No. 01-1015

IN THE
Supreme Court of the United States
OCTOBER TERM, 2002

VICTOR MOSELEY and CATHY MOSELEY,
D/B/A VICTOR'S LITTLE SECRET,
Petitioners,
v.
V SECRET CATALOGUE, INC., ET AL.,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF OF BEST WESTERN INTERNATIONAL, INC. AND SHERATON INTERNATIONAL, INC. AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

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BRIEF OF BEST WESTERN INTERNATIONAL, INC. AND SHERATON INTERNATIONAL, INC. AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS[1]

Statement of Interest

Amici Best Western International, Inc. and Sheraton International, Inc., two of America's oldest and largest hotel brands, hold the kind of "truly prominent and renowned" trademarks that the Federal Trademark Dilution Act ("FTDA") was enacted to protect. *I.P. Lund Trading ApS v. Kohler Co.*, 163 F.3d 27, 46-47 (1st Cir. 1998) (citation omitted); 15 U.S.C. § 1125(c)(1) (only "[t]he owner of a famous mark shall be entitled" to invoke the dilution remedy). *Amici* file this brief because the issues on *certiorari* affect their ability to protect their famous marks.

Under the FTDA, a mark's fame is judged by, among other things: (1) the duration and extent of the use of the mark on goods or services; (2) the extent of advertising and publicity of the mark; (3) the geographic area in which the mark is used; and (4) the degree of recognition of the mark in the trading areas in which it is used. *See* 15 U.S.C. § 1125(c)(1)(B)-(D) & (F); *see also Bose Corp. v. QSC Audio Prods., Inc.*, 293 F.3d 1367, 1371 (Fed. Cir. 2002) ("[C]ases teach that the fame of a mark may be measured indirectly . . . by the volume of sales and advertising expenditures of those goods traveling under the mark and by the length of time the indicia of commercial awareness have been evident."). By these measures, BEST WESTERN and SHERATON are classic

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[1] Counsel of record for all parties have given written consent to file this brief. *Amici* have filed those letters of consent with the Clerk.

No party or counsel to a party has authored this brief in whole or in part, and no person or entity other than the companies submitting this brief and their counsel have contributed monetarily to the preparation or submission of this brief.

examples of famous marks. The BEST WESTERN and SHERATON marks have achieved fame by these measures through years of efforts and great costs.

Founded in 1946, Best Western is an Arizona non-profit corporation, operating as an association of independently-owned-and-operated hotels.[2] Today, it has over 2000 member hotels in the United States and a similar number in the rest of the world. All of these hotels operate exclusively under the Best Western name.

From its headquarters in Phoenix, Arizona, Best Western has continuously invested in marketing and promoting its brand. For example, in 1947, it distributed 150,000 copies of *The Best Western Travel Guide* to American travelers. In 2001, it distributed more than 3,660,000 copies of the *Guide*. Best Western spent more than $283 million on brand-promotion over the past decade, including more than $35 million in 2001 alone. Those efforts have resulted in consistently high occupancy rates for the member hotels and in growth of the membership ranks. With more than 306,000 rooms, Best Western is the largest hotel chain in the world under a single brand and is significantly larger by volume than other individual brands. *See Hotels' Corporate 300 Ranking*, HOTELS, July 2002, at 60. Best Western believes that the fame of its trademarks has reached the level and nature intended for protection under the FTDA.

Sheraton began as a single hotel in 1937. In 1946, Sheraton became the first hotel company to be listed on the New York Stock Exchange. In 1998, Sheraton was acquired by its parent company, Starwood Hotels & Resorts Worldwide, Inc., which has continued to grow and strengthen the Sheraton brand. There are 206 Sheraton

[2] Best Western is the owner of the trademark BEST WESTERN and design, Reg. No. 1900620, as well as other trademarks incorporating the phrase "Best Western" or commencing with the word "Best."

hotels in the United States and 192 in other countries. In the past eight years, Sheraton's advertising and promotion budget exceeded $233 million in North America and Latin America alone, with more than $26 million spent in 2001 alone. Sheraton's global, gross sales for 2001 exceeded $3 billion. It is the seventh largest hotel brand in the world with more than 127,000 rooms. *Id.* Sheraton believes that the fame of its trademark has reached the level and nature intended for protection under the FTDA.

Amici's investments in the BEST WESTERN and SHERATON marks can be fully and fairly safeguarded only with vigorous enforcement of the FTDA. A motorist often makes the decision to stay in a particular hotel a split second after seeing a roadside sign displaying the hotel's mark. If that mark has been eroded by tarnishment or blurring, *amici* will lose the motorist's business for that night and perhaps for future stays.

Amici's ability to prevent such tarnishment and blurring would be undermined by the limitation on injunctive relief proposed by petitioners and adopted by the Fourth[3] and Fifth[4] Circuits. In the view of petitioners and those courts, no injunctive relief should be awarded under the FTDA absent proof of actual harm in the form of economic loss. Under that standard of proof, however, trademark diluters would be encouraged to exploit the BEST WESTERN and SHERATON marks, secure in the knowledge that Best Western's and Sheraton's growing success will hide (and likely render unprovable) the effects of their dilution. By the time dilution manifests itself in provable economic loss, the BEST WESTERN and SHERATON marks will have been whittled away. An

[3] *See Ringling Bros.-Barnum & Bailey Combined Shows, Inc. v. Utah Div. of Travel Dev.*, 170 F.3d 449 (4th Cir. 1999).

[4] *See Westchester Media v. PRL USA Holdings, Inc.*, 214 F.3d 658 (5th Cir. 2000).

injunction at that point would be too late to stop the damage. And because the FTDA provides that plaintiff may collect its damages only in the rare circumstance of provable willful dilution, petitioners' proposed standard would generally leave Best Western and Sheraton without any effective remedy under the statute. *See Nabisco, Inc. v. PF Brands, Inc.*, 191 F.3d 208, 224 (2d Cir. 1999) (noting that requiring proof of actual harm "would subject the senior user to uncompensable injury"); *Eli Lilly & Co. v. Natural Answers, Inc.*, 233 F.3d 456, 467 (7th Cir. 2000) ("[I]f the 'causes dilution' element requires proof of actual economic harm, senior mark holders will be restrained from bringing suit prior to suffering an injury for which the [FTDA] will not compensate them in many circumstances."). Because petitioners' standard would subject Best Western and Sheraton to injuries that can never be remedied, *amici* have a keen interest in the outcome of this action.

In *amici's* view, the standard and result advocated by petitioners violate the equitable principles expressly incorporated into the FTDA. To give effect to those equitable principles, *amici* urge this Court to affirm the judgment of the Sixth Circuit, and hold that an FTDA-injunction is available upon proof that defendant's conduct is *likely* to dilute plaintiff's mark.

Summary of Argument

The FTDA explicitly states that an injunction against dilution shall be awarded "subject to the principles of equity." 15 U.S.C. § 1125(c)(1). Allowing injunctive relief when dilution is likely appropriately follows Congress's directive to apply equitable principles to the dilution remedy.

First, it is a bedrock "principle[] of equity" that "'[o]ne does not have to await the consummation of threatened injury to obtain preventive relief.'" *Farmer v. Brennan*, 511 U.S. 825, 845 (1994) (quoting *Pennsylvania v. West Virginia*, 262 U.S. 553, 593 (1923)). Rather, as this Court has consistently recognized, injunctions serve to prevent harm *before* it occurs and thus do not require a showing of past injury. Illustratively, this Court has held that injunctions may issue to prevent threatened harm under 42 U.S.C. § 1983 even though that statute—like the FTDA—is phrased in the present tense, and prohibits conduct that "causes" a deprivation of rights. Because requiring plaintiffs to prove actual harm, as advocated by petitioners, contradicts the inherently preventative nature of injunctive relief, it should be rejected.

Second, requiring proof of actual harm as a condition to injunctive relief conflicts with other equitable principles such as laches, estoppel and acquiescence. The lower courts have held these doctrines to be among the "principles of equity" incorporated into the FTDA. Yet requiring a dilution plaintiff to delay suit until it has amassed the extraordinarily difficult (and possibly unattainable) proof of actual harm would undermine the very interests that laches and other equitable doctrines are designed to prevent.

Argument

Advocates of requiring proof of actual harm purport to ground their argument in the FTDA's language, even though the Fourth Circuit itself has acknowledged that "[t]hat meaning surely does not leap fully and immediately from the statutory text." *Ringling Bros.-Barnum & Bailey Combined Shows, Inc. v. Utah Div. of Travel Dev.*, 170 F.3d 449, 453 (4th Cir. 1999). What *does* leap from the statutory text is that courts must award the dilution remedy *"subject to the principles of equity."* 15 U.S.C. § 1125(c)(1) (emphasis added).

Even without this explicit incorporation of equitable principles, the courts would have to presume that Congress intended the FTDA to embrace the traditional principles of equitable relief. *See United States v. Texas*, 507 U.S. 529, 534 (1993) ("courts may take it as a given that Congress has legislated with an expectation that the [common law] principle will apply except 'when a statutory purpose to the contrary is evident'") (quoting *Astoria Fed. Sav. & Loan Ass'n v. Solimino*, 501 U.S. 104, 108 (1991), and *Isbrandtsen Co. v. Johnson*, 343 U.S. 779, 783 (1952)). Congress's express incorporation of the principles of equity into the FTDA irrefutably confirms their integral importance to the interpretation and application of the statute.

I. REQUIRING PROOF OF ACTUAL HARM IS INCONSISTENT WITH THE "PRINCIPLES OF EQUITY" EXPRESSLY INCORPORATED INTO THE FTDA.

A. Requiring Proof of Actual Harm as a Condition to Injunctive Relief Misconceives the Purpose of, and Is Contrary to the Equitable Nature of, an Injunction.

Petitioners argue (at 27) that "Congress did not incorporate any language indicating an intent to remedy incipient harm." To the contrary, that language appears in the FTDA's express incorporation of "principles of equity." 15 U.S.C. § 1125(c)(1).

One of the most fundamental "principles of equity" is that "'[o]ne does not have to await the consummation of threatened injury to obtain preventive relief.'" *Farmer v. Brennan*, 511 U.S. 825, 845 (1994) (holding that prisoners need not suffer physical injury before obtaining court-ordered correction of inhumane prison conditions) (quoting *Pennsylvania v. West Virginia*, 262 U.S. 553, 593 (1923)); *accord United States v. W.T. Grant Co.*, 345 U.S. 629, 633 (1953) ("The purpose of an injunction is to prevent future violations and, of course, it can be utilized even without a showing of past wrongs.") (citation omitted); *Carter v. Carter Coal Co.*, 298 U.S. 238, 287-88

(1936) (fact that no harm had actually occurred did not bar injunctive relief); *Swift & Co. v. United States*, 276 U.S. 311, 326 (1928) ("[A] suit for an injunction deals primarily, not with past violations, but with threatened future ones; . . . an injunction may issue to prevent future wrong, although no right has yet been violated."); 42 AM. JUR. 2D *Injunctions* § 32 (2002) ("a party may seek an injunction to prevent probable, threatened injury and need not delay application until injury has actually been inflicted").

The rationale behind allowing plaintiffs to seek injunctive relief before actual harm occurs (or can be proven) is equally well established: "it is one of the most valuable features of equity jurisdiction, to anticipate and prevent a threatened injury, where the damages would be insufficient or irreparable." *Vicksburg Waterworks Co. v. Vicksburg*, 185 U.S. 65, 82 (1902); *accord Pierce v. Soc'y of Sisters*, 268 U.S. 510, 536 (1925) ("Prevention of impending injury by unlawful action is a well recognized function of courts of equity."). In fact, because "[t]he sole function of an action for injunction is to forestall future violations," actual injury has never been and cannot be a prerequisite to injunctive relief. *United States v. Or. State Med. Soc'y*, 343 U.S. 326, 333 (1952) (noting that an action for injunctive relief is a "forward-looking action").

Despite the FTDA's express incorporation of equitable principles, petitioners would have this Court ignore the preventative, forward-looking nature of an injunction and require proof of past economic harm before enjoining diluting conduct. It appears that they, and the Fourth and Fifth Circuits, mistakenly find a qualitative difference, for purposes of injunctive relief, between threatened and consummated harm. *See Ringling Bros.*, 170 F.3d at 458 (drawing a distinction between proving a "likelihood of dilution" and proving "actual, consummated dilution"); *Westchester Media v. PRL USA Holdings, Inc.*, 214 F.3d 658, 670 (5th Cir. 2000) (agreeing with the

Fourth Circuit's analysis). Equity, however, draws no such distinction. *See Hitchman Coal & Coke Co. v. Mitchell*, 245 U.S. 229, 256 (1917) ("Of course, in a court of equity, when passing upon the right of injunction, damage threatened, irremediable by action at law, is *equivalent* to damage done.") (emphasis added); *see also* 42 AM. JUR. 2D *Injunctions* § 32 ("With regard to injunctions, the threat of damage that cannot be remedied by an action at law is equivalent to damage done.").

Equally misplaced is petitioners' and the Fourth and Fifth Circuits' focus on the fact that state dilution statutes, unlike the FTDA, explicitly refer to "likelihood of dilution." *See Ringling Bros.*, 170 F.3d at 458 (calling this difference "[m]ost critical[]"); *Westchester Media*, 214 F.3d at 670-71 (describing this as a "key difference"). It was unnecessary for the FTDA to include this reference given its incorporation of "principles of equity"—principles that themselves embrace a likelihood-of-harm standard. Notably, state dilution statutes using "likelihood of injury" language do not contain the FTDA's reference to "principles of equity." *See, e.g.*, CAL. BUS. & PROF. CODE § 14330 (2002); MONT. CODE ANN. § 30-13-334 (2001); N.H. REV. STAT. ANN. § 350-A:12 (2001).

In any event, the *lack* of an explicit reference to "likelihood of harm" in the FTDA is far too slender a basis for assuming that Congress intended to abandon the "long established and familiar" equitable principle that an injunction need not await actual harm. *See United States v. Texas*, 507 U.S. at 534 (noting that "'[s]tatutes which invade the common law . . . are to be read with a presumption favoring the retention of long-established and familiar principles, except when a statutory purpose to the contrary is evident'") (quoting *Isbrandtsen Co.*, 343 U.S. at 783, and *Astoria Fed. Sav. & Loan Ass'n*, 501 U.S. at 108). Indeed, "[i]n order to abrogate a common-law principle, the statute must 'speak directly' to the question addressed by the common law." *Id.* (citation omitted).

Once again, even the Fourth Circuit has acknowledged that an actual harm requirement "does not leap fully and immediately from the statutory text." *Ringling Bros.*, 170 F.3d at 453.

In other statutory contexts, this Court has recognized that neither the absence of express "likelihood-of-harm" language nor legislative use of the present tense to describe the prohibited conduct requires a plaintiff to suffer or prove actual harm before obtaining injunctive relief. For example, 42 U.S.C. § 1983 does not explicitly refer to the "likelihood" of deprivation of federal rights, but rather imposes liability on any person who "*subjects*, or *causes to be subjected*" any other person "to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws." (Emphasis added). The foregoing italicized language is grammatically the same as the "causes dilution" language in the FTDA. Yet, consistent with settled equitable principles, this Court has held that section 1983 plaintiffs facing only a threatened deprivation of rights may secure injunctive relief (so long as Article III standing requirements are met). *See, e.g.*, *Virginia v. Am. Booksellers Ass'n*, 484 U.S. 383, 392-93 (1988) (booksellers had standing to bring a pre-enforcement facial challenge to an anti-pornography statute).

This Court should, therefore, reaffirm the equitable nature of injunctions and hold that a federal trademark dilution plaintiff does not have to prove actual dilution by a junior mark as a condition to injunctive relief. Any other result would impose an unprecedented limitation on the courts' powers to issue injunctions and would contravene the "principles of equity" explicitly incorporated into the FTDA.[5]

[5] Requiring actual harm also has the drawback of encouraging piecemeal litigation. Trademark infringement and dilution claims are often asserted in the same complaint and arise out of the same transaction or occurrence. This case is a typical example. Yet all

B. Requiring Proof of Actual Harm Is Incompatible With Other "Principles of Equity," to the Prejudice of Both Plaintiffs and Defendants.

Requiring proof of actual harm is also inconsistent with the equitable doctrines of laches, estoppel and acquiescence. Equally inequitably, the actual-harm standard forces plaintiffs to suffer, without possibility of redress, the very damage that the FTDA means to prevent.

This Court has held that, in appropriate cases, trademark claims may be barred by the doctrines of laches, estoppel and acquiescence where the plaintiff's delay in asserting its rights has caused the defendant to invest substantial resources and otherwise change its position in reliance on the plaintiff's inaction.[6] Courts

circuits that have decided this issue agree that actual harm is not required for *infringement* claims. *See* 3 J. THOMAS MCCARTHY, MCCARTHY ON TRADEMARKS AND UNFAIR COMPETITION § 23:12, at 23-47 to 23-49 (4th ed. 2002) (collecting cases). Accordingly, if proving *dilution* claims requires actual harm, plaintiffs would bring infringement claims when there was a likelihood of confusion and bring dilution claims only later, when actual economic harm had occurred. Such a regime would waste judicial resources and encourage claim-splitting.

[6] *See, e.g., United Drug Co. v. Theodore Rectanus Co.*, 248 U.S. 90, 103 (1918) (applying estoppel to bar injunctive relief in a trademark infringement action because defendant "had expend[ed] money and effort in building up a trade under [the mark]" while plaintiff did nothing); *Hanover Star Milling Co. v. Metcalf*, 240 U.S. 403, 418-19 (1916) (noting that "trademark rights . . . may be lost by abandonment, nonuser, laches, or acquiescence" and finding that plaintiff was estopped from claiming trademark infringement after taking no action to stop another user of a similar mark), *superseded by statute on other grounds, Park 'N Fly, Inc. v. Dollar Park & Fly, Inc.*, 469 U.S. 189, 200 (1985); *see also Hot Wax, Inc. v. Turtle Wax, Inc.*, 191 F.3d 813, 822, 824 (7th Cir. 1999) (noting that Lanham Act remedies "shall be subject to the principles of equity, which include the doctrine of laches" and using that doctrine to bar an infringement claim because plaintiff took no action).

have specifically applied these equitable doctrines to avoid undue prejudice to defendants in claims under the FTDA.[7]

Requiring proof of actual harm is inconsistent with the courts' desire in these cases to avoid the prejudice that may come from delay in bringing suit. It would force a dilution plaintiff to postpone suit under the FTDA until it has amassed the highly difficult and complex proof of actual dilution (proof that ultimately may be unattainable). Even the proponents of the actual-harm standard recognize that the time and effort required to develop this proof is likely to be extraordinary. *See, e.g., Ringling Bros.*, 170 F.3d at 464-65 (recognizing that "[t]he difficulties of proving actual dilution by practically available means is evident," whether that proof comes from evidence of "an actual loss of revenues" or a "skillfully constructed consumer survey"); *Nabisco, Inc. v. PF Brands, Inc.*, 191 F.3d 208, 224 (2d Cir. 1999) ("Even if diminished revenue could be shown, it would be extraordinarily speculative and difficult to prove that the loss was due to the dilution of the mark. And as to consumer surveys, they are expensive, time-consuming and not immune to manipulation."). By the time the plaintiff can marshal such proof (if it can do so at all), the defendant may well have invested significant resources on the allegedly offending trademark, and thus incurred the

[7] *See, e.g., H.G. Shopping Ctrs. L.P. v. Birney*, 59 U.S.P.Q.2d 1109, 1119 (S.D. Tex. 2000) (finding that "equitable defenses can defeat prospective injunctive relief" and applying laches to bar a dilution claim in view of delay which caused defendants, who were unaware of plaintiff's claims, to incur the expenses of advertising, property maintenance and renovation); *but see AutoZone Inc. v. Ferrell Air Conditioning & Heating Inc.*, 63 U.S.P.Q.2d 1042, 1044 (W.D. Tenn. 2002) (finding that plaintiff's dilution claim was not barred by laches where the plaintiff waited only three months to bring suit and defendant "offered nothing beyond conclusory statements to support its argument that it suffered prejudice").

very prejudice that laches and like doctrines are designed to avoid.

On the other side of the equitable coin, requiring proof of actual harm would give plaintiffs an unfairly narrow window of opportunity to bring their dilution claims. If plaintiffs wait too long in developing the necessary evidence, they may be greeted with a laches finding when they come to court. *See Eli Lilly & Co. v. Natural Answers, Inc.*, 233 F.3d 456, 467-68 (7th Cir. 2000) ("[I]f the 'causes dilution' element requires proof of actual economic harm, . . . [s]enior mark holders would also be open to the argument that they had failed actively to protect their marks."); *Nabisco*, 191 F.3d at 222 ("A factor . . . in considering infringement is whether the senior user's effort to enjoin the junior use was made with reasonable promptness and whether the junior user will suffer harm resulting from any such delay. The factor seems at least as relevant to the question of dilution, perhaps more so.") (citation omitted). Conversely, if they do not wait long enough, their claim will be dismissed for failure of proof. It is patently inequitable to impose upon holders of widely used and famous trademarks, such as BEST WESTERN and SHERATON, the burden of picking just the magic date to sue one of the many entities who seek to take advantage of brands built up through decades of labor and expenditure.

This timing quandary not only puts dilution plaintiffs in an inequitable vise (wait and lose, jump the gun and lose), but it also guarantees that these plaintiffs will suffer the very injury that the FTDA is designed to prevent. Under an actual-harm proof standard, a plaintiff could not sue until its mark has actually been diluted. Yet "because the statute provides only for an injunction and no damages (absent willfulness), *see* 15 U.S.C. § 1125(c)(2), such injury would never be compensated." *Nabisco*, 191 F.3d at 224; *accord Eli Lilly*, 233 F.3d at 467 ("[I]f the 'causes dilution' element requires proof of actual economic harm, senior mark holders will be restrained from bringing suit prior to suffering an injury for which the [FTDA] will not compensate them in many circumstances."). An injunction will not bring back the guest who elected not to spend the night in *amici's* hotels; the small businessmen and women who run these hotels will bear this financial burden.

This unjust result cannot be tolerated under a statute that expressly embraces the "principles of equity."

C. The Solicitor General's Hybrid Test Also Cannot Be Squared With the "Principles of Equity" Incorporated Into the FTDA.

The Solicitor General's Amicus Brief correctly recognizes (at 25-26) that the actual-injury standard, as adopted by the Fourth and Fifth Circuits and advocated by petitioners, cannot be reconciled with the statutory language insofar as it requires a dilution plaintiff to prove that the defendant has caused actual, economic harm. But the Solicitor General proposes a hybrid test that also misses the mark. According to the Solicitor General (at 6), an injunction may issue only if "some dilution of [the plaintiff's] famous mark has already occurred."

In rejecting the "likelihood-of-dilution" standard, the Solicitor General makes the same mistake that petitioners do. He ignores that the FTDA expressly incorporates the "principles of equity," which themselves embrace a likelihood standard for injunctive relief. [*See* Section A above] Likewise, although the Solicitor General correctly notes that the statute targets conduct that "causes dilution," this Court has emphasized that "when passing upon the right of injunction, damage threatened, irremediable by action at law, is *equivalent* to damage done." *Hitchman Coal & Coke Co.*, 245 U.S. at 256 (emphasis added). Thus, for purposes of injunctive relief, conduct creating a likelihood of dilution *is* conduct that "causes" dilution.

The other statutes cited by the Solicitor General fail to support his interpretation of the FTDA. *First*, like petitioners, he points (at 14) to the difference between the federal and state dilution statutes. But again, like petitioners, he overlooks that the state statutes—unlike the FTDA—do not explicitly incorporate the "principles of equity."

Second, he notes (at 15) that in 1999, "several years after the FTDA was enacted," Congress amended the trademark statutes to authorize the Patent and Trademark Office to consider threatened dilution when reviewing trademark applications. Those amendments, however, do not purport to repeal the FTDA's incorporation of "principles of equity." Nor do those amendments concerning *administrative* proceedings overcome the presumption that, when Congress enacted the FTDA years earlier, it intended to retain the "long-established and familiar" equitable principles applicable in *judicial* proceedings. *See United States v. Texas*, 507 U.S. at 534 (citations omitted).[8]

[8] Both the Solicitor General (at 16) and petitioners (at 28-29) also refer to the legislative history of the 1999 amendments. That history has even less relevance than the amendments themselves. As this Court has "oft-repeated," "'the views of a subsequent Congress form a hazardous basis for inferring the intent of an earlier one.'" *Consumer Prod. Safety Comm'n v. GTE Sylvania, Inc.*, 447 U.S. 102, 117-18 (1980) (citations omitted).

Conclusion

The judgment and rationale of the Court of Appeals should be affirmed.

August 23, 2002.

Respectfully submitted,

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