAYOR: It's doing both,
19 counselor.

20 MR. COOPER: I'm sorry?

21 JUSTICE SOTOMAYOR: You want people to
22 buy this product because of the parody.

23 MR. COOPER: That's not the test.

24 JUSTICE SOTOMAYOR: I mean, I've
25 seen -- I -- I -- I'm exaggerating only

1 slightly -- I've seen thousands of dog toys in
2 the market and you pick based on something
3 uniquely funny about a particular toy.

4 MR. COOPER: That's correct, but
5 that's not the test.

6 JUSTICE SOTOMAYOR: So that's
7 proposing -- you're proposing a transaction.

8 MR. COOPER: Any product you sell
9 proposes a transaction -- proposes a transaction
10 in the sense that it's an appealing product, but
11 that's not what the test is. That's -- it's not
12 --

13 JUSTICE SOTOMAYOR: Thank you,
14 counsel.

15 MR. COOPER: Thank you.

16 CHIEF JUSTICE ROBERTS: Justice Alito,
17 anything further?

18 Justice Sotomayor? No?

19 Justice Kagan?

20 Justice Gorsuch?

21 Justice Jackson? Okay.

22 Thank you, counsel.

23 MR. COOPER: Thank you, Your Honor.

24 CHIEF JUSTICE ROBERTS: Ms. Blatt,
25 rebuttal?

1 REBUTTAL ARGUMENT OF LISA S. BLATT

2 ON BEHALF OF THE PETITIONER

3 MS. BLATT: Thank you, Mr. Chief

4 Justice.

5 Justice Alito, all trademarks are
6 expressive. They have speech rights. And every
7 time you infringe them, it's going to implicate
8 speech, by definition.

9 And what the other side and I don't
10 hear you guys talking about is the half of
11 speech that no one likes, the pornography and
12 the poison. And it is hard for me to see how
13 you can say that the trademark owner doesn't
14 have an interest in something that approaches
15 compelled speech if their mark has been using in
16 porn films and porn toys and sex toys, and
17 people are profiting off of that.

18 In terms of where we're going with the
19 message versus the product, the T-shirt example
20 -- there's a very entertaining case. The case
21 is on page 25, all rejecting parody, and it
22 involves the Miami Vice T-shirt that's turned
23 into "Miami Mice" T-shirt. Very funny. No one
24 would think it's confusing because they're
25 cartoon mice. And so there are plenty of

1 T-shirts that just don't meet that confusion.
2 The First, Seventh, Tenth, and D.C.
3 Circuit have not adopted Rogers. Twombly and
4 Iqbal, there's a case we cited on page 11 of our
5 brief out of the Seventh Circuit, and it is a
6 case saying it's completely implausible that the
7 "Clean Slate" program and the "Dark Knight"
8 movie could be confused with a Clean Slate
9 software program, and the Court dismissed that
10 on Twombly -- excuse me, at 12(b)(6).

11 As far as I know, Rogers doesn't even
12 get dismissed on 12(b)(6). It goes to summary
13 judgment. So I'm not sure how Rogers helps.

14 In terms of, you know, the -- the
15 disconnect between Justice Jackson and Justice
16 Sotomayor, Justice Jackson is talking about
17 designation of source and Justice Sotomayor is
18 talking about parody. But, of course, those two
19 intersect. You could have a political message
20 on a dog toy. You can put a parody on a
21 T-shirt. You can put a political message on a
22 calendar or -- one man's tchotchke is another
23 man's paperweight. They are both decorative.
24 And -- and then anytime you mention holidays,
25 like Christmas lights, Christmas ornaments,

1 Christmas trees, Halloween costumes, and I
2 mentioned dreidels, menorahs, et cetera. I
3 don't know what that is. It sounds too
4 expressive to me, but they're all utilitarian.

5 Finally -- well, two more points.
6 Justice Thomas, the examples of uses in
7 commerce, which means trade or interstate
8 commerce, sales over state lines, the examples
9 that would not be commercial use are tweets,
10 anything like a TikTok video, so that's social
11 media; any televised campaign speech, campaign
12 buttons, opinion articles, and pamphlets. So
13 those are all goods that move in commerce,
14 noncommercial because they don't involve the
15 buying and selling of goods.

16 Finally, in terms of the remand, we of
17 course want the Court to remand, and we think
18 the issues are preserved. But it is somewhat
19 galling to have the SG's Office come up time and
20 again and don't even mention the PTO's position.
21 They have 30 years of case law that doesn't
22 mention anything they're talking about today,
23 and the government doesn't even mention it in
24 their brief. I think that's unacceptable for
25 them to come up here and say the opposite.

1 Thank you.

2 CHIEF JUSTICE ROBERTS: Thank you,
3 counsel.

4 The case is submitted.

5 (Whereupon, at 11:29 a.m., the case
6 was submitted.)

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