

No. 24-1016

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**In the Supreme Court of the United States**

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RISEANDSHINE CORPORATION, DBA RISE BREWING,

*Petitioner,*

v.

PEPSICO, INC.,

*Respondent.*

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

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**REPLY BRIEF FOR PETITIONER**

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## INTRODUCTION

“[T]he federal trademark statute makes infringement turn on the likelihood of consumer confusion.” *Jack Daniel’s Props. v. VIP Prods. LLC*, 599 U.S. 140, 144 (2023). The Second Circuit, in structuring its likelihood-of-confusion analysis below, held that a critical factor, a mark’s conceptual strength, is a question of law. The Second Circuit’s unique approach has created a circuit split that erodes national uniformity in the fundamental right to a jury trial in trademark infringement disputes. This case presents a stark example of the import of the Second Circuit’s approach, as the judgment—not of a jury of ordinary consumers but of the Second Circuit itself, followed by a district court judge bound on remand by the Second Circuit’s legal conclusion—whipsawed the litigants between two poles, from a preliminary injunction for the Petitioner to a summary judgment for the Respondent.

Respondent PepsiCo, Inc.’s Brief in Opposition tries to obscure the nature of that variance, this case’s suitability as a vehicle to align the circuits, and the importance of unifying federal trademark jurisprudence. But this Court should grant review to resolve the circuit split and establish that conceptual strength “falls comfortably within the ken of a jury.” *Hana Fin., Inc. v. Hana Bank*, 574 U.S. 418, 422 (2015).

## ARGUMENT

### I. THE COURT SHOULD GRANT CERTIORARI TO RESOLVE THE CIRCUIT SPLIT

#### A. PepsiCo Undersells the Circuit Split

1. PepsiCo seeks to minimize the circuit split by emphasizing that “trademark strength” comprises two components—conceptual strength and acquired strength—and arguing that there is no split on acquired strength, which all courts treat as factual. Opp.15. But the petition focuses on conceptual strength: “[A] trademark’s conceptual strength is squarely a factual question. The Second Circuit erred in treating conceptual strength as a legal question.” Pet.1 (paragraph break omitted).

2. As to conceptual strength, PepsiCo contends that “[t]here is no circuit split on whether [the] additional analysis of conceptual strength, *i.e.*, beyond classification of a mark’s distinctiveness, is a question of fact or law.” Opp.14. PepsiCo is wrong. The legal element that the Second Circuit injects is precisely its treatment of a mark’s conceptual strength as a question of law. All other circuits treat the question as a factual determination based on consumer perception as decided by a jury of one’s peers. See Pet.11-12. The consensus among all other circuits underscores the Second Circuit’s isolated position. And worse still, that outlier status evolved from a conscious shift away from the Second Circuit’s own prior precedent treating the question as factual. See Pet.15 n.1.

PepsiCo’s assertion that there is an “additional analysis” of conceptual strength treated as a question of law in circuits other than the Second is incorrect. Opp.18. The other circuits are consistent in holding that conceptual strength, and the analysis of a mark’s

overall strength, are questions of fact reviewed for clear error. The survey of circuit cases presented in the petition, see Pet.11-12, is no compilation of outliers. To be sure:

Considering whether a mark was generic, the First Circuit has reviewed determinations of a “phrase’s conceptual strength—its inherent distinctiveness” for clear error. *Bos. Duck Tours, LP v. Super Duck Tours, LLC*, 531 F.3d 1, 15-16 (1st Cir. 2008). The Third Circuit has held that both “[l]evel of distinctiveness and mark strength are factual determinations that we review for clear error.” *A&H Sportswear, Inc. v. Victoria’s Secret Stores, Inc.*, 237 F.3d 198, 221 (3d Cir. 2000). The Fourth Circuit has held that “[t]he strength of a mark and whether it is capable of being registered are also questions of fact that we review for clear error.” *Swatch AG v. Beehive Wholesale, Ltd. Liab. Co.*, 739 F.3d 150, 155 (4th Cir. 2014). The Fifth Circuit, considering both a mark’s conceptual strength and its standing in the marketplace, has reviewed the question of strength for clear error. *Future Proof Brands, L.L.C. v. Molson Coors Bev. Co.*, 982 F.3d 280, 294 (5th Cir. 2020). The Sixth Circuit has held that “[t]he strength of a mark is a factual determination of the mark’s distinctiveness,” which is “subject to the clearly erroneous rule of appellate review.” *Frisch’s Rest., Inc. v. Shoney’s Inc.*, 759 F.2d 1261, 1264 (6th Cir. 1985). The Seventh Circuit has held that inherent distinctiveness is “a question of fact.” *Uncommon, LLC v. Spigen, Inc.*, 926 F.3d 409, 420 (7th Cir. 2019). The Eighth Circuit has reviewed a finding of descriptiveness under the clearly erroneous standard. *ConAgra, Inc. v. George A. Hormel & Co.*, 990 F.2d 368, 370 (8th Cir. 1993). The Ninth Circuit has reviewed whether a mark is suggestive and thus inherently distinctive under the clearly erroneous



standard. *Eko Brands, LLC v. Adrian Rivera Maynez Enters.*, Nos. 20-35369, 20-35556, 2021 U.S. App. LEXIS 24503, at \*3 (9th Cir. Aug. 17, 2021). The Tenth Circuit has reviewed the conceptual categorization of a mark as a factual question subject to clear-error review. *Heartland Animal Clinic, P.A. v. Heartland SPCA Animal Med. Ctr., LLC*, 503 F. App'x 616, 621, 622 (10th Cir. 2012). The Eleventh Circuit has held that “[w]hether a mark has either inherent or acquired distinctiveness is a question of fact.” *Eng’red Tax Servs. v. Scarpello Consulting, Inc.*, 958 F.3d 1323, 1327 (11th Cir. 2020). The D.C. Circuit has explained that the categories of a mark’s distinctiveness “are not airtight” but “like the tones in a spectrum, tend to blur at the edges and merge together.” *Blinded Veterans Ass’n v. Blinded Am. Veterans Found.*, 872 F.2d 1035, 1039 (D.C. Cir. 1989) (quoting *Zatarains, Inc. v. Oak Grove Smokehouse, Inc.*, 698 F.2d 786, 790 (5th Cir. 1983) (reviewing a mark’s classification under the “clearly erroneous” standard)). And the Federal Circuit has held that “[p]lacement of a term on the fanciful-suggestive-descriptive-generic continuum is a question of fact” based on “the relevant purchasing public’s understanding of a contested term.” *In re Dial-A-Mattress Operating Corp.*, 240 F.3d 1341, 1344, 1345 (Fed. Cir. 2001).

The common theme of all circuits, aside from the Second, is that the entire analysis of a mark’s conceptual strength is a question of fact. PepsiCo’s argument that “there is no split on how the circuits treat [a purported] additional analysis of [a mark’s] conceptual strength” is off base. Opp.18.

## B. The Circuit Split Matters

PepsiCo next argues that “any marginal differences” in how conceptual strength is treated among the circuits “make virtually no difference” in a likelihood-of-confusion analysis. Opp.18. That position overlooks the material impact of the Second Circuit’s unique rule. The strength-of-mark factor is “often the most important factor.” App.50a. And the impact is starkly evident here: the district court held that the Second Circuit’s decision vacating the preliminary injunction “compels a finding that \* \* \* the mark is inherently weak as a matter of law.” App.29a; App.28a (holding the marks “inherently weak as a matter of law per the Second Circuit’s binding conclusion”). This was after the district court had found that the strength of the RISE marks supported Rise Brewing, leading to a preliminary injunction. App.82a, 94a. The district court’s blunt reversal demonstrates how individuals—here, judges not juries—can disagree on the inherent strength of the RISE marks and highlights why the question is properly for a jury.

PepsiCo also argues that Rise Brewing’s “appeal to the jury-trial right, Pet.17-18, is \* \* \* unavailing.” Opp.32. But this argument does not withstand scrutiny. Trademark strength is foundational to the infringement analysis. Removing that central question from the purview of the fact finder curtails the jury system, and “any seeming curtailment of the right to a jury trial should be scrutinized with the utmost care.” *Dimick v. Schiedt*, 293 U.S. 474, 486 (1935).

The Second Circuit’s unique approach is also likely to encourage forum-shopping. A legal determination by a judge creates a new risk incentive: simply roll the dice with a single judge rather than rely on the collective determination of twelve jurors engaged in

thoughtful deliberations. Justice Stevens noted the importance of uniform appellate standards to avoid forum-shopping, and that notion applies here. He observed that Congress, in creating the Federal Circuit, was “responding to concerns about both the lack of uniformity in federal appellate construction of the patent laws and the forum-shopping that such divergent appellate views had generated.” *Christianson v. Colt Indus. Operating Corp.*, 486 U.S. 800, 820 (1988) (J. Stevens, concurring). Divergent views in appellate review of the trademark laws raise the same forum-shopping concerns.

## **II. THIS CASE IS AN EXCELLENT VEHICLE FOR RESOLVING THE QUESTION PRESENTED**

PepsiCo contends that a ruling for Rise Brewing would not change the outcome below. Opp.23. That Rise Brewing was initially awarded a preliminary injunction shows otherwise. PepsiCo also exaggerates the variability of the likelihood-of-confusion tests across the circuits to try to sow confusion about the centrality of the question presented. But the issue presented is outcome-determinative, cleanly presented, and unambiguously preserved.

1. The Second Circuit’s legal conclusion that the RISE marks are “decidedly weak” infected the district court’s likelihood-of-confusion analysis. App.57a. On remand the district court held the marks “inherently weak as a matter of law per the Second Circuit’s binding conclusion.” App.28a. If instead treated as a factual question, the district court could have submitted the likelihood-of-confusion test to a jury, which could reasonably reach an outcome consistent with the

judge’s original grant of a preliminary injunction stopping PepsiCo’s likely infringement.

As to acquired strength or secondary meaning, the Second Circuit found no triable issue but did so only “in the context of the mark’s inherent weakness.” App.10a. The Second Circuit’s legal determination on conceptual strength thus permeated this analysis as well. If inherent conceptual strength were found to be stronger (as a jury might find), the evidence of acquired distinctiveness—including Rise Brewing’s approximately \$17.5 million in advertising, many industry and consumer awards, and exclusive use of RISE to identify canned caffeinated beverages before PepsiCo’s launch—could support a triable issue for overall trademark strength.

PepsiCo also misinterprets Rise Brewing’s position on the similarity factor. Opp.25-26. This Court has recognized the close connection between strength of mark and the scope of protection under the likelihood-of-confusion test, as “[t]he weaker a mark, the fewer are the junior uses that will trigger a likelihood of consumer confusion.” *United States PTO v. Booking.com B.V.*, 591 U.S. 549, 562 (2020) (quoting 2 McCarthy on Trademarks and Unfair Competition § 11:76 (5th ed. June 2019)). If a jury finds the RISE marks stronger than the Second Circuit judges did, then the jury could find the RISE marks are entitled to broader protection and thus find that PepsiCo’s use of the marks is likely to cause consumer confusion.

Rise Brewing’s evidence of actual consumer confusion highlights the importance of having a jury analyze conceptual strength. See Opp.19 (acknowledging that actual confusion is sometimes considered the

most important factor). The record here includes witness testimony confirming that customer confusion occurred between the Rise Brewing and PepsiCo marks at such a rate that it was the “norm \* \* \* not the exception.” App.73a.

2. This case’s procedural posture—a preliminary injunction awarded to Rise Brewing, a reversal based on the Second Circuit’s determination of law, a remand that bound the district court to award summary judgment to PepsiCo, and an affirmance where the Second Circuit “reiterated in no uncertain terms” that “inherent strength is a legal question” (App.6a)—makes this case a clean, indeed ideal, vehicle to address the question presented. Whether conceptual trademark strength is a question of fact or law is a discrete issue that transcends the thirteen circuit courts’ permutations of the likelihood-of-confusion tests and their weighing of factors. And those permutations are not nearly as varied as PepsiCo suggests. Each of the thirteen circuits considers strength of mark in its likelihood-of-confusion analysis. See pp.3-4, *supra*. Also, this Court has already recognized, for example, that the factors considered by the Eighth Circuit and the Trademark Trial and Appeal Board are not “fundamentally different,” concluding that likelihood of confusion for registration is subject to the same standard as likelihood of confusion for infringement purposes. *B&B Hardware, Inc. v. Hargis Indus.*, 575 U.S. 138, 154 (2015).

This Court has dealt with similar underlying questions about a mark’s strength in the likelihood-of-confusion test, holding that a mark’s incontestability could be relied on to support an infringement claim, and such incontestability could not be defended “on the grounds that the mark is merely descriptive.”

*Park 'n Fly v. Dollar Park & Fly*, 469 U.S. 189, 205 (1985). This holding resolved a circuit split between the Ninth and Seventh Circuits without any need to discuss differences in those two circuits' likelihood-of-confusion tests. *Id.* at 193. The Court here can similarly resolve the “fact versus law” question on conceptual strength without having to unify the multifactor tests used by the circuits.

That this case involves both forward and reverse confusion does not muddy the question presented. See Opp.30-31. The fundamental question of how a trademark's conceptual strength is determined—whether a question of law per the Second Circuit, or a question of fact per all other circuits—remains the same. See, e.g., *A&H Sportswear*, 237 F.3d at 231 (considering reverse confusion and holding that “[w]hen it comes to conceptual strength \* \* \* we believe that, just as in direct confusion cases, a strong mark should weigh in favor of a senior user”).

3. PepsiCo's notions of waiver lack any credibility. Opp.27-29. Rise Brewing squarely raised the question presented to the Second Circuit, arguing that conceptual strength (i.e., inherent strength) is a question of fact. E.g., App.6a (“Rise[ Brewing] first argues that the inherent strength is a question of fact. We disagree.”). Rise Brewing not only presented the argument, but the Second Circuit explicitly addressed and rejected it: “Earlier this year, we reiterated in no uncertain terms that ‘[a] mark[’s] inherent strength is a legal question.’” App.6a-7a (quoting *City of New York by and through FDNY v. Henriquez*, 98 F.4th 402, 413 (2d Cir. 2024)). The court continued: “Rise[ Brewing] urges us to disregard our recent precedent in favor of other decisions by this Court, which have suggested that inherent strength is a question of fact. \* \* \* We

decline to do so.” App.7a. Rise Brewing did not need to present identical citations to *Hana Financial* and *Booking.com* to preserve the question presented. The Second Circuit’s explicit consideration and rejection of the argument leaves no doubt that this issue was before the lower court and is now ripe for review.

### III. THE SECOND CIRCUIT’S APPROACH CONTRAVENES THIS COURT’S PRECEDENT

*Booking.com* and *Hana Financial* evoke a sensible truism: when a test relies on an ordinary consumer’s perception or impression, it is a question of fact for a jury. The Second Circuit’s fashioning of a mark’s conceptual strength as a legal determination defies that truism and conflicts with this Court’s precedents. PepsiCo’s attempt to distinguish the precedents is unpersuasive.

The principle explained in *Booking.com* is broad and directly applicable: “Whether any given ‘generic.com’ term is generic \* \* \* depends on whether consumers in fact perceive that term as the name of a class or, instead, as a term capable of distinguishing among members of the class.” 591 U.S. at 560-61. The Court rejected a *per se* legal rule for generic.com terms, emphasizing consumer perception as a factual inquiry. PepsiCo’s argument that *Booking.com*’s reference to consumer perception applies only to acquired strength is incorrect, as the holding directly implicates the conceptual strength inquiry.

For *Hana Financial*, the core holding is that “[a]pplication of a test that relies upon an ordinary consumer’s understanding of the impression that a mark conveys falls comfortably within the ken of a

jury.” 574 U.S. at 422. This principle applies to assessing a mark’s conceptual strength, which is about consumer perception of the mark’s distinctiveness. Conceptual strength is thus a perfect fit for the “ordinary consumer’s understanding,” and it aligns with this Court’s precedents.

PepsiCo tries to draw analogies to other tests treated as legal questions despite relying on an “ordinary person’s” perspective. Opp.36. Looking first at *Ornelas v. United States*, 517 U.S. 690 (1996), the Court ruled that reasonable suspicion is determined not by ordinary consumers but by an “objectively reasonable police officer” trained to make such determinations. *Id.* at 696. And the Court relied on a long-established history of no deferential review of such determinations. *Id.* at 697 (“We have never, when reviewing a probable-cause or reasonable-suspicion determination ourselves, expressly deferred to the trial court’s determination.”). By comparison, in the context of assessing a mark’s conceptual strength, jurors can more easily decide the perceptions or impressions of ordinary consumers, for they themselves qualify—unlike deciding what an objectively reasonable police officer should do or not do.

Similarly, the observer at issue in *Santa Fe Independent School District v. Doe*, 530 U.S. 290 (2000) is no ordinary consumer, but an “objective observer, acquainted with the text, legislative history, and implementation of the statute.” *Id.* at 308. Such familiarity makes that test more appropriate for a judge and bears no semblance to the task of considering a trademark’s conceptual strength. The latter is all about the meaning a mark conveys to ordinary consumers, falling “comfortably within the ken of a jury,” just as



twelve of thirteen circuits have held. *Hana Fin.*, 574 U.S. at 422.

### CONCLUSION

For these reasons and those stated in the petition, the Court should grant the petition for a writ of certiorari.

Respectfully submitted,

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