In the

Supreme Court of the United States

STAR ATHLETICA, L.L.C.,

Petitioner,

v.

VARSITY BRANDS, INC., et al.,

Respondents.

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

BRIEF OF FASHION LAW INSTITUTE ET AL. AS AMICI CURIAE IN SUPPORT OF RESPONDENTS

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Cases				
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Bureau of Labor Statistics, U.S. Dep't Of Labor, Occupational Outlook Handbook: Fashion Designers (2014-2015 ed.)	16
Charles James, Clover Leaf (1953)	30
Claude E. Shannon & Warren Weaver, The MATHEMATICAL THEORY OF COMMUNICATION (Univ. of Illinois Press 1949)	24
Danica Lo, Hannah Bernhard Says Iris Apfel Ripped Off Her Toucan Pin Design, RACKED (May 18, 2011)	
Diane von Furstenberg, Fashion Deserves Copyright Protection, L.A. TIMES, Aug. 24, 2007	16
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