

No. 21-417

**In The
Supreme Court of the United States**

SULZER MIXPAC AG,

Petitioner,

v.

A & N TRADING COMPANY, *ET AL.*,

Respondents.

**On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Second Circuit**

**BRIEF OF *AMICI CURIAE* INTELLECTUAL
PROPERTY LAW PROFESSORS IN SUPPORT
OF PETITION FOR WRIT OF CERTIORARI**

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STATEMENT OF INTEREST

Amici, who file this brief with the consent of parties,¹ are professors who teach and have written extensively about trademark law and other intellectual property law subjects. Their interest in this case lie in the development and application of trademark law in a way serving the interest of the public and trademark owners alike.

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SUMMARY OF ARGUMENT

Amici submit this Brief to urge the Court to resolve an increasing split among the circuit courts of appeals on an important question of federal law,

1. Pursuant to Rule 37.2(a), counsel of record for all parties received timely notice of *amici curiae*'s intent to file this brief. Counsel of record for all parties consented in writing to its filing. No counsel of record for any party authored this brief in whole or in part, and no person or entity other than *amici curiae* made a monetary contribution to the preparation or submission of this brief.

2. All *amici curiae* speak only on their own behalf. Institutional affiliations are listed for identification purposes only.

namely, whether mere utility renders a claimed trade dress functional and therefore ineligible for protection under the Lanham Act, 15 U.S.C. § 1051 *et. seq.* Amici additionally urge the Court to resolve that split by holding that, although utility properly should be one of many considerations informing the functionality inquiry, any small degree of utility does not, and should not, trigger an inflexible bright-line prohibition against trade dress protection.

Congress enacted the Lanham Act in 1946 to provide uniform, nationwide rights for owners of trademarks, service marks, collective marks, and certification marks, even when those marks take the form of nonverbal trade dress.³ That purpose is frustrated by the current, fractured state of the law regarding whether claimed trade dress is nonfunctional, in which case it might qualify for protection, or functional, in which case it cannot. The resulting split in the circuits incentivizes forum shopping among potential plaintiffs and defendants alike.

Beyond the description of it by the court of appeals, Amici are unfamiliar with the record on which the district court and the court of appeals relied. They therefore do not take a position on the ultimate factual question of whether the court of appeals properly reversed the district court's finding of nonfunctionality for clear error. Instead, Amici file this brief to explain how the test for functionality applied by the court of appeals in this case both diverges from that applied by other federal appellate courts and inappro-

3. Consistent with the convention adopted by the Lanham Act, this brief refers to these designations collectively as “trademarks” or “marks.”

priately narrows trade dress protection. Amici therefore urge the Court to accept the question presented for review.

ARGUMENT

I. **There Is a Clear Split in the Circuits on the Definition of Trade Dress Functionality**

The Court should grant the petition because the court of appeals in this case has entered a decision in conflict with those of other United States courts of appeals. That conflict involves an important question of federal law.

The question at issue is the definition of utilitarian functionality under trade dress law. Under the Lanham Act, a “trademark” may be “any word, name, symbol, or device” used by an owner “to identify and distinguish [its] goods.” 15 U.S.C. § 1127. This definition includes trade dress—that is, “the total image of a product” or its packaging, including “features such as size, shape, color or color combinations,” among others. *Two Pesos, Inc. v. Taco Cabana, Inc.*, 505 U.S. 763, 764 n.1 (1992). Thus, in *Qualitex Co. v. Jacobson Products Co.*, 514 U.S. 159 (1995), this Court recognized the potential protectability of individual colors such as the ones at issue in this case for protection. *Id.* at 167-74. This Court’s observation in *Two Pesos* that “[p]rotection of trade dress, no less than of trademarks, serves the Act’s purpose to secure to the owner of the mark the goodwill of his business and to protect the ability of consumers to distinguish among competing producers” therefore applies with equal force in the context of nonverbal marks. *See* 505 U.S. at 774.

It is, of course, well settled that “trade dress protection may not be claimed for product features that are functional,” *TrafFix Devices, Inc. v. Mktg. Displays, Inc.*, 532 U.S. 23, 29 (2001), but that does not mean all product features are thereby disqualified; rather, the inquiry into trade dress protectability requires distinguishing between functional and non-functional elements of a claimed trade dress. As discussed at length in the petition, however, several splits exist among the circuit courts of appeal on the significance of utility, or usefulness, to the functionality inquiry. Petitioner has accurately explained that split:

1. A majority of the circuit courts of appeal, comprising the First, Fourth, Sixth, Seventh, Eighth, Ninth, Eleventh, and Federal Circuits, treats the usefulness, or utility, of a claimed trade dress as a consideration in the utilitarian functionality inquiry, but not a dispositive one.

2. In contrast, both the court of appeals in this case and the Third Circuit in *Ezaki Glico Kabushiki Kaisha v. Lotte International America Corp.*, 986 F.3d 250, 255 (3d Cir. 2021), *petition for cert. docketed*, No. 20-1817 (U.S. June 29, 2021), have adopted an inflexible bright-line rule holding that any amount of utility automatically makes a claimed trade dress functional and thus disqualifies it from protection.

This split requires resolution by this Court. In fact, this case presents an opportunity for this Court to address and provide much needed clarification of the nature of the functionality inquiry for the first time since its opinion in *TrafFix Devices* over two decades ago.

II. The Methodology Employed by the Court of Appeals Conflicts with This Court's Authority

The court of appeals acknowledged this Court's holding in *Inwood Laboratories v. Ives Laboratories*, 456 U.S. 844 (1982), that "[i]n general terms, a product feature is functional [in the utilitarian sense] if it is essential to the use or purpose of the article or if it affects the cost or quality of the article." *Id.* at 850 n.10. It similarly referenced this Court's observation in *TrafFix* that an aesthetically functional feature "is one the 'exclusive use of [which] would put competitors at a significant non-reputation-related disadvantage.'" *TrafFix*, 532 U.S. at 32 (quoting *Qualitex*, 514 U.S. at 165).

The court of appeals did not employ an aesthetic functionality analysis, and, in reaching a finding of utilitarian functionality as a matter of law, it expressly eschewed reliance on the first prong of the *Inwood* standard: whether petitioner's registered color marks are essential to the use or purpose of the goods associated with the marks. *See* Pet. App. 15a ("The evidence elicited at the bench trial does not support [Respondent's] argument that use of colors on mixing tips is essential to use of the product. . . . The district court did not make a factual finding that colors are essential to the use or purpose of mixing tips, and we decline to do so on this record."). Likewise, with respect to the second *Inwood* prong, it affirmed the district court's factual finding that the addition of the disputed colors to Petitioner's goods increased Petitioner's manufacturing costs. Pet. App. 14a. Rather, the court of appeals' decision in this case focuses on whether the color of Petitioner's goods enhanced their "quality." Pet. App. 17a.

A. The Court of Appeals Applied an Overly Expansive Interpretation of the *Inwood* Quality Inquiry

The court of appeals' invalidation of Petitioner's marks as functional in the utilitarian sense rests only on a determination, under the second *Inwood* prong, that the marks affect the *quality* of the associated goods. The court reasoned that the quality of the product was enhanced (and hence the trade dress was functional), because the purchaser could match tips and cartridges of the same size by color. Pet. App. 17a.

The court of appeals' expansive interpretation of the second prong of the *Inwood* test for utilitarian functionality conflicts with this Court's decision in *Qualitex*. In that case, this Court recognized that a color could serve a utilitarian function and yet remain a nonfunctional, protectable form of trade dress. The Court in *Qualitex* noted that, in the dry cleaning industry, "it is important to use *some* color on press pads to avoid noticeable stains" 514 U.S. at 166. Thus, the green-gold color of the dry-cleaning pad served a purpose: hiding stains. Under the reasoning of the court of appeals in this case, the green-gold color would therefore enhance the "quality" of the dry-cleaning pad, rendering it functional and hence unprotectable as a form of trade dress. But this Court did not, of course, make such a determination in *Qualitex*. Rather, the Court recognized that the color of the dry cleaning pad served a purpose (hiding stains), but nevertheless found the trade dress to be nonfunctional because other colors served the same purpose equally well. In other words, the court focused on the availability of alternative designs. See *TrafFix*, 532 U.S. at 33 (noting that, in *Qualitex*, there was "no indication that the green-gold color of the laundry press

pad had any bearing on the use or purpose of the product or its cost or quality”). The *Qualitex* Court thus held that the green-gold color at issue was nonfunctional, even though it had some utility, in light of the district court’s finding that the press pad industry had “no competitive need . . . for the green-gold color, since other colors are equally usable.” 514 U.S. at 166. The Court explained, “[w]hen a color serves as a mark, normally alternative colors will likely be available for similar use by others.” *Id.* at 168. The analysis employed by the court of appeals herein is thus fundamentally inconsistent with *Qualitex*.

Indeed, not all products having a “utility” (in patent terms) have “functional” product features (in trade dress terms). Courts often describe this distinction as the difference between *de facto* and *de jure* functionality, and it is essential to a proper evaluation of functionality under *Inwood*, *Qualitex*, and *TrafFix*. The court of appeals ignored that distinction here.

The methodology of assessing competitive need by considering elements including alternative designs is consistent with cases holding that mere utility or usefulness is not dispositive of functionality. Indeed, as the Court noted in *TrafFix*, a finding of functionality may be appropriate if competitors must use one or two “best” designs to compete effectively. *See TrafFix*, 532 U.S. at 32 (“[I]t was acknowledged that the device ‘could use three springs but this would unnecessarily increase the cost of the device.’”). But if any modicum of utility were dispositive of functionality, the Court would likely have concluded that the existence of a relative utility patent is dispositive of functionality, rather than merely strong evidence of it. *Id.*, at 29-30. Instead, the disclosure of a related utility patent does not always mandate a finding of trade dress functionality. *See, e.g., McAirlaids, Inc. v. Kimberly-Clark*

Corp., 756 F.3d 307, 313 (4th Cir. 2014) (distinguishing claims of related patent).

As the court of appeals itself has recognized, most products perform *some* utilitarian function, yet their particular configurations are clearly nonfunctional in the trade dress sense. “In the context of . . . the Lanham Act, ‘functional’ is not synonymous with ‘utilitarian,’ nor is it the antonym of ‘ornamental.’” *Industria Arredamenti Fratelli Saporiti v. Charles Craig, Ltd.*, 725 F.2d 18, 19 (2d Cir. 1984). For instance, the fact that an office chair supports a user’s weight does not mean it is functional as a matter of law. *See Blumenthal Distrib., Inc. v. Herman Miller, Inc.*, 963 F.3d 859, 866-68 (9th Cir. 2020), *cert. denied*, 141 S. Ct. 1514 (2021). The support feet of a French press coffee maker allow the press the stand, but the design of the feet may not be functional as a matter of law. *Bodum USA, Inc. v. A Top New Casting Inc.*, 927 F.3d 486, 492-93 (7th Cir.) (affirming finding of nonfunctionality and recognizing “the distinction between a product’s ‘function’ in the everyday meaning of the term and ‘functional’ as a term of art used in trade dress law”), *cert. denied*, 140 S. Ct. 675 (2019).⁴

4. Likewise, a clock may communicate the time to its owner, but that usefulness does not disqualify its features from trade dress protection. *See Mastercrafters Clock & Radio Co. v. Vacheron & Constantin-Le Coultre Watches, Inc.*, 221 F.2d 464 (2d Cir. 1955). So, too, is the configuration of a lamp not rendered functional by the illumination it provides. *See Bauer Lamp Co. v. Shaffer*, 941 F.2d 1165 (11th Cir. 1991) (*per curiam*). The list could go on and on. *See, e.g., I.P. Lund Trading ApS v. Kohler Co.*, 163 F.3d 27, 37 (1st Cir. 1998) (“The fact that a [water faucet] contains some functional elements does not . . . preclude Lanham Act protection.”); *Brunswick Corp. v. Spinit Reel Co.*, 832 F.2d 513, 519-520 (10th Cir. 1987) (affirming finding of nonfunctionality for shape of fishing reel cover despite evidence that cover “[held] the fishing line guide out in the front and provide[d] a thumbstop in the back”); *Dall. Cowboys Cheerleaders, Inc. v. Pussycat Cinema, Ltd.*, 604 F.2d 200, 203 (2d Cir. 1979) (“[W]e

The Federal Circuit has explained that:

De facto functionality simply means that a design has a function Such functionality is irrelevant to the question of whether a mark as a whole is functional so as to be ineligible for trademark protection. De jure functionality means that the product is in its particular shape because it works better in this shape.

In re Becton, Dickinson & Co., 675 F.3d 1368, 1373-74 (Fed. Cir. 2012).

In other words, “[t]hat a feature has utility . . . does not render the entire configuration de jure functional.” *In re Craigmyle*, 224 U.S.P.Q. 791, 793 (T.T.A.B. 1984); *see also Converse, Inc. v. Int’l Trade Comm’n*, 909 F.3d 1110, 1124 (Fed. Cir. 2018) (“Any functional benefit is derived from the presence of toe caps and bumpers [on sneakers] generally, not the particular design of [those elements], and there are numerous commercial alternatives to that design.”); *Warner Bros. v. Gay Toys, Inc.*, 724 F.2d 327, 331 (2d Cir. 1983) (holding finding of functionality appropriate “only if the feature is dictated by the functions to be performed; a feature that merely accommodates a useful function is not enough.”); *In re Morton-Norwich Prods., Inc.*, 671 F.2d 1332, 1341 (C.C.P.A. 1982) (“The question is whether appellant’s plastic spray bottle is de jure functional; is it the best or one of a few superior designs available?”); *Bodum USA*, 927 F.3d at 493 (affirming finding of nonfunctionality because claimed features “are not necessary to make

do not agree that . . . because an item is in part incidentally functional, it is necessarily precluded from being designated as a trademark.”).

the [plaintiff’s coffee maker] work better as a French press coffeemaker”).⁵ As a leading commentator explains, “[a] jury instruction that more effectively demystifies the puzzle of functionality in layman’s words is the ‘works better’ test: a design feature is functional if the article works better because it is in this particular shape.” 1 J. Thomas McCarthy, *McCarthy on Trademarks and Unfair Competition* § 7:69.50 (5th ed. 2020). Only if the article works better in that shape do competitors have a “necessity to copy” it. *See Morton-Norwich*, 671 F.2d at 1342; *see also L.D. Kichler Co. v. Davoil, Inc.*, 192 F.3d 1349, 1353 (Fed. Cir. 1999) (“Mere taste or preference cannot render a [claimed mark]—unless it is the best, or at least one, of a few superior designs—*de jure* functional.”).

Because its test measures functionality “in the lay sense,” not *de jure* functionality, *see Morton-Norwich*, 671 F.2d at 1337, the court of appeals erred by filing to assign proper significance to the district court’s finding that “other companies use different or no colors.” Pet. App. 17a. This type of outlying analysis threatens the trade dress protection of every nonverbal mark potentially said to perform *some* utilitarian function, regardless of whether it is “essential to the use or purpose of the article” or “affects the [article’s] cost or quality” under *Inwood*, *see* 456 U.S. at 850-51 n.10, and regardless of whether granting trade dress protection would disadvantage competitors in a “significant non-reputation-related” way. *See Qualitex*, 514 U.S. at 165.

5. Other factors relevant in the analysis are “(1) the existence of utility patents, (2) advertising focusing on the utilitarian advantages of a design, (3) the availability of ‘functionally equivalent designs,’ and (4) the effect of the design on manufacturing.” *McAirlaids, Inc.*, 756 F.3d at 313 (quoting *Valu Eng’g, Inc. v. Rexnord Corp.*, 278 F.3d 1268, 1274 (Fed. Cir. 2002)).

Moreover, the court of appeals' determination that the colors of Petitioner's product enhanced its quality did not arise from record evidence showing a natural link between the underlying product and Petitioner's colors. The court did not find that Petitioner's colors communicate an inherent characteristic of Petitioner's goods to purchasers, nor did it determine that purchasers have a preexisting association of the color with that characteristic. The court of appeals' reliance on *Dippin' Dots, Inc. v. Frosty Bites Distribution, LLC*, 369 F.3d 1197 (11th Cir. 2004), as precedent in this case is therefore misplaced. In *Dippin' Dots*, the court found that "[t]he color [of ice cream] is functional because it indicates the flavor of the ice cream, for example, pink signifies strawberry, white signifies vanilla, brown signifies chocolate, etc."

Id. at 1203-04.⁶ The *Dippin' Dots* court thus found that trade dress protection of these *particular* colors would place competitors at a disadvantage, because purchasers understood these colors as indicating a certain type of good (e.g., pink for strawberry ice cream). A competitor required to use a different color for the same good (e.g., purple for strawberry ice cream) would be disadvantaged, because consumers expect all strawberry ice cream to be pink, the color of strawberry juice (red) mixed with milk (white). See Justin Hughes, *Cognitive and Aesthetic Functionality in Trademark Law*, 36 CARDOZO L. REV. 1227, 1253-1255 (2015).

Relatedly, the court of appeals also did not find that Petitioner's colors were a natural byproduct of

6. The association of particular colors with ice cream flavors at issue in that case was so undisputed that the district court in *Dippin' Dots* properly took judicial notice of it; likewise, the plaintiff's counsel conceded the point in oral argument before the district court. 369 F.3d at 1204-05.

the goods' ingredients. *See, e.g., C5 Med. Werks, LLC v. CeramTec GmbH*, 249 F. Supp. 3d 1210, 1221 (D. Colo. 2017) (invalidating claimed pink color mark for hip implants because “pink . . . is the natural byproduct of the chromium that is used in the production of [the implants]”), *rev'd on other grounds*, 937 F.3d 1319 (10th Cir. 2019). Instead, the court of appeals reasoned that “because the colors on the tip correspond to the tip sizes, the color affects the quality of the product.” Pet. App. 17a. The court did not consider whether other colors could serve the same function, because it held that Petitioner’s color-based trade dress was unprotectable under the definition of utilitarian functionality. Under this analysis, colors are functional unless they serve *no purpose* other than as a source identifier, which, as explained above, is inconsistent with this Court’s analysis in *Qualitex*. A rule equating any evidence of utility with an increase in “quality,” hence rendering the claimed trade dress invalid under the test of utilitarian functionality, is incorrect as a matter of law.

B. Colors are Functional Only When Their Protection Creates a Significant Non-Reputation-Related Disadvantage

Colors do not typically make a product work better, in a utilitarian sense. Hence, even though the green-gold color of the dry-cleaning pad in *Qualitex* made it more stain-resistant, it did not make it “work better” as a press pad. Therefore, the proper analysis to apply in such cases should focus on the definition of aesthetic functionality, as this Court held in *TrafFix*: “It is proper to inquire into a ‘significant non-reputation-related disadvantage’ in cases of esthetic functionality, the question involved in *Qualitex*.” 532 U.S. at 33.

Analysis of “significant non-reputation-related disadvantage” requires a court to consider the availability (or lack thereof) of alternative designs. When color functions as trade dress, the court should focus on whether the particular color acting as a source identifier also confers some competitive advantage, or, alternately, whether other colors could be substituted with no competitive harm. Therefore, the general rule that a claimed color mark is functional only if it is “one of a few colors that are uniquely superior.” *L.D. Kichler Co.*, 192 F.3d at 1353; *see also Moldex-Metric, Inc. v. McKeon Prods., Inc.*, 891 F.3d 878, 887 (9th Cir. 2018) (reversing grant of defense motion for summary judgment and observing that “[the plaintiff’s] evidence that numerous color shades are equally or more visible than its bright green color and would result in the same function of visibility . . . weighs against a finding of functionality, and a reasonable jury could conclude that [the] green color is not functional”); *SafeRack, LLC v. Bullard Co.*, 350 F. Supp. 3d 438, 452 (D.S.C. 2018) (“Even where *some* color would be required on a product, a color mark can still be protected by trademark [law] unless there is a competitive need for the specific color scheme.”), *report and recommendation adopted*, No. 2:17-cv-1613-RMG, 2019 WL 460699 (D.S.C. Feb. 5, 2019).

The court of appeals did not reach that question in this case. This case is therefore distinguishable from *ERBE Elektromedizin GmbH v. Canady Technology LLC*, 629 F.3d 1278 (Fed. Cir. 2010), in which the Federal Circuit, applying Third Circuit law, invalidated the plaintiffs’ claimed rights to the color blue in connection with endoscopic probes because of undisputed evidence that blue probes were more visible than competing alternatives. *See id.* at 1289 (“[The

lead plaintiff] fails to present a genuine issue of material fact that the color blue does not make the probe[s] more visible through an endoscopic camera or that such a color mark would not lead to anti-competitive effects.”). It is similarly distinguishable from *Black & Decker Manufacturing v. Ever-Ready Appliance Mfg. Co.*, 518 F. Supp. 607 (E.D. Mo. 1981), *aff’d*, 684 F.2d 546 (8th Cir. 1982), in which the color black was functional when applied to the treads of a step-ladder because “[b]lack doesn’t show dirt” *Id.* at 617. In failing to consider alternative designs—the proper test in cases of aesthetic functionality—the court of appeals erred in a manner that distorts the functionality doctrine.

III. The Court Should Grant Certiorari to Restore Uniformity to Federal Trademark Law

The current split in authority runs counter to Congress’ purpose of providing uniform, nationwide rights to trademark owners when it passed the Lanham Act in 1946. Congress designed the Lanham Act to provide a robust and consistent, national scheme of protection for trademarks, to “secur[e] to the [trademark] owner the good will of his business and protect[] the public against spurious and falsely marked goods.” S. Rep. No. 79-1333 (1946), *as reprinted in* 1946 U.S.C.C.A.N. 1274, 1274-75. As it became clear in the post-World War II era that “trade [in the United States] is no longer local, but is national,” protection of trademarks could no longer be provided “by the inconsistent amalgam of state law protections.” *Id.* at 1277. Consequently, “a sound public policy require[d] that trademarks should receive nationally the greatest protection that can be given them.” *Id.* The Senate Committee on Patents described this purpose as follows:

The purpose of this bill is *to place all matters relating to trademarks in one statute* and to *eliminate judicial obscurity*, to simplify registration and to make it stronger and more liberal, to dispense with mere technical prohibitions and arbitrary provisions, to make procedure simple, and relief against infringement prompt and effective.

Id. at 1274 (emphasis added).

Courts have acknowledged that Congress' purpose in federalizing trademark law in the Lanham Act was to create uniform, nationwide rights for a national economy. Indeed, not long after the Lanham Act's passage, Judge Learned Hand recognized that it "put federal trade-mark law upon a new footing . . . [and] created rights uniform throughout the Union, in the interpretation of which we are not limited by local law." *S.C. Johnson & Son, Inc. v. Johnson*, 175 F.2d 176, 178 (2d Cir. 1949).

This Court has similarly acknowledged Congress's goals by noting that "[n]ational protection of trademarks is desirable . . . because trademarks foster competition and the maintenance of quality by securing to the producer the benefits of good reputation." *Park 'N Fly, Inc. v. Dollar Park & Fly, Inc.*, 469 U.S. 189, 198 (1985); *see also Two Pesos, Inc. v. Taco Cabana, Inc.*, 505 U.S. 763, 781-82 (1992) (Stevens, J., concurring) ("The purpose of [the Lanham Act] is to protect legitimate business and the consumers of the country,' [and] [o]ne way of accomplishing these dual goals was by creating uniform legal rights and remedies that were appropriate for a national economy." (citation omitted)); *Inwood*, 456 U.S. at 861 n.2

(White, J., concurring) (noting purpose of the Lanham Act to “codify and unify” the common law of . . . trademark protection).

When conflicting interpretations of the Lanham Act among the circuit courts of appeal have matured in the past, this Court has granted certiorari to restore uniformity to the law. For example, in *KP Permanent Make-Up, Inc. v. Lasting Impression I, Inc.*, 543 U.S. 111 (2004), the Court noted it had granted certiorari “to address a disagreement among the Courts of Appeals on the significance of likely confusion for a fair use defense to a trademark infringement claim, and the obligation of a party defending on that ground to show that its use is unlikely to cause consumer confusion.” *See id.* at 116; *see also Moseley v. V Secret Catalogue, Inc.*, 537 U.S. 418, 428 (2003) (granting certiorari “[b]ecause other Circuits have also expressed differing views about the ‘actual harm’ issue” under the Federal Trademark Dilution Act, Pub. L. No. 109–312, 120 Stat. 1730 (1996)); *Qualitex*, 514 U.S. at 161 (noting that the Court granted certiorari because “[t]he Courts of Appeals have differed as to whether or not the law recognizes the use of color alone as a trademark”).

Uniform rights are particularly important in a marketplace increasingly characterized by brands with national and global reach. The current fractured state of the law frustrates Congress’s purpose, and the Court should take the opportunity presented by this case to resolve the split in the circuits and restore uniformity to the law.

CONCLUSION

The touchstone of trade dress protection is the communication and appreciation of a nonfunctional

distinguishing, source-identifying message. If the relevant facts appropriately considered in the functionality inquiry disclose that a nonverbal color or design is ineligible for protection, claims to its protection as trade dress should be dismissed. Nevertheless, a bright-line legal prohibition on the trade dress protection of *useful* colors and designs, without an inquiry into whether they are *functional*, can actually undermine symbols on which consumers rely, limit consumers' access to products of quality and variety, and harm the competition such a rule might ostensibly be intended to protect.

Respectfully submitted,

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