

No. _____

In the
Supreme Court of the United States

CESARI S.R.L.,
Petitioner,
v.

PEJU PROVINCE WINERY L.P. AND
PEJU FAMILY OPERATING PARTNERSHIP L.P.,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

In *B&B Hardware, Inc. v. Hargis Industries, Inc.*, 575 U.S. 138 (2015), this Court established a uniform rule for the identity-of-issue element of federal trademark preclusion. It held categorically that the Trademark Trial and Appeal Board (TTAB) and federal district courts apply the same likelihood-of-confusion standard for registration and infringement under the Lanham Act. *Id.* at 154. In doing so, this Court reversed a judgment that had expressly adopted the Second Circuit’s rule that differing multifactor analyses render the two standards distinct. *See* 716 F.3d 1020, 1024-1025 (8th Cir. 2013) (adopting *Jim Beam Brands Co. v. Beamish & Crawford, Ltd.*, 937 F.2d 729 (2d Cir. 1991), and *Levy v. Kosher Overseers Ass’n of America, Inc.*, 104 F.3d 38 (2d Cir. 1997)).

Having settled the legal standard, *B&B Hardware* made identity purely factual: “[i]f a mark owner uses its mark in ways that are materially the same as the usages included in its registration application, then the TTAB is deciding the same likelihood-of-confusion issue as a district court in infringement litigation.” 575 U.S. at 156. Applying this test to nearly identical marks (LIANA and LIANO) on identical goods (wine), the district court found the issue identical, the other elements met, and held Peju precluded.

The Second Circuit vacated on both fronts. It revived its abrogated precedents, *Jim Beam* and *Levy*, and *sua sponte* created a new rule for factual identity making preclusion under *B&B Hardware* impossible.

The questions presented are:

1. Whether the Second Circuit’s pre-*B&B*

Hardware rule conditioning issue preclusion on a case-by-case comparison of how tribunals apply their respective multifactor tests conflicts with *B&B Hardware*’s categorical holding that the likelihood-of-confusion standard for registration and infringement under the Lanham Act is the same.

2. Whether the Second Circuit’s new rule—that a marketplace use “narrower” than an unrestricted registration application defeats identity of the issue—conflicts with *B&B Hardware*’s “included-usages” test.

PARTIES TO THE PROCEEDING

Petitioner Cesari S.R.L. was the plaintiff below and the cross-appellant on appeal. Respondents Peju Province Winery L.P. and Peju Family Operating Partnership L.P. (together, Peju) were the defendants below and the appellants on appeal. Peju Province Corporation was also a defendant until October 5, 2021, when it was dismissed on Cesari's unopposed application under Federal Rule of Civil Procedure 21. Dkt. 299.¹ It took no part in the appeal.

RULE 29.6 STATEMENT

Cesari S.R.L. has no parent company, and no publicly held company owns ten percent or more of its stock.

¹"C.A. Dkt." refers to the United States Court of Appeals for the Second Circuit lead docket, *Peju Province Winery L.P. v. Cesari S.R.L.*, Nos. 24-1903(L), 24-2014(XAP). "Dkt." refers to the United States District Court for the Southern District of New York docket, *Cesari S.R.L. v. Peju Province Winery L.P.*, Case No. 1:17-cv-00873.

RELATED PROCEEDINGS

The following proceedings are directly related to this case within the meaning of Rule 14.1(b)(iii):

Cesari S.R.L. v. Peju Province Winery L.P., et al., No. 1:17-cv-00873-NRB, United States District Court for the Southern District of New York. Amended judgment entered July 12, 2024 (App. 11a).

Peju Province Winery L.P. v. Cesari S.R.L., Nos. 24-1903(L) (Peju's appeal), 24-2014(XAP) (Cesari's cross-appeal), United States Court of Appeals for the Second Circuit. Judgment entered June 8, 2026 (App. 1a). Rehearing denied July 28, 2026 (App. 37a).

Cesari S.R.L. v. Peju Province Winery L.P., No. 26A263, Supreme Court of the United States. Application to recall and stay the mandate denied August 28, 2026. Application renewed August 29, 2026, referred to the Court, and denied October 5, 2026.

The prior adjudication to which the district court gave preclusive effect is the decision of the Trademark Trial and Appeal Board in *Cesari S.R.L. v. Peju Province*, Opposition No. 91158374, entered July 20, 2004. App. 31a.

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INTRODUCTION

The Second Circuit has dismantled the uniform rule of federal trademark preclusion this Court established in *B&B Hardware, Inc. v. Hargis Industries, Inc.*, 575 U.S. 138 (2015). In its place, it has resurrected the test this Court rejected and created a new rule for factual identity that contradicts *B&B Hardware* and makes preclusion functionally impossible.

In *B&B Hardware*, this Court resolved both the legal and factual components of the identity-of-issue element of preclusion. The Court held categorically that the likelihood-of-confusion standard for registration and infringement under the Lanham Act is the same. *Id.* at 154. Having settled the legal standard, the Court anchored identity in a purely factual test: the Trademark Trial and Appeal Board (TTAB) decides the same issue as a district court in a subsequent infringement action when a mark owner “uses its mark in ways that are materially the same as the usages included in its registration application.” *Id.* at 156 (the “included-usages” test).

The conflict this Court resolved in *B&B Hardware* arose when the Eighth Circuit denied preclusive effect to a registration determination of the TTAB by adopting the Second Circuit’s rule in *Jim Beam Brands Co. v. Beamish & Crawford, Ltd.*, 937 F.2d 729 (2d Cir. 1991), and its progeny, *Levy v. Kosher Overseers Ass’n of America, Inc.*, 104 F.3d 38 (2d Cir. 1997): “for collateral estoppel to apply, the [TTAB] must have examined the ‘entire marketplace context’ as is done in trademark infringement actions.” 716 F.3d 1020, 1024-1025 (8th Cir. 2013) (citing *Levy*, 104

F.3d at 43). When the issue reached this Court, the Solicitor General specifically faulted *Levy's* rule, explaining that “it purports to require scrutiny into how ‘meaningful’ the Board’s consideration of the marketplace context was”—a phrase used as a proxy for comparing the tribunals’ multifactor tests. Brief for the United States as Amicus Curiae 19, *B&B Hardware*, No. 13-352 (May 23, 2014). This Court agreed and reversed, because the Eighth Circuit’s reasons “would make it difficult for the doctrine ever to apply in trademark disputes.” 575 U.S. at 141.

Here, the district court faithfully applied *B&B Hardware* and found preclusion. The TTAB, applying its own multifactor test, had refused Peju’s application to register LIANA for wine, finding the mark “almost identical” to Cesari’s registered LIANO for wine and the goods “identical.” App. 33a-34a. Peju did not appeal. When Peju resumed using the same mark to sell wine, Cesari sued for infringement. The district court held Peju precluded from relitigating likelihood of confusion between LIANA and LIANO for wine. App. 12a-25a. After a trial on disgorgement, it entered judgment for Cesari. App. 11a.

The Second Circuit vacated, departing from *B&B Hardware* on both components of identity: on the legal standard, it applied its resurrected rule of *Jim Beam* and *Levy*; on the factual test, it created a new rule of its own. *B&B Hardware* asked whether the registration and infringement standards are the same and answered: “We conclude it is.” 575 U.S. at 154. The Second Circuit rewrote that categorical rule as a condition, holding that a TTAB determination precludes “if it looked to the ‘same likelihood-of-confusion standard’ as the district court.” App. 8a. “Is”

became “if.” The court of appeals then answered that reopened question against preclusion by reverting to *Levy* word for word, demanding that the TTAB assess the “context of the marketplace” in a “meaningful” way. App. 6a-7a. Under *Levy*, that requires “a comparison of commercial use *identical* to that required in a trademark infringement action”—factor by factor, with each factor “considered in the context of all of the other factors.” *Levy*, 104 F.3d at 43 (citation and internal quotation marks omitted). That rule is so extreme that in *Jim Beam* it stripped preclusive effect even from the Federal Circuit’s judgment on the identical issue, because the Second Circuit held that court had applied a different likelihood-of-confusion standard. 937 F.2d at 735.

Having replaced the legal component of this Court’s identity rule with an abrogated one, the Second Circuit then dismantled the factual component. It set aside *B&B Hardware*’s included-usages test and crafted a novel rule of its own: a marketplace use “narrower” than the usages in an unrestricted application defeats identity. App. 10a. It then applied that new test to a “dessert wine” defense that Peju never asserted and the record foreclosed. App. 7a, 10a. Any marketplace use can be described more narrowly than the goods listed in a registration application. The Second Circuit’s new rule therefore ensures that the identity element of issue preclusion can never be met. *B&B Hardware* foreclosed that very move. Its test asks whether the use is “materially the same as the usages *included* in” the application. 575 U.S. at 156 (emphasis added). This Court also held that “trivial variations between the usages set out in an application and the use of a mark in the marketplace do not create different ‘issues.’” *Id.* at

157. Otherwise, “a party could escape the preclusive effect of an adverse judgment simply by adding an immaterial feature.” *Ibid.*

The decision below violates vertical *stare decisis*. It is the latest in a series of Second Circuit decisions applying abrogated circuit precedent over this Court’s intervening mandates. *See infra* Part III. By pronouncing *B&B Hardware* “perfectly consistent” with repudiated circuit law, App. 8a, and pointing to its own continued citations to keep that law alive, App. 9a, the Second Circuit—home to the Nation’s second-largest district-court trademark docket—has rendered *B&B Hardware* a dead letter.

Litigants are entitled to rely on the rules this Court announces. They should not be forced to litigate against dead circuit law kept alive by insular citation loops or by commercial treatises that recast this Court’s decisions to match repudiated precedent. If the structural limits of this Court’s docket become a safe harbor to summarily nullify the decisions it does issue, the law this Court declares collapses into the preferences of individual courts of appeals, and vertical *stare decisis* becomes an illusion. This Court should send a clear message that its categorical rulings cannot be so easily bypassed. The petition should be granted to enforce this Court’s authority, protect litigants’ reliance on its decisions, and restore the rule of issue preclusion *B&B Hardware* secured in trademark disputes.

OPINIONS BELOW

The decision of the court of appeals is unreported and available at 2026 U.S. App. LEXIS 16442. App. 1a. The order denying rehearing is unreported. App.

37a. The district court's decision applying issue preclusion is available at 2017 U.S. Dist. LEXIS 210542. App. 12a. Its later decision extending preclusion to respondent Peju Family Operating Partnership L.P. is available at 2022 U.S. Dist. LEXIS 138100. Its post-trial decision awarding disgorgement is reported at 693 F. Supp. 3d 375, and its fee award is available at 2024 U.S. Dist. LEXIS 122194. The TTAB decision given preclusive effect is available at 2004 TTAB LEXIS 431. App. 31a.

JURISDICTION

The court of appeals entered its judgment on June 8, 2026. App. 1a. On July 28, 2026, it denied respondents' timely motion for rehearing. App. 37a. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

15 U.S.C. § 1052(d) provides in pertinent part: "No trademark . . . shall be refused registration . . . unless it . . . [c]onsists of or comprises a mark which so resembles a mark registered in the Patent and Trademark Office, or a mark or trade name previously used in the United States by another and not abandoned, as to be likely, when used on or in connection with the goods of the applicant, to cause confusion, or to cause mistake, or to deceive"

15 U.S.C. § 1114(1) provides in pertinent part: "Any person who shall, without the consent of the registrant[,], use in commerce any reproduction, counterfeit, copy, or colorable imitation of a registered mark in connection with the sale, offering for sale, distribution, or advertising of any goods or services on or in connection with which such use is likely to cause

confusion, or to cause mistake, or to deceive . . . shall be liable in a civil action by the registrant.”

STATEMENT OF THE CASE

A. The TTAB Rules That Peju’s Word Mark LIANA Is Likely To Cause Confusion With Cesari’s Registered Mark LIANO, Both For Wines.

Cesari, an Italian winery, has sold its flagship wine in the United States under the mark LIANO since 1989. App. 13a, 31a n.2, 35a-36a. In January 2003, Cesari obtained a federal trademark registration for LIANO for “wines” in International Class 33. App. 35a-36a. When Peju,² a California winery, applied to register the mark LIANA for “wine” in the same class, without restriction as to type of wine, channels of trade, or classes of purchasers, Cesari opposed. App. 13a-14a, 31a, 34a.

Peju chose to litigate the issue before the TTAB, opposing Cesari’s motion on the merits. App. 32a. The TTAB sustained the opposition, granted summary judgment to Cesari, and refused registration. App. 31a-34a. Applying the likelihood-of-confusion factors of *In re E.I. du Pont de Nemours & Co.*, 476 F.2d 1357 (C.C.P.A. 1973), the TTAB compared the marks by their “overall commercial impression” on “the average purchaser, who normally retains a general rather than a specific impression of trademarks.” App. 33a.

² Only Peju Province Winery L.P. filed the 2003 application at issue before the TTAB. App. 31a. The later-formed Peju Family Operating Partnership L.P. was held equally bound below, *Cesari S.R.L. v. Peju Province Winery L.P.*, 2022 U.S. Dist. LEXIS 138100 (S.D.N.Y. Aug. 3, 2022), a ruling Peju did not challenge on appeal; the two are referred to as “Peju.”

Giving particular weight to the similarity of the marks and the similarity of the goods, as the TTAB had in *B&B Hardware* itself, *see* 575 U.S. at 146, it found confusion likely: LIANO and LIANA are “almost identical,” differing only in “the last letter, which is insufficient to distinguish the marks’ high degree of similarity,” and the goods are “identical,” both wine. App. 33a-34a.³

The TTAB expressly considered and rejected as “unpersuasive” Peju’s argument that its goods were distinguishable because its wine was “a late harvest Chardonnay Dessert wine,” and held LIANA for wine, dessert wine included, likely to cause confusion with LIANO for wines. App. 31a-32a, 34a.

Peju did not appeal the TTAB’s decision to the Federal Circuit or a district court. *See* 15 U.S.C. § 1071; App. 15a. The determination became final.

³ In *B&B Hardware*, the Eighth Circuit denied preclusion in part because the TTAB “placed too much emphasis on the appearance and sound of the two marks,” 575 U.S. at 147; this Court held that ground erroneous. *Id.* at 157. *Polaroid* itself framed its multifactor inquiry for cases “[w]here the products are different.” *Polaroid Corp. v. Polarad Elecs. Corp.*, 287 F.2d 492, 495 (2d Cir. 1961). Infringement courts weigh those two factors no differently: a study of 10,977 federal opinions and 4,003 TTAB decisions from 1970 through 2025 found that the similarity of the marks and the proximity of the goods “predict the bottom-line confusion finding with accuracy exceeding 93 percent, in both tribunals, across five decades.” Br. of Amicus Curiae Thomas A. Reichert 10, *RiseandShine Corp. v. PepsiCo, Inc.*, No. 24-1016 (July 20, 2026).

**B. The District Court Applies *B&B Hardware*
And Gives The TTAB Determination
Preclusive Effect.⁴**

When Peju later resumed using the LIANA mark to sell wines and reapplied to register the identical mark, Cesari demanded that it cease and desist. *Cesari*, 2022 U.S. Dist. LEXIS 138100, at *8-10. After Peju refused, Cesari sued for infringement. *Id.* at *11. The district court held Peju precluded from relitigating whether LIANA for wine is likely to be confused with LIANO for wine, the issue the TTAB had decided. App. 12a-25a.

Peju disputed only two elements of issue preclusion: whether the issue before the TTAB was the same, and whether Peju had a full and fair opportunity to litigate it there. App. 17a. On identity, Peju argued that the TTAB “did not consider a majority of the factors relevant to the likelihood of confusion analysis in an infringement action,” and it devoted its opposition to showing how a court would evaluate each factor differently. App. 27a-29a; Dkt. 29, at 1, 5-16.⁵

The district court rejected that comparison of factors and faithfully applied *B&B Hardware*’s factual-identity test. The issue is the same, it

⁴ The district court had jurisdiction under 15 U.S.C. § 1121(a) and 28 U.S.C. § 1338.

⁵ As to fairness, Peju made only a cursory argument that the TTAB had converted Cesari’s motion into one for summary judgment without notice. Dkt. 29, at 17-20. The district court found the argument “entirely unpersuasive”: Peju suffered no prejudice, and any error was reviewable by appeal to the Federal Circuit or by a de novo action in district court, 15 U.S.C. § 1071, neither of which Peju pursued. App. 20a-22a.

explained, when “a mark owner uses its mark in ways that are materially the same as the usages included in its registration application,” but not as to “non-disclosed usages.” App. 18a (quoting *B&B Hardware*, 575 U.S. at 156). Peju had applied to register LIANA for “wine,” and it used LIANA on wine. App. 19a. Because neither party’s identification of goods carried any limitation, the court held: “the marketplace usage the TTAB considered, wines, entirely encompasses the narrower usages defendants proffer in this litigation. Wines purchased by sophisticated consumers, after all, are still wines.” App. 19a-20a. Finding “no ‘non-disclosed’ usages that might necessitate a successive adjudication,” the court found the issue identical, the other elements met, and held Peju precluded. App. 20a-22a, 25a.

After a bench trial on remedies, the district court found Peju’s infringement willful and disgorged its profits on approximately thirty LIANA wines, only three of them dessert wines. *Cesari S.R.L. v. Peju Province Winery L.P.*, 693 F. Supp. 3d 375, 388, 391-392, 402 (S.D.N.Y. 2023); App. 11a.

C. The Second Circuit Vacates Under Abrogated Circuit Precedent And A New Rule Of Its Own Creation.

Peju appealed, renewing its argument that the TTAB did not consider the likelihood-of-confusion factors as an infringement court would. C.A. Dkt. 39.1, at 35, 39. The court of appeals agreed, vacating the judgment under its own pre-*B&B Hardware* precedent and a new rule it created on its own initiative. App. 1a-10a.

First, the court of appeals resolved the legal-standard component of identity under *Jim Beam* and *Levy*. Pronouncing *B&B Hardware* “perfectly consistent with our own precedent in *Levy*,” App. 8a, the court held that a TTAB determination precludes “only if” the TTAB took “into account, in a meaningful way, the context of the marketplace,” App. 6a (quoting *Levy*, 104 F.3d at 42). It held the TTAB determination failed this standard because it “cabined its likelihood-of-confusion inquiry to the four corners of Peju’s application” rather than considering the “entire marketplace context” as an infringement court would. App. 7a-8a.

Second, the court of appeals asserted that the TTAB “never considered the merits of Peju’s principal defense to Cesari’s infringement claim,” that its wine “is a dessert wine.” App. 7a. Although the TTAB expressly considered and rejected that contention, App. 34a, and Peju never asserted it as a defense in the infringement action, Dkt. 15, at 10; Dkt. 213, the Second Circuit used it to create a new federal rule of trademark preclusion: a marketplace use “significantly narrower than” the unrestricted usage stated in a registration application defeats identity of the issue. App. 10a. On that ground, it vacated the judgment in its entirety and remanded. App. 10a.

Cesari’s cross-appeal challenged the computation of Peju’s profits, the cap on Cesari’s fee award, and the denial of prejudgment interest. C.A. Dkt. 67.1, at 40-98. The order never mentions the cross-appeal and never addresses any aspect of it. App. 1a-10a.

REASONS FOR GRANTING THE PETITION

Certiorari is warranted for three independent reasons. First, the decision below conflicts on its face with *B&B Hardware*, Sup. Ct. R. 10(c), by reviving the abrogated different-standards rule of *Jim Beam* and *Levy* that the Eighth Circuit adopted and this Court reversed (Part I). Second, the court of appeals *sua sponte* created a new rule of federal trademark preclusion—and a new, factually foreclosed defense to fit it—that is the exact opposite of *B&B Hardware*’s included-usages test (Part II). Third, the decision violates vertical *stare decisis* in a way only this Court can correct. For the fifth time in recent Terms, the Second Circuit has adhered to its own precedent over an intervening decision of this Court. Here, that practice strips the law of certainty, denies courts and litigants alike the repose that preclusion under *B&B Hardware* secures, and inflicts immense costs on both (Part III).

I. The Decision Below Revived The Different-Standards Rule Of *Jim Beam* And *Levy* That *B&B Hardware* Rejected.

A. *B&B Hardware* Abrogated *Jim Beam* And *Levy*.

1. Before *B&B Hardware*, the Second Circuit held that different likelihood-of-confusion standards govern trademark registration and infringement proceedings because the two inquiries differ and each tribunal applies its multifactor test differently. *Jim Beam*, 937 F.2d at 734-735; *Levy*, 104 F.3d at 41-43. *Jim Beam* began from the rule that “[i]ssues that may bear the same label are nonetheless not identical if the standards governing them are significantly different.”

937 F.2d at 734. Although “both sections [of the Lanham Act] refer to whether the use of a mark is likely to cause confusion,” it held, “the standards by which that likelihood is judged are different because the factual frame of reference used by the adjudicating body is different.” *Ibid.* In a registration proceeding, likelihood of confusion turns on the mark “exactly as shown in the application and only as to the goods listed, regardless of actual usage”; an infringement court “must examine the visual appearance of each mark in the context of its use.” *Id.* at 734-735 (citation omitted). The *Jim Beam* court held that the TTAB and the Federal Circuit had “applied the standard that was appropriate to that proceeding,” and that a determination under one standard could not bind an infringement court applying another. *Id.* at 735. The Second Circuit withheld preclusion from the judgment of a coordinate court of appeals on the sole ground that the prior court had evaluated likelihood of confusion under the registration standard rather than the infringement standard. *Ibid.* *Jim Beam* thus decided the exact question later presented in *B&B Hardware*—whether the Lanham Act’s likelihood-of-confusion standard is identical in registration and infringement. *Jim Beam* held it was not; *B&B Hardware* held it was. 575 U.S. at 154.

Levy cemented *Jim Beam*’s rule. The Second Circuit held again that the question was one of standards: “the standards governing ‘likelihood of confusion’ in registration cancellation or opposition proceedings before the TTAB and Federal Circuit can be different than the ‘likelihood of confusion’ standard applicable in trademark infringement actions in a district court.” *Levy*, 104 F.3d at 41. The difference lay in the factors, in how each tribunal applies them, and

in the purpose for which it does so. The TTAB decides registrability of the mark “exactly as shown in the application and only as to the goods listed, *regardless of actual usage*”; “[i]n a trademark infringement action, on the other hand, eight non-exclusive factors—the so-called *Polaroid* factors, *see Polaroid Corp. v. Polarad Elecs. Corp.*, 287 F.2d 492 (2d Cir. 1961) (Friendly, J.)—are considered” *Id.* at 41-42. *Levy* then raised *Jim Beam*’s bar. Because the Second Circuit held the registration and infringement standards for likelihood of confusion were different, it did not matter that the registration tribunal—there, the TTAB—had applied its own multifactor test; only an infringement court’s analysis would do. The district court found that the TTAB “did in fact consider, and in fact emphasized, the market context in which [the mark] is used.” *Levy v. Kosher Overseers Ass’n of America*, 1994 U.S. Dist. LEXIS 9262, at *12 (S.D.N.Y. July 7, 1994). The Second Circuit vacated anyway: a TTAB determination precludes only if the TTAB has “taken into account, in a meaningful way, the context of the marketplace,” by performing “a comparison of commercial use identical to that required in a trademark infringement action.” *Levy*, 104 F.3d at 42-43. Preclusion was denied because the TTAB had “relied solely on a visual examination of the two marks,” its decision “provide[d] no basis for the conclusion that it examined any of the other relevant *Polaroid* factors,” and its “inquiry . . . was not identical to the ‘likelihood of confusion’ inquiry required in the plaintiffs’ trademark infringement action.” *Id.* at 42-43. As *Levy* shows, under that rule the TTAB’s *DuPont* analysis cannot realistically ever ground preclusion, because, in the Second Circuit’s view, it applies different factors, to a different frame of reference, for

a different purpose. *Jim Beam*, 937 F.2d at 734-735; *Levy*, 104 F.3d at 41-42.

2. The Eighth Circuit expressly adopted *Jim Beam* and *Levy* in the decision this Court reversed in *B&B Hardware*: “for collateral estoppel to apply, the [TTAB] must have examined the ‘entire marketplace context’ as is done in trademark infringement actions.” 716 F.3d at 1024-1025 (citing *Levy*, 104 F.3d at 43). This Court categorically rejected that test. It held that “the same likelihood-of-confusion standard applies to both registration and infringement.” *B&B Hardware*, 575 U.S. at 154. It closed each door *Jim Beam* and *Levy* had opened: the tribunals’ factor lists “are not fundamentally different,” *ibid.*, and parties “cannot escape preclusion simply by litigating anew in tribunals that apply that one standard differently,” *ibid.* *B&B Hardware* does not name *Jim Beam* or *Levy*; it did not need to.⁶ After *B&B Hardware*, identity of the issue turns on comparing usages, not on whether the registration and infringement standards are the same. Comparing how two tribunals apply their factor tests improperly reopens the same question this Court settled.

B. The Second Circuit Has Now Revived Its Abrogated Precedent Word For Word.

1. Despite this Court’s categorical holding that the standards are the same, the Second Circuit rewrote it. *B&B Hardware* asked “whether likelihood of

⁶ Peju argued below that *B&B Hardware* “does not even mention either opinion, let alone definitively (or even impliedly) overrule them,” and that the Second Circuit “cited both *Levy* and *Jim Beam* approvingly” after *B&B Hardware*. C.A. Dkt. 85.1, at 18-19. The order adopted both grounds. App. 8a-9a.

confusion for purposes of registration is the same standard as likelihood of confusion for purposes of infringement,” and answered: “We conclude it is.” 575 U.S. at 154. The order restated the holding as a condition: a TTAB decision precludes “if it looked to the ‘same likelihood-of-confusion standard’ as the district court.” App. 8a. “Is” became “if.” A categorical answer became a condition to be litigated case by case. This Court did not leave that question open for readjudication. “It is this Court’s responsibility to say what a statute means, and once the Court has spoken, it is the duty of other courts to respect that understanding of the governing rule of law.” *Nitro-Lift Techs., L.L.C. v. Howard*, 568 U.S. 17, 21 (2012) (per curiam) (quoting *Rivers v. Roadway Express, Inc.*, 511 U.S. 298, 312 (1994)).

The Second Circuit then answered the reopened question by restoring *Jim Beam* and *Levy* word for word. It held that preclusion applies “only if” the TTAB took “into account, in a meaningful way, the context of the marketplace,” and that “such occasions are the exception, not the norm.” App. 6a-7a (quoting *Levy*, 104 F.3d at 42). Adopting wholesale the arguments that this Court rejected in *B&B Hardware* and the International Trademark Association (INTA) recycled below, at times verbatim,⁷ the court of appeals held that the TTAB determination failed because the TTAB “cabined its likelihood-of-confusion inquiry to the four corners of Peju’s application,” rather than considering the “entire marketplace

⁷ Compare Brief for International Trademark Association as Amicus Curiae 5-19, *B&B Hardware*, No. 13-352 (Sept. 11, 2014) (INTA Br.), with C.A. Dkt. 123.1, at 9-19.

context.” App. 7a-8a.⁸ That is the Eighth Circuit’s rule in the Eighth Circuit’s words: the TTAB “must have examined the ‘entire marketplace context.’” *B&B Hardware*, 716 F.3d at 1025. This Court reversed. The “marketplace context” the order demands is, as in *Levy*, the multifactor analysis an infringement court performs. Peju’s own argument confirms it: its only challenge to issue identity in the district court was the challenge Hargis made to this Court, that the TTAB “did not consider a majority of the factors relevant to the likelihood of confusion analysis in an infringement action.” App. 27a-28a; Dkt. 29, at 1, 5, 16; *see* Brief in

⁸ In *B&B Hardware*, INTA urged this Court to deny preclusive effect to TTAB decisions. INTA Br. 4, 7. This Court refused. 575 U.S. at 156-160. Undeterred, INTA took the same argument to the Second Circuit, this time claiming it “comport[s] with” *B&B Hardware*. C.A. Dkt. 123.1, at 9. It asked the court of appeals to adopt the exact test this Court rejected, requiring district courts “to examine the extent to which the TTAB considered the ‘entire marketplace context’ with respect to the marks at issue, and to grant preclusion only when the TTAB considered such context ‘in a meaningful way.’” *Compare id.* at 12, *with* INTA Br. 7. INTA claimed it “support[ed] neither party,” C.A. Dkt. 123.1, at 3, without disclosing that Peju’s counsel of record Martin Schwimmer sat on its Amicus Committee and had represented INTA for years. C.A. Dkt. 55.1, at 2, 6. He still does. *See* Brief for International Trademark Association as Amicus Curiae, *RiseandShine*, No. 24-1016 (Sept. 15, 2026). Peju then traded on INTA’s professed neutrality, calling it “the world’s preeminent trademark advocacy organization” and assuring the court that “INTA does not weigh in as an amicus to support frivolous or unreasonable positions.” C.A. Dkt. 85.1, at 4, 45. Over Cesari’s objection, the Second Circuit accepted the brief, C.A. Dkt. 118, and adopted it wholesale, down to INTA’s assertion that the TTAB “rarely considers actual marketplace usage.” C.A. Dkt. 123.1, at 12. Such occasions, the order echoed, “are the exception, not the norm.” App. 7a; *see* App. 8a-9a.

Opposition 2-6, *B&B Hardware*, No. 13-352 (Nov. 20, 2013) (Br. in Opp.).

2. To conclude that the TTAB never considered the marketplace factors, the order relied on *Octocom Systems, Inc. v. Houston Computer Services, Inc.*, 918 F.2d 937 (Fed. Cir. 1990). App. 7a-8a, 10a. Hargis made the same argument in *B&B Hardware* and lost. Brief for Respondents 46-47, *B&B Hardware*, No. 13-352 (Oct. 24, 2014). *Octocom* fixes the scope of the TTAB's adjudication, not its method. Because registrability "must be decided on the basis of the identification of goods set forth in the application," the scope of the TTAB's adjudication lies in the applicant's own hands: the applicant chooses the goods it claims, and an unrestricted identification reaches all goods of the kind identified, in all channels of trade, to all classes of purchaser. 918 F.2d at 942; *see id.* at 941, 943. *Octocom* does not say that the TTAB ignores the marketplace; it says only which goods the TTAB adjudicates, and the marketplace analysis of those goods is what the *DuPont* factors perform. *See In re E.I. du Pont*, 476 F.2d at 1360-1361. Far from defeating preclusion, that principle is the premise on which *B&B Hardware* built its test: this Court called the usages listed in the application "critical" precisely because the TTAB's likelihood-of-confusion adjudication is decided on them. 575 U.S. at 143. This Court accepted Hargis's premise and rejected its conclusion: the argument "mistakes a reason not to apply issue preclusion in some or even many cases as a reason never to apply issue preclusion." *Id.* at 156. Identity, this Court held, turns instead on the facts, whether the usages before the two tribunals are materially the same, and it supplied the test. *Ibid.*; *see infra* Part II.

The order’s linchpin—that the TTAB ignored the marketplace—is contradicted by the record and foreclosed by *B&B Hardware*. As the order recognizes, the TTAB applied the *DuPont* factors, App. 3a-4a, evaluating the marks’ “overall commercial impression” on “the average purchaser.” App. 33a. The *DuPont* analysis is itself a marketplace analysis: “[t]he only relevant application is made in the marketplace.” *In re E.I. du Pont*, 476 F.2d at 1360-1361. And “[j]ust because the TTAB does not always consider the same usages as a district court does, it does not follow that the Board applies a different standard to the usages it does consider.” *B&B Hardware*, 575 U.S. at 156. When a court rejects the TTAB’s marketplace analysis as the product of a separate registration standard, it performs the very inquiry *B&B Hardware* took off the table: how each tribunal applies its multifactor test. *See* 575 U.S. at 154-155, 157.

More fundamentally, once this Court holds two standards identical, no court may reopen the question case by case by grading the TTAB’s work against an infringement court’s. By demanding a factor-by-factor autopsy of the first tribunal’s reasoning—scrutinizing how it assessed each element and what specific factual circumstances it considered—the court of appeals reduced the doctrine of issue preclusion from a test of factual identity to a comparison of the tools each tribunal used to decide the issue. No preclusion decision of this Court has ever measured factual identity that way. When this Court compares the factors two tribunals consider, it asks one question only: whether the legal standard is the same. *Smith v. Bayer Corp.*, 564 U.S. 299, 309-310, 312 n.9 (2011); *B&B Hardware*, 575 U.S. at 154. That question *B&B*

Hardware had already closed. The issue itself never changed: whether LIANA for wine is likely to be confused with LIANO for wines.

**C. The Grounds The Court Of Appeals Gave
For Applying *Jim Beam* And *Levy* As
Good Law Defy Vertical *Stare Decisis*.**

“[A]lthough the [court of appeals] professed to apply” *B&B Hardware*, “each step of its analysis defied [its] reasoning.” *Caetano v. Massachusetts*, 577 U.S. 411, 415 (2016) (Alito, J., concurring in the judgment). Rather than explain how *Jim Beam* and *Levy*, which held the standards different, could survive a decision holding them the same, the Second Circuit pronounced *B&B Hardware* “perfectly consistent with our own precedent in *Levy*.” App. 8a. It offered three grounds. None withstands reading.

1. *Taking “Marketplace Usage” Out Of Context To Resurrect Levy*. Quoting this Court’s statement that a TTAB decision lacks preclusive effect where the TTAB “d[id] not consider the marketplace usage of the parties’ marks,” the court of appeals equated “marketplace usage” with *Levy*’s “entire marketplace context.” App. 8a (quoting *B&B Hardware*, 575 U.S. at 156-157). But this Court defined “usages” as “those goods on which the mark appears along with, if applicable, their channels of distribution.” 575 U.S. at 143. In *B&B Hardware*, “marketplace usage” is a category of goods: usages the application does not disclose. *Id.* at 155-156. In *Levy*, “entire marketplace context” is a mode of analysis: the infringement court’s multifactor test. 104 F.3d at 42-43. And the sentence the order quoted begins with “Thus,” applying the test before it: whether the mark is used “in ways that are materially the same as the usages

included in its registration application.” 575 U.S. at 156 (emphasis added).

The Second Circuit ignored both this Court’s definition and its reasoning. See *Bucklew v. Precythe*, 587 U.S. 119, 136 (2019) (“[J]ust as binding as [the] holding is the reasoning underlying it.”). By transforming a category of goods into a mode of analysis, it severed the sentence from the reasoning that produced it and gave it the force of a contrary rule.

2. *Elevating Circuit Precedent Over This Court’s Mandates Through The Fallacy Of Continued Citation.* The court of appeals justified its departure by noting that its “own post-*B&B Hardware* rulings have continued to cite *Jim Beam* and *Levy* with approval.” App. 9a. But the single ruling it cited, *International Information Systems Security Certification Consortium, Inc. v. Security University, LLC*, 823 F.3d 153 (2d Cir. 2016), is a nominative-fair-use case that has nothing to do with issue preclusion or *B&B Hardware*.

“[A] lower court ought not invoke the ‘persuasive authority’ of . . . a repudiated court of appeals decision to reach a different conclusion on an equivalent record.” *Nat’l Insts. of Health v. Am. Pub. Health Ass’n*, 145 S. Ct. 2658, 2664 (2025) (Gorsuch, J., concurring in part and dissenting in part). Insulating abrogated precedent through intra-circuit citation allows “anarchy to prevail within the federal judicial system.” *Hutto v. Davis*, 454 U.S. 370, 375 (1982) (per curiam).

3. *Substituting A Treatise Comment For This Court’s Precedent.* Instead of engaging this Court’s reasoning, the Second Circuit invoked a trademark

treatise because it “was cited ten times by the Supreme Court in *B&B Hardware*.” App. 9a. On that basis, the court adopted an “Author’s Comment” asserting without explanation that this Court’s decision was “essentially the same” as the circuit’s anterior rule. *Ibid.* (quoting 5 J. Thomas McCarthy, *McCarthy on Trademarks & Unfair Competition* § 32:98 & n.3 (5th ed. 2026)).

Tallying citations to a secondary source does not spare a lower court its duty to conduct its own legal analysis. A commercial trademark treatise holds no special authority over the federal common law of issue preclusion. And the court of appeals ignored the comment’s own framing. The comment offers “essentially the same” as the first of the “factors” that “may ameliorate any negative impacts of the *B&B Hardware* precedent.” 5 McCarthy § 32:98.

Opposite rules cannot be reconciled by a commentator’s *ipse dixit*. What this Court’s decisions “say and what they mean are one and the same.” *Mathis v. United States*, 579 U.S. 500, 514 (2016). By substituting a secondary source’s gloss for this Court’s actual text, the court of appeals evaded this Court’s categorical holding that the tribunals apply the identical legal standard. *Levy*’s rule—adopted by the Eighth Circuit and reversed in *B&B Hardware*—cannot be “perfectly consistent” with the decision that reversed it.

II. The Second Circuit’s New Rule Of Factual Identity Conflicts With *B&B Hardware* And Violates The Party Presentation Principle.

Entirely on its own initiative, the Second Circuit created a new rule of federal trademark preclusion

and applied it to a factually foreclosed defense that Peju never raised. The rule holds that a use “significantly narrower than” an unrestricted registration application defeats identity of the issue. App. 10a. That is the exact opposite of *B&B Hardware*’s test, under which the issue is the same whenever a mark is used “in ways that are materially the same as the usages *included* in its registration application.” 575 U.S. at 156 (emphasis added).

The defense to which the court of appeals applied its new rule was that Peju’s infringing product was a “dessert wine.” App. 10a. Peju never raised that defense, and the record foreclosed it: Peju admitted below to selling approximately thirty types of wine under the mark, only three of them dessert wines. *Cesari*, 693 F. Supp. 3d at 391-392, 402. The Second Circuit discarded both the record and this Court’s test to create its own, violating the party presentation principle and *B&B Hardware*.

A. The Second Circuit Drastically Departed From The Party Presentation Principle By Creating A New Rule Of Preclusion And A New Defense That No Party Raised.

“[O]ur adversarial system of adjudication” relies “on the parties to frame the issues for decision and assign[s] to courts the role of neutral arbiter of matters the parties present.” *United States v. Sineneng-Smith*, 590 U.S. 371, 375 (2020) (internal quotation marks and citation omitted). This restraint “is all the more appropriate when the appellate court itself spots an issue the parties did not air below.” *Wood v. Milyard*, 566 U.S. 463, 473 (2012). A court of appeals that “depart[s] so drastically from the

principle of party presentation as to constitute an abuse of discretion” has left its role as neutral arbiter. *Sineneng-Smith*, 590 U.S. at 375. Here, the court of appeals abandoned that role entirely: Peju never argued for this new rule, and it never raised the defense to which the court applied it.

1. Peju never argued for this new rule. Peju’s argument on identity was that the TTAB and the courts apply their multifactor tests differently; it devoted its argument below to showing how a court would apply each factor. App. 27a-29a; Dkt. 29, at 5-16; C.A. Dkt. 39.1, at 35, 39; C.A. Dkt. 85.1, at 15-23. The district court properly rejected that premise, applied *B&B Hardware*’s included-usages test as written, and found it satisfied. App. 19a-20a. At no point did Peju ask any court to find that a “dessert wine” out of the dozens of its LIANA-branded wines at issue in the infringement action defeats that factual-identity test.

2. Nor did Peju raise the defense. Peju’s two answers pleaded numerous affirmative defenses; none asserted that its use fell outside the registration application the TTAB adjudicated because the wine at issue in the infringement action was a dessert wine. Dkt. 15, at 10; Dkt. 213, at 14-18. The court of appeals appears to have searched the record on its own, but stopped at page 3 of Peju’s original answer. App. 4a-5a. Even that page describes the dessert wine as one among the “California wines” Peju offers for sale, and later pages of the same pleading admit that Peju uses the LIANA mark “to promote and offer for sale only California wines.” Dkt. 15, at 3, 7. Peju’s answer to the amended complaint does not mention a dessert wine

at all. Dkt. 213.⁹ At summary judgment, Peju drew distinctions to show how a court would apply each likelihood-of-confusion factor differently from the TTAB. App. 19a; Dkt. 29, at 12-15. On appeal, Peju repeated that the two tribunals apply their factors differently. C.A. Dkt. 39.1, at 35, 39. It never presented the “principal defense to Cesari’s infringement claim” the Second Circuit attributed to it: “that its wine [wa]s distinguishable [from Cesari’s] because it is a dessert wine.” App. 7a.¹⁰

3. Neither the rule nor the defense fits the case. The rule is the opposite of the test this Court prescribed. *See infra* Part II.B. The defense is foreclosed by the record: it was undisputed that Peju sold approximately thirty types of wine under the LIANA mark, reds, whites, and a late-harvest Orange Muscat, in every ordinary channel, and the judgment disgorged its profits on all of them. *Cesari*, 693 F. Supp. 3d at 391-392, 402. The order’s stated ground reaches at most three of those wines, yet the court of appeals vacated the judgment as to all of them—stripping preclusion from dozens of wines that do not even fit its own invented defense. App. 10a-11a.

When a court leaves the case the parties presented, it loses the accuracy the adversarial process is intended to safeguard. The result here was a defense the record forecloses, a rule this Court’s precedent forbids, and a final judgment vacated on the strength of both. That is a departure “so drastic[] . . . as to

⁹ Peju also admitted promoting “California wines under the LIANA ESTATES label.” Dkt. 15, at 9.

¹⁰ The order’s assertion that the TTAB “never considered” that defense, App. 7a, goes to whether the issue was actually litigated, an element Peju never challenged in the district court. App. 17a.

constitute an abuse of discretion,” *Sineneng-Smith*, 590 U.S. at 375, and one that has “so far departed from the accepted and usual course of judicial proceedings . . . as to call for an exercise of this Court’s supervisory power.” Sup. Ct. R. 10(a). Only this Court can reject the resulting rule: a doctrine of the Second Circuit’s own creation, unmoored from the record and from this Court’s precedent alike. See *Lucky Brand Dungarees, Inc. v. Marcel Fashions Grp., Inc.*, 590 U.S. 405, 412 (2020) (rejecting the Second Circuit’s newly devised “defense preclusion” rule).

B. The Second Circuit’s Rule That A Narrower Use Defeats Factual Identity Directly Conflicts With *B&B Hardware’s* Included-Usages Test.

The central purpose of the factual-identity inquiry in *B&B Hardware* is to determine precisely what issue the TTAB adjudicated, in order to assess whether that same issue is presented in the infringement action. 575 U.S. at 155-156. The test this Court adopted, whether a mark is used “in ways that are materially the same as the usages *included* in its registration application,” was built so that a party cannot “escape the preclusive effect of an adverse judgment.” *Id.* at 156-157 (emphasis added). The Second Circuit’s new rule conflicts directly: it holds that an included use, if “significantly narrower than” an unrestricted application, defeats identity. App. 10a.

1. To identify the adjudicated issue, this Court anchored the test entirely to the registration application. The Court expressly defined a mark’s “usages” as “[t]he usages listed in the application—i.e., those goods on which the mark appears along

with, if applicable, their channels of distribution.” *B&B Hardware*, 575 U.S. at 143. The “materially the same” standard is an anti-evasion rule: “trivial variations between the usages set out in an application and the use of a mark in the marketplace do not create different ‘issues.’” *Id.* at 157. This Court distinguished these *included* usages from “non-disclosed usages,” meaning “common-law rights in usages not encompassed by [the] registration.” *Id.* at 155-156 (quoting Brief for United States as Amicus Curiae 23). Preclusion is withheld only for non-disclosed usages “materially unlike” those in the application. *Id.* at 156.

2. A use narrower than an unrestricted application is included in it by definition and by law. A registration is *prima facie* evidence of the owner’s “exclusive right to use the registered mark in commerce on or in connection with the goods or services specified in the certificate”—all of them, not a subset. 15 U.S.C. § 1057(b). To “include” means “to take in or comprise as a part of a whole or group,” *Include*, Merriam-Webster.com Dictionary, <https://www.merriam-webster.com/dictionary/include> (last visited Oct. 14, 2026), and this Court reads the word as “a term of enlargement, and not of limitation.” *Burgess v. United States*, 553 U.S. 124, 131 n.3 (2008) (quoting 2A N. Singer & J. Singer, *Statutes and Statutory Construction* § 47:7, at 305 (7th ed. 2007)); *Christopher v. SmithKline Beecham Corp.*, 567 U.S. 142, 162 (2012). The Solicitor General, whose reasoning this Court adopted, said the same: preclusion applies “when the usages at issue in the infringement action represent a subset of the usages adjudicated in the Board proceeding.” Brief for the United States as Amicus Curiae Supporting

Petitioner 24, *B&B Hardware*, No. 13-352 (Sept. 11, 2014). A use the application *includes* is therefore “materially the same” under *B&B Hardware*, not materially different. Here, Peju dictated the scope of the TTAB’s adjudication by applying to register LIANA for “wine,” without restriction. App. 31a. Cesari’s registration covers LIANO for “wines,” also without restriction. App. 31a, 34a. A determination that LIANA for wine is likely to cause confusion with LIANO for wines necessarily covers LIANA on every wine. A dessert wine is not a non-disclosed usage; it is an instance of the usage the TTAB adjudicated. The district court faithfully applied that rule: “the marketplace usage the TTAB considered, wines, entirely encompasses the narrower usages defendants proffer in this litigation. Wines purchased by sophisticated consumers, after all, are still wines.” App. 19a-20a.

3. The court of appeals dismantled *B&B Hardware*’s included-usages test. By ruling that a marketplace use “significantly narrower than” an unrestricted application defeats identity of the issue, App. 10a, it treated an included use as a material difference. That logic swallows the test whole: if an included use defeats identity, the test reaches nothing. Any marketplace use can be described more narrowly than an unrestricted application; under the order, that description alone lets a party “escape the preclusive effect of an adverse judgment.” 575 U.S. at 157.

III. Certiorari Is Necessary To Enforce Vertical *Stare Decisis* And Restore The Right To Preclusion That *B&B Hardware* Secured.

This Court decided *B&B Hardware* to establish one national rule of trademark issue preclusion. The Second Circuit has nullified that mandate to resurrect the very circuit precedent this Court displaced. With *Jim Beam* and *Levy* re-born, identity of the issue once again turns on a comparison of standards this Court foreclosed and a factual distinction its test excludes. Only this Court can restore *B&B Hardware* and end the “new adventures” of abrogated circuit precedent, now enhanced by a rule of its own creation. *See CNH Indus. N.V. v. Reese*, 583 U.S. 133, 134 (2018) (per curiam) (summarily reversing rejected precedent “re-born, re-built, and re-purposed for new adventures” (citation omitted)).

1. The structural question of vertical *stare decisis*—whether *B&B Hardware* means what it says, rather than what the Second Circuit modified it to say—is a pure question of federal law. It arrives here on a fully adjudicated district-court record and undisputed facts: Peju’s unrestricted application for LIANA and Cesari’s registration of LIANO, both for wine; a TTAB decision finding the marks “almost identical” and the goods “identical,” App. 33a-34a; an undisputed summary-judgment record on which the district court applied *B&B Hardware*, App. 12a-25a; and a post-trial judgment disgorging profits on approximately thirty wines that Peju admitted were sold under the LIANA mark. App. 11a; *Cesari*, 693 F. Supp. 3d at 391-392, 402.

The question was pressed and passed upon. Cesari argued below that *B&B Hardware* abrogated *Jim*

Beam and *Levy*. C.A. Dkt. 67.1, at 15-20; App. 8a. Peju answered that *B&B Hardware* “does not even mention either opinion, let alone definitively (or even impliedly) overrule them,” and that “[t]heir principal holdings remain intact,” C.A. Dkt. 85.1, at 18; amicus INTA added that the two decisions “comport with” *B&B Hardware* and are “essentially the same,” C.A. Dkt. 123.1, at 9, 12. The order agreed. App. 8a-9a. The ruling was outcome-determinative. The court of appeals vacated on identity of the issue alone and rejected Peju’s remaining arguments as “without merit.” App. 10a. On this clean record, the Second Circuit invoked the repudiated authority of *Jim Beam* and *Levy* to evade this Court’s mandate and create exceptions in direct conflict with its rules. Whatever its own views, a court of appeals is “duty-bound to respect ‘the hierarchy of the federal court system created by the Constitution and Congress.’” *Nat’l Insts. of Health*, 145 S. Ct. at 2665 (Gorsuch, J., concurring in part and dissenting in part) (quoting *Hutto*, 454 U.S. at 375). Such a departure is the most corrosive because it is the hardest to detect: an order reciting fidelity to a precedent circulates as an application of it, and slips past the summary correction that candid defiance invites. If open refusals to follow this Court’s precedents warrant summary reversal, *Bosse v. Oklahoma*, 580 U.S. 1, 3 (2016) (per curiam); *Marmet Health Care Ctr., Inc. v. Brown*, 565 U.S. 530, 531 (2012) (per curiam), a departure that will be read as a faithful application of *B&B Hardware* warrants review *a fortiori*.

2. The casualty of this defiance is issue preclusion, “a rule of fundamental and substantial justice, ‘of public policy and of private peace.’” *Federated Dep’t Stores, Inc. v. Moitie*, 452 U.S. 394, 401 (1981)

(citation omitted). The doctrine exists precisely because a “losing litigant deserves no rematch after a defeat fairly suffered.” *B&B Hardware*, 575 U.S. at 147 (citation omitted). It conserves judicial resources, fosters reliance on judicial action, and protects litigants from “the expense and vexation attending multiple lawsuits.” *Ibid.* (citation omitted).

In fiscal 2025 alone, 7,650 oppositions and 2,897 petitions to cancel were filed with the TTAB.¹¹ Under the order below, no determination in any of them will bind an infringement court in the circuit that is home to the Nation’s second-largest district-court trademark docket.¹² The Second Circuit’s rule reduces those adjudications to expensive dress rehearsals. The cost to the federal judiciary is starkly visible here: the TTAB settled the identical issue between Cesari and Peju in 2004. After nine years of federal litigation, the Second Circuit erased the final judgment and returned the issue to the district court for a second adjudication on its new rules and on an invented

¹¹ U.S. Patent & Trademark Office, *TTAB Incoming Filings and Performance Measures for Decisions*, <https://www.uspto.gov/trademarks/ttab/ttab-incoming-filings-and-performance> (last visited Oct. 14, 2026).

¹² Admin. Office of the U.S. Courts, *Judicial Business of the United States Courts 2025*, tbl. C-7, https://www.uscourts.gov/sites/default/files/document/jb_c7_093_0.2025.pdf (trademark cases pending as of Sept. 30, 2025: Second Circuit 468 of 3,206 nationwide; Southern District of New York 295, second only to the Northern District of Illinois); *see also* Admin. Office of the U.S. Courts, *Just the Facts: Intellectual Property Cases—Patent, Copyright, and Trademark* (Feb. 13, 2020), <https://www.uscourts.gov/data-news/judiciary-news/2020/02/13/just-facts-intellectual-property-cases-patent-copyright-and-trademark> (New York second in trademark filings, 1996-2018).

defense that has no application to this case. What preclusion confers is freedom from a second adjudication, and that benefit “would be irretrievably lost” once relitigation begins. *Coinbase, Inc. v. Bielski*, 599 U.S. 736, 743 (2023). By using dead circuit precedent to grant a rematch on the identical issue, the decision below destroys the repose *B&B Hardware* secured. This subversion threatens preclusion itself: *B&B Hardware* rejected reasoning that “would make it difficult for the doctrine ever to apply in trademark disputes,” 575 U.S. at 141; the Second Circuit treats preclusion as “the exception, not the norm.” App. 7a.

3. Only this Court can correct this structural evasion. This is not an isolated lapse. At least five times in recent Terms the Second Circuit has kept its own precedent in force against an intervening decision of this Court. In *RiseandShine Corp. v. PepsiCo, Inc.*, No. 23-1176-cv, 2024 U.S. App. LEXIS 32182 (2d Cir. Dec. 19, 2024) (summary order), *cert. granted*, No. 24-1016 (U.S. June 29, 2026), the Second Circuit acknowledged it “arguable” that this Court’s intervening decision “casts doubt on our view,” yet “continued to adhere to the view” because its own later decisions were “binding here.” *RiseandShine*, 2024 U.S. App. LEXIS 32182, at *10 (internal quotation marks omitted). The United States now tells this Court that the Second Circuit’s view “is incorrect” and that the court kept it “notwithstanding *Hana Financial*.” Brief for the United States as Amicus Curiae Supporting Vacatur 29, *RiseandShine*, No. 24-1016 (Sept. 15, 2026). In *MOAC Mall Holdings LLC v. Transform Holdco LLC*, 598 U.S. 288 (2023), the Second Circuit treated a statute as jurisdictional “based on Second Circuit precedent,” *id.* at 294, while asserting that its precedent “followed the Supreme

Court’s warning,” *In re Sears Holdings Corp.*, 2021 U.S. App. LEXIS 37358, at *9 (2d Cir. Dec. 17, 2021) (summary order); this Court unanimously vacated, 598 U.S. at 304-305.

The Second Circuit did the same in *Ciminelli v. United States*, 598 U.S. 306 (2023), and *Percoco v. United States*, 598 U.S. 319 (2023). In both cases, the court of appeals adhered to circuit precedent that “controls this panel” and that it chose to “reaffirm,” while dismissing this Court’s intervening decisions as “inapposite” or as giving “no reason to doubt” the circuit’s anterior rule. *United States v. Percoco*, 13 F.4th 158, 164 n.2 (2d Cir. 2021), *rev’d sub nom. Ciminelli v. United States*, 598 U.S. 306 (2023); *United States v. Percoco*, 13 F.4th 180, 194, 196-197 (2d Cir. 2021), *rev’d*, 598 U.S. 319 (2023). And here, the court of appeals held *Jim Beam* and *Levy* good law by pronouncing *B&B Hardware* “perfectly consistent,” pointing to its own “post-*B&B Hardware* rulings [that] have continued to cite *Jim Beam* and *Levy* with approval.” App. 8a-9a.

This recurring playbook—where a court elevates its own precedent as “binding,” relies on its own later rulings to keep the precedent alive, and dismisses this Court’s mandates as merely “consistent” with repudiated law—exploits a structural vulnerability in the federal system. Because this Court can review only a fraction of the judgments entered below, vertical *stare decisis* depends entirely on circuit courts to faithfully execute its mandates. *See Hutto*, 454 U.S. at 375.

The Second Circuit has even treated this Court’s denial of certiorari as an endorsement of its precedent. In *Ciminelli*, the court of appeals justified adhering to

circuit precedent over this Court’s intervening decision by noting that “the Supreme Court recently denied a petition for certiorari that presented challenges . . . similar to those raised by defendants here.” 13 F.4th at 164 n.2. On that reasoning, abrogated precedent survives for as long as this Court declines review—which is to say, in almost every case. This Court takes few cases, and it takes them to settle the law for the Nation. A court of appeals that sets one of those decisions aside without even explaining how its anterior precedent survives strikes vertical *stare decisis* at its core. Unless this Court intervenes, its decisions will be only as binding as the lower courts choose to make them.

The summary-order form does not diminish the need for this Court’s intervention. Under the Second Circuit’s own rules, even a summary order does not free the court “to rule differently in similar cases.” 2d Cir. L.R. 32.1 cmt., App. 41a.

Nor will the resurrected *Jim Beam* and *Levy* test, or the new rule of factual identity the Second Circuit created, stay in the Second Circuit. The Eighth Circuit adopted *Jim Beam* and *Levy* in *B&B Hardware* itself, 716 F.3d at 1024-1025, and Hargis told this Court that “the Eighth Circuit’s holding expressly tracked and followed the Second Circuit’s rule,” which reflected “the settled and well-reasoned views of the Second Circuit and scholarly commentators.” Br. in Opp. 22, 28. Hargis went further: “[e]very circuit and administrative body to address the issue in the past twenty-five years has adopted this principle,” and every court applying it “cites *Jim Beam* as the appropriate standard.” Supplemental Brief for Respondents 2, 6, *B&B Hardware*, No. 13-352 (June

9, 2014). The order, and the treatise comment it adopts, App. 9a, will be the new authority on what *B&B Hardware* requires. INTA itself told the court of appeals that this case’s “precedential impact on trademark infringement litigation could be far greater than the Supreme Court’s decision in *B&B Hardware*.” C.A. Dkt. 46.1, at 6-7. The treatise now instructs courts that the abrogated rule is “essentially the same” as *B&B Hardware*, App. 9a; the amicus whose arguments this Court rejected repeats it, C.A. Dkt. 123.1, at 12; and the Second Circuit has adopted both. Left standing, the order below reduces *B&B Hardware* to a dead letter and strips litigants and courts of the finality that issue preclusion guarantees.

B&B Hardware will be restored here or not at all.

CONCLUSION

The petition for a writ of certiorari should be granted, the judgment of the court of appeals reversed, and the case remanded with instructions to reinstate the judgment of the district court and to decide Cesari’s cross-appeal, which the Second Circuit never addressed.

Respectfully submitted.

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