No. 23-757

IN THE

Supreme Court of the United States

RELISH LABS LLC AND THE KROGER CO,

Petitioners,

v.

GRUBHUB, INC. AND
TAKEAWAY.COM CENTRAL CORE, B.V.,

Respondents.

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

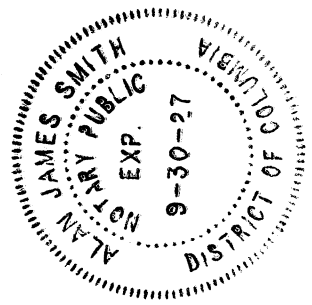
BRIEF *AMICUS CURIAE* MAX STUL OPPENHEIMER, VISHWA ROSS AND LOGAN THIGPEN IN SUPPORT OF NEITHER PARTY, SUGGESTING REVERSAL

CERTIFICATE OF COMPLIANCE

As required by Supreme Court Rule 33.1(h), I certify that the document contains 1,082 words, excluding the parts of the document that are exempted by Supreme Court Rule 33.1(d).

I declare under penalty of perjury that the foregoing is true and correct.

Sworn to and subscribed before me this 12th day of February 2024.



ALAN JAMES SMITH
NOTARY PUBLIC
District of Columbia

My commission expires September 30, 2027.

INTERESTS OF THE *AMICUS*

Amici are law school faculty and students with no interest in the substantive outcome of the case, but a keen interest in the resolution of the fundamental rule of law.[1] Taking Justice Brandeis' words entirely out of context, "in most matters, it is more important that the applicable rule of law be settled than that it be settled right."[2]

SUMMARY OF ARGUMENT

A fundamental issue in trademark law is whether two marks are confusingly similar. This Court has approved several formulations of the factors involved in that determination. It has, however, declined to resolve a conflict in the Circuits surrounding a closely related issue: who, fact-finder or judge, makes that determination. This case illustrates the need for resolving that question.

ARGUMENT

Briefly, this case involves a trademark dispute between two competitors in the food industry. Both use a logo that incorporates a knife and fork. The owner of the registered mark requested a preliminary injunction. The underlying issue was whether the competitor's mark was "likely to cause confusion, or to cause mistake, or to deceive."[3] The matter was

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[1] Counsel for neither party has authored this brief in whole or in part, nor contributed financially to the preparation of this brief. Counsel for all parties were advised of our intention to file an amicus brief at least 10 days prior to the deadline for filing this brief.

[2] *Burnet v. Coronado Oil and Gas Co*., 285 U.S. 393, 406 (1982) (Brandeis dissenting).

[3] 15 U.S.C. §1114.

assigned to a U.S. Magistrate Judge, who issued a 70+ page Report and Recommendations[4] finding the two logos confusingly similar and recommending an injunction in favor of the registered trademark owner. Objections were filed and, in a 20 page decision,[5] the District Court conducted a *de novo* review of the factual findings, rejected them, and denied the injunction. The Seventh Circuit thoroughly reviewed federal trademark law and affirmed.[6] Tellingly, however, it reached that conclusion

> [b]ecause we cannot say on this record that the district court clearly erred in concluding that Home Chef failed to show that consumers are likely to confuse its mark with Grubhub's.[7]

In other words, the District Court treated the question of consumer confusion without deference to the fact-finder, but the Circuit Court felt bound by the District Court's substitute fact-finding absent clear error.

The question of consumer confusion is at the heart of trademark law.[8] It determines whether a federal trademark will be issued[9] as well as whether use of a confusingly similar mark will be enjoined.

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[4] The report is Appendix C to the Petition.

[5] Appendix B to the Petition.

[6] Appendix A to the Petition.

[7] Appendix A, p. 2a.

[8] In *B&B Hardware, Inc. v. Hargis Industries, Inc*., 575 U.S. 138 (2015) this Court noted that the Circuits had articulated different factors in determining the likelihood of confusion, but concluded that all reflected the same standard.

[9] 15 U.S.C. §1052(d)

The Circuits are split on who makes that determination: the Seventh Circuit in this case applied a "clearly erroneous" standard of review as, apparently, would the Fourth Circuit.[10] The Second Circuit reviews determinations of likelihood of confusion *de novo.* [11] The Federal Circuit considers likelihood of confusion a legal question, reviewed de novo, but reviews the underlying factual findings for substantial evidence.[12]

The Court has been asked to resolve the split before. In *Elby's Big Boy of Steubenville, Inc. v. Frisch's Restaurants, Inc.*, this Court denied a cert. petition over the dissent of Justice White, who wrote

> One of the questions presented by this case is whether a district court's finding of a likelihood of confusion for purposes of s 43(a) of the Lanham Act…is reviewable under the "clearly erroneous" standard, as a question of fact, or de novo, as a legal conclusion. Because there is a split in the lower courts on this question,…I would grant certiorari to resolve the conflict.[13]

The pending case poses the problem dramatically – with the same case being controlled by both (inconsistent) standards, illustrating the general confusion that makes planning (and teaching) in the area difficult. With the dramatic increase in the importance

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[10] *Swatch AG v. Beehive Wholesale, LLC*, 739 F.3d 150 (4th Cir. 2014).

[11] *Car Freshener Corp. v. American Covers, LLC*, 980 F.3d 314 (2d Cir. 2020).

[12] *In re Charger Ventures LLC*, 64 F.4th 1375 (Fed. Cir. 2023).

[13] 459 U.S. 916 (1982) (citations omitted).

of intellectual property in the last decade, and given the nationalization of most markets brought on by internet sales, it is important that there be a single national standard. Only this Court can provide that standard.

Amici urge the deference standard, allocating the decision to the trier of fact. Unlike patent law, where this Court has held that the complexity of the patent document requires that it be interpreted by judges,[14] the decision on confusion ultimately comes down to concluding whether an ordinary consumer would likely be confused. That decision is well within the competence of lay jurors. While involving a different trademark issue (tacking – whether two marks are "'legal equivalents' in that they create the same, continuing commercial impression") this Court held "[b]ecause the tacking inquiry operates from the perspective of an ordinary purchaser or consumer, we hold that a jury should make this determination."[15]

> Application of a test that relies upon an ordinary consumer's understanding of the impression that a mark conveys falls comfortably within the ken of a jury. Indeed, we have long recognized across a variety of doctrinal contexts that, when the relevant question is how an ordinary person or community would make an assessment, the jury is generally the decisionmaker that ought to provide the fact-intensive answer.[16]

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[14] *Westview Instruments, Inc.*, 517 U.S. 370 (1996). Even *Westview* allocates the determination of infringement to the trier of fact once the court has construed the claim language.

[15] *Hana Financial, Inc. v. Hana Bank*, 574 U.S. 418, 420 (2015).

[16] *Hana* at 422.

The same analysis should apply to determining whether consumers are likely to be confused, deceived, or mistaken by two marks.

CONCLUSION

In arguing for judicial authority over Constitutional construction, Alexander Hamilton wrote

> Thirteen independent courts of final jurisdiction over the same causes, arising upon the same laws, is a hydra in government, from which nothing but contradiction and confusion can proceed.[17]

There are currently multiple interpretations of the same federal law among independent courts which, absent this Court's intervention, are courts of final jurisdiction.

Amici respectfully urge the Court to grant the Petition for Certiorari and end the contradiction and confusion.

Respectfully submitted,

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February 12, 2024

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[17] Federalist Papers 80 (Hamilton), The Powers of the Judiciary.

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AFFIDAVIT OF SERVICE

I HEREBY CERTIFY that on February 12, 2024, three (3) copies of the BRIEF *AMICUS CURIAE* MAX STUL OPPENHEIMER, VISHWA ROSS AND LOGAN THIGPEN IN SUPPORT OF NEITHER PARTY, SUGGESTING REVERSAL in the above-captioned case were served, as required by U.S. Supreme Court Rule 29.5(c), on the following:

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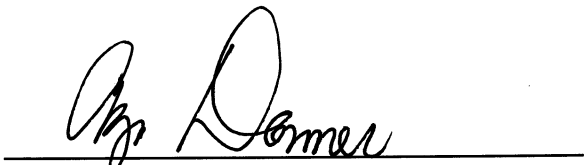

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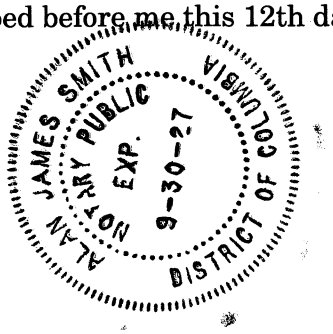

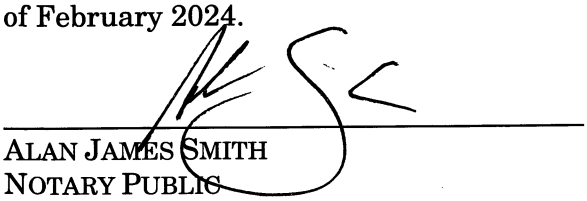

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