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*Star Athletica, LLC v. Varsity Brands, Inc.*, No. 15-866

The Copyright Act does not protect the “design of a . . . useful article,” but the “pictorial, graphic, or sculptural features” of a useful article can be copyrighted if they can be “identified” and “exist[] independently of the utilitarian aspects of the article.” 17 U.S.C. § 101. In *Star Athletica, LLC v. Varsity Brands, Inc.*, No. 15-866, the Supreme Court granted review to settle a circuit split over the appropriate test for determining when a design feature of a useful article qualifies for copyright protection, arising in the context of cheerleading uniforms.

In an opinion for five Justices authored by Justice Thomas, the Court held that a feature incorporated into the design of a useful article is eligible for copyright protection if the feature “(1) can be perceived as a two- or three-dimensional work of art separate from the useful article and (2) would qualify as a protectable pictorial, graphic, or sculptural work—either on its own or fixed in some other tangible medium of expression—if it were imagined separately from the useful article into which it is incorporated.” Applying that standard to the cheerleading uniforms at issue, the Court found them to be copyrightable, as the decorations could be separated from the practical utility of the uniforms.

Justice Ginsburg concurred in the judgment. She would have skipped the separability analysis altogether, on the theory that the designs at issue were copyrightable works that were *reproduced on* useful articles, as opposed to designs *of* useful articles. Justice Breyer, joined by Justice Kennedy, dissented. Although he agreed with much of the Court’s framework, he did not think that the uniform designs could be perceived as works of art separate from the useful article because they were tailored to the shape of the uniform, such that replicating the design of the uniform would entail replicating the uniform itself.