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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Washington, D.C.

Wednesday, March 22, 2023

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

APPEARANCES:

LISA S. BLATT, ESQUIRE, Washington, D.C.; on behalf of the Petitioner.

MATTHEW GUARNIERI, Assistant to the Solicitor General, Department of Justice, Washington, D.C.; for the United States, as amicus curiae, supporting the Petitioner.

BENNETT E. COOPER, ESQUIRE, Phoenix, Arizona; on behalf of the Respondent.

C O N T E N T S

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

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

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

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

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

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

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

I welcome your questions.

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

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

JUSTICE THOMAS: Yeah.

MS. BLATT: -- as to sponsorship --

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

MS. BLATT: Well --

JUSTICE THOMAS: -- likelihood to confuse.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

The end.

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

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

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

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

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

JUSTICE KAGAN: Well, you know --

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

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

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

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

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

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

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

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

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

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

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

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

What's wrong with that?

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

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

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

MS. BLATT: Confusion has --

JUSTICE JACKSON: -- infringement?

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

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

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

MS. BLATT: So let me --

JUSTICE JACKSON: -- the threshold question?

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

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

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

And I know that I'm right about this

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

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

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

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

engaged in --

JUSTICE SOTOMAYOR: Ms. Blatt --

MS. BLATT: -- trademark use.

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

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

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

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

I think it's contextual, and I think

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

MS. BLATT: Yes, absolutely.

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

MS. BLATT: Yeah.

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

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

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

I think they did add something to the

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

MS. BLATT: Artistic relevance?

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

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

MS. BLATT: Of course.

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

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

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

JUSTICE SOTOMAYOR: Takes an animal logo --

MS. BLATT: Animal?

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

MS. BLATT: Oh, elephant.

JUSTICE SOTOMAYOR: Yeah, you know, whatever.

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

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

MS. BLATT: Do you want my answer?

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

MS. BLATT: Okay.

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

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

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

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

(Laughter.)

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

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

MS. BLATT: No, whether --

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

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

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

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

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

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

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

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

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

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

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

So I think what you're --

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

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

MS. BLATT: Yeah. So --

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

MS. BLATT: So -- yeah.

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

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

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

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

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

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

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

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

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

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

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

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

diluting.

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

CHIEF JUSTICE ROBERTS: Thank you, counsel.

Justice Thomas, anything further?

Justice Alito?

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

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

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

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

would -- could be resolved on summary judgment.

JUSTICE ALITO: It would go on summary judgment --

MS. BLATT: Yeah.

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

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

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

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

What about that?

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

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

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

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

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

JUSTICE ALITO: Really?

MS. BLATT: Yes, because --

JUSTICE ALITO: All right. Let me

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

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

JUSTICE ALITO: So a reasonable person would --

MS. BLATT: People make dumb commercials.

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

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

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

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

MS. BLATT: Oh, I thought you --

JUSTICE ALITO: -- this toy.

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

(Laughter.)

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

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

MS. BLATT: I'm sorry.

JUSTICE ALITO: -- which purportedly contains --

MS. BLATT: Oh.

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

MS. BLATT: Oh, I'm sorry.

JUSTICE ALITO: -- or urine.

MS. BLATT: Okay. My bad.

(Laughter.)

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

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

(Laughter.)

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

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

MS. BLATT: Okay. But --

JUSTICE ALITO: -- so don't --

(Laughter.)

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

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

MS. BLATT: Okay.

JUSTICE ALITO: The question is not

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

MS. BLATT: Oh.

JUSTICE ALITO: -- to simplify this whole thing.

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

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

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

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

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

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

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

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

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

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

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

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

had survey cases.

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

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

CHIEF JUSTICE ROBERTS: Anything further, Justice Sotomayor?

Justice Kagan?

Justice Gorsuch?

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

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

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

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

does butt up against the First Amendment.

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

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

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

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

MS. BLATT: I agree.

(Laughter.)

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

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

MS. BLATT: Yeah, okay, fair.

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

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

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

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

MS. BLATT: Yes.

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

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

JUSTICE GORSUCH: Yes.

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

JUSTICE GORSUCH: Thank you.

CHIEF JUSTICE ROBERTS: Justice Kavanaugh?

Justice Barrett?

Justice Jackson?

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

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

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

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

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

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

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

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

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

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

MS. BLATT: No.

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

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

So the -- the arts have flourished --

JUSTICE JACKSON: All right. One last question.

MS. BLATT: Sure.

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

MS. BLATT: Of course.

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

MS. BLATT: Yes.

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

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

JUSTICE JACKSON: All right. Great. Thank you.

CHIEF JUSTICE ROBERTS: Thank you, counsel.

Mr. Guarnieri?

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

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

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

JUSTICE SOTOMAYOR: I said either political party.

(Laughter.)

MR. GUARNIERI: Excuse me, Justice Sotomayor.

JUSTICE SOTOMAYOR: Let's be clear.

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

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

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

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

I welcome the Court's questions.

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

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

First, as -- as applied by the Ninth

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

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

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

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

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

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

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

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

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

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

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

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

JUSTICE SOTOMAYOR: Well, that begs my question.

MR. GUARNIERI: Sure.

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

MR. GUARNIERI: Well, I -- I think

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

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

JUSTICE KAGAN: I think, Mr. --

JUSTICE SOTOMAYOR: Fiction.

JUSTICE KAGAN: I -- I'm sorry.

JUSTICE SOTOMAYOR: Go ahead.

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

JUSTICE GORSUCH: Counsel, I --

CHIEF JUSTICE ROBERTS: Counsel, if --

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

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

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

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

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

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

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

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

that?

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

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

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

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

MR. GUARNIERI: Certainly.

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

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

JUSTICE GORSUCH: Okay.

JUSTICE KAGAN: Mr. Guarnieri, going

--

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

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

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

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

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

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

JUSTICE KAGAN: If I --

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

JUSTICE KAGAN: -- could --

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

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

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

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

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

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

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

protected political and artistic speech.

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

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

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

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

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

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

MR. GUARNIERI: Well, it's very

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

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

MR. GUARNIERI: Well --

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

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

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

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

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

CHIEF JUSTICE ROBERTS: Thank you, counsel.

Justice Thomas?

Justice Kavanaugh?

Justice Barrett?

Oh, I'm sorry. Justice Jackson?

Mr. Cooper?

ORAL ARGUMENT OF BENNETT E. COOPER

ON BEHALF OF THE RESPONDENT

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

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

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

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

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

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

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

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

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

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

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

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

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

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

I welcome your questions.

JUSTICE THOMAS: So is your concern --

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

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

JUSTICE THOMAS: Yes. And --

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

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

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

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

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

JUSTICE THOMAS: Yes.

MR. COOPER: -- as a application.

JUSTICE THOMAS: Yeah, I --

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

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

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

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

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

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

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

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

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

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

JUSTICE JACKSON: Can I ask you,

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

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

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

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

everything is the same, and there we have it.

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

MR. COOPER: It is that --

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

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

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

MR. COOPER: The parody?

JUSTICE KAGAN: Yeah.

MR. COOPER: The parody is of --

JUSTICE KAGAN: Because maybe I just

have no sense of humor, but --

(Laughter.)

JUSTICE KAGAN: -- what's the parody?

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

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

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

(Laughter.)

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

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

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

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

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

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

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

MR. COOPER: Well --

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

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

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

MR. COOPER: And they would --

JUSTICE KAGAN: They have very funny commercials.

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

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

JUSTICE KAGAN: I mean, this is --

(Laughter.)

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

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

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

(Laughter.)

JUSTICE GORSUCH: I just have a slightly different question.

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

MR. COOPER: That's correct.

JUSTICE GORSUCH: Okay.

MR. COOPER: So do lawyers of all kinds.

JUSTICE GORSUCH: Thank you. Appreciate that.

The other part is this "explicitly

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

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

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

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

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

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

MR. COOPER: Right.

JUSTICE GORSUCH: -- why "explicitly"?

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

JUSTICE GORSUCH: Oh, so we're back at

-- so it's confusion then that's --
MR. COOPER: Well --
JUSTICE GORSUCH: -- the relevant standard?
MR. COOPER: -- confusion caused by an explicitly misleading form.
JUSTICE GORSUCH: But confusion is the right standard?
MR. COOPER: Well, it factors into the Rogers test. Yes.
JUSTICE GORSUCH: It factors into the -- the statutory standard factors into --
MR. COOPER: It is part.
JUSTICE GORSUCH: -- the Rogers test --
MR. COOPER: Yes.
JUSTICE GORSUCH: -- through the explicitly misleading portion?
MR. COOPER: Yes, it brings -- as we've argued in our brief, it brings the confusion standard in.
JUSTICE GORSUCH: Okay. I -- I -- I think I understand.
MR. COOPER: Okay:
JUSTICE GORSUCH: You -- you had a

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

MR. COOPER: Yes.

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

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

JUSTICE GORSUCH: Right.

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

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

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

JUSTICE GORSUCH: Yeah.

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

JUSTICE GORSUCH: Would you be okay with that?

MR. COOPER: I -- I think --

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

MR. COOPER: Yes.

JUSTICE GORSUCH: -- the answer is yes.

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

JUSTICE GORSUCH: Okay. Thank you.

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

MR. COOPER: Right.

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

MR. COOPER: Yes.

JUSTICE SOTOMAYOR: That's the trademark?

MR. COOPER: That is the actual trademark.

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

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

JUSTICE SOTOMAYOR: Okay. I'm not

sure how you're calling Bad Spaniels a trademark --

MR. COOPER: We --

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

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

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

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

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

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

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

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

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

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

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

MR. COOPER: It --

JUSTICE ALITO: Dos -- Dos Perros is registered?

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

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

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

MR. COOPER: Well --

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

(Laughter.)

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

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

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

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

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

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

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

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

works, including parodies, that the standard method --

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

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

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

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

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

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

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

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

MR. COOPER: No, no.

(Laughter.)

JUSTICE GORSUCH: This will be interesting.

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

JUSTICE GORSUCH: Oh.

(Laughter.)

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

JUSTICE GORSUCH: Fair enough. Who wouldn't?

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

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

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

JUSTICE GORSUCH: Well -- well --

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

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

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

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

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

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

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

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

JUSTICE KAGAN: Mr. --

MR. COOPER: -- I think --

JUSTICE KAGAN: I'm sorry. Go ahead.

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

JUSTICE KAGAN: So --

MR. COOPER: -- in every case.

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

MR. COOPER: Okay.

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

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

(Laughter.)

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

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

question is why aren't you leagues from Rogers?

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

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

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

MR. COOPER: Well --

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

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

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

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

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

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

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

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

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

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

JUSTICE JACKSON: True.
MR. COOPER: It doesn't.
JUSTICE JACKSON: I'm asking --
MR. COOPER: Slightly different.
JUSTICE JACKSON: -- something slightly different --
MR. COOPER: What the question is whether people perceive -- whether a reasonable, objective reasonable consumer would perceive that this came from Jack Daniels, or --
JUSTICE JACKSON: Right, rather than -- rather than does this have artistic value, is it explicitly misleading, all of these other questions, why isn't the question just whether people in looking at this, a reasonable person, et cetera, the way the Lanham Act I understood directs courts to look at, are people confused into believing that Jack Daniels created this, sponsored this, or whatever?
MR. COOPER: I think Your Honor could do that. The problem I think that Rogers recognized is, to paraphrase my opposing counsel, but we've got a survey --
JUSTICE JACKSON: No, I think --
MR. COOPER: And the Rogers court --

JUSTICE JACKSON: But I think the problem --

MR. COOPER: -- said --

JUSTICE JACKSON: Yeah.

MR. COOPER: Let me just say --

JUSTICE JACKSON: Yeah.

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

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

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

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

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

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

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

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

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

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

stripped-down version of the test.

CHIEF JUSTICE ROBERTS: Justice Thomas?

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

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

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

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

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

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

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

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

MR. COOPER: Commercial would be an advertisement.

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

that is not noncommercial.

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

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

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

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

you need the word noncommercial at all?

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

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

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

MR. COOPER: Correct.

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

MR. COOPER: Yes. MCA Records was the

original case.

JUSTICE SOTOMAYOR: So why is that wrong?

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

JUSTICE SOTOMAYOR: Why is that wrong?

MR. COOPER: It's not wrong --

JUSTICE SOTOMAYOR: I mean, I --

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

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

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

JUSTICE SOTOMAYOR: It's doing both, counselor.

MR. COOPER: I'm sorry?

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

MR. COOPER: That's not the test.

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

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

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

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

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

JUSTICE SOTOMAYOR: Thank you, counsel.

MR. COOPER: Thank you.

CHIEF JUSTICE ROBERTS: Justice Alito, anything further?

Justice Sotomayor? No?

Justice Kagan?

Justice Gorsuch?

Justice Jackson? Okay.

Thank you, counsel.

MR. COOPER: Thank you, Your Honor.

CHIEF JUSTICE ROBERTS: Ms. Blatt, rebuttal?

REBUTTAL ARGUMENT OF LISA S. BLATT
ON BEHALF OF THE PETITIONER

MS. BLATT: Thank you, Mr. Chief Justice.

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

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

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

T-shirts that just don't meet that confusion.

The First, Seventh, Tenth, and D.C. Circuit have not adopted Rogers. Twombly and Iqbal, there's a case we cited on page 11 of our brief out of the Seventh Circuit, and it is a case saying it's completely implausible that the "Clean Slate" program and the "Dark Knight" movie could be confused with a Clean Slate software program, and the Court dismissed that on Twombly -- excuse me, at 12(b)(6).

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

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

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

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

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

Thank you.

CHIEF JUSTICE ROBERTS: Thank you, counsel.

The case is submitted.

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