

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.

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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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**BRIEF FOR THE UNITED STATES AS AMICUS CURIAE**

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### **QUESTION PRESENTED**

Whether, in a likelihood-of-confusion analysis under 15 U.S.C. 1114, a dispute concerning a trademark's inherent strength presents a question of fact.

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## **INTEREST OF THE UNITED STATES**

This brief is submitted in response to the Court’s order inviting the Solicitor General to express the views of the United States. In the view of the United States, the petition for a writ of certiorari should be denied.

## **INTRODUCTION**

“Confusion as to source is the *bête noire* of trademark law.” *Jack Daniel’s Props., Inc. v. VIP Prods. LLC*, 599 U.S. 140, 147 (2023). The courts of appeals have developed multi-factor tests to analyze whether a junior user’s mark will create a likelihood of confusion with a senior user’s mark. While the number of factors in those tests varies among the circuits, all circuits treat the strength of the senior user’s mark as a relevant consideration. Assessment of a mark’s strength depends on both its “inherent” strength and its “commercial” (or

“acquired”) strength, with the ultimate goal of determining whether the consuming public perceives the mark as identifying the source of a good or service. This case involves inherent strength, which depends on a mark’s ability to identify a good’s source at the time of the mark’s first use.

The Second Circuit has suggested that a mark’s inherent strength is a pure question of law to be decided by the court. That suggestion is incorrect. Where an inquiry “operates from the perspective of an ordinary purchaser or consumer,” it is ordinarily entrusted to a jury. *Hana Fin., Inc. v. Hana Bank*, 574 U.S. 418, 420 (2015). The assessment of a mark’s inherent strength involves such an inquiry because inherent strength depends on the consuming public’s perception of a mark’s source-identifying power. And in any given case, the determination whether a particular mark is inherently strong primarily involves an assessment of the relevant facts, rather than the clarification or interpretation of the legal standard of inherent strength. Because the inherent-strength inquiry “involves the application of a legal standard” to the circumstances of particular cases, *id.* at 423, the inquiry is best viewed as presenting a “mixed question of law and fact,” *id.* at 424 (citation omitted)—but that “mixed” question is one in which the factual component predominates.

Nevertheless, further review is not warranted. Although the court of appeals erred in characterizing inherent strength as a question of law, and its decision conflicts with rulings of other circuits, it is far from clear whether the court’s error was outcome-determinative in this case. Other, unchallenged factors also weighed against petitioner RiseandShine Corporation’s claim of consumer confusion and consequent trademark

infringement. Treating this sub-factor of a factor in a multi-factor test as a question of law, rather than a factual question or a mixed question in which the factual aspect predominates, is also unlikely to have a significant effect on the litigation and disposition of infringement cases more generally. There is consequently no “compelling” or “important” reason for further review here. Sup. Ct. R. 10(a).

## STATEMENT

### A. Legal Background

1. A trademark is a “word, name, symbol, or device” used by a person “to identify and distinguish his or her goods” in commerce and “to indicate the source of the goods.” 15 U.S.C. 1127. A trademark’s “primary” function is “to identify the origin or ownership of the article to which it is affixed”—that is, to “identif[y] a product’s source” and “distinguish[] that source from others.” *Jack Daniel’s Props., Inc. v. VIP Prods. LLC*, 599 U.S. 140, 146 (2023) (citation and internal quotation marks omitted). To be a valid trademark under federal law, a mark must be “distinctive.” 1 J. Thomas McCarthy, *McCarthy on Trademarks and Unfair Competition* § 11:2, at 965 (5th ed. 2025); see *Two Pesos, Inc. v. Taco Cabana, Inc.*, 505 U.S. 763, 768 (1992).

Courts classify marks along a spectrum of “increasing distinctiveness[:] \* \* \* (1) generic; (2) descriptive; (3) suggestive; (4) arbitrary; or (5) fanciful.” *Two Pesos, Inc.*, 505 U.S. at 768; see *Abercrombie & Fitch Co. v. Hunting World, Inc.*, 537 F.2d 4, 9 (2d Cir. 1976) (Friendly, J.) (setting out the formulation); 1 McCarthy § 11:2, at 966. “The latter three categories of marks”—fanciful, arbitrary, and suggestive—“are deemed inherently distinctive and are entitled to protection” because “their intrinsic nature serves to identify a particular

source of a product.” *Two Pesos, Inc.*, 505 U.S. at 768. Suggestive marks—which is the category involved here—“suggest[], but do[] not directly and immediately describe, some aspect of the” product. 1 McCarthy § 11:62, at 1126-1127. For example, “Tide” evokes the ocean tide to market laundry detergent, but it does not directly describe the product. *United States Patent & Trademark Office v. Booking.com B.V.*, 591 U.S. 549, 553 (2020).

Descriptive and generic marks are not inherently distinctive. Descriptive marks are just that—they are “merely descriptive of a product.” *Two Pesos, Inc.*, 505 U.S. at 769. A generic term “refers \* \* \* to the genus of which the particular product is a species” and can never “become [a] valid trademark[.]” *Abercrombie & Fitch Co.*, 537 F.2d at 9.

2. To establish trademark infringement, the owner of a valid trademark must show that the alleged infringement “is likely to produce confusion in the minds of consumers about the origin of the goods or services in question.” *KP Permanent Make-Up, Inc. v. Lasting Impression I, Inc.*, 543 U.S. 111, 117 (2004). The courts of appeals have adopted slightly different multi-factor tests to assess whether a likelihood of confusion exists in particular cases. See 1 McCarthy § 11:74, at 1158; see also 3 McCarthy § 24:30, at 903-904. The Second Circuit, which held that respondent was entitled to summary judgment here, applies an eight-factor test that considers a mark’s strength, the similarity between the plaintiff’s mark and the allegedly infringing one, the proximity of the parties’ products and of their competitiveness, the likelihood that the prior owner may “bridge the gap” in the markets for the products, any evidence of actual confusion, the defendant’s good faith,

the relative quality of the products, and buyers' sophistication. Pet. App. 20a (citation omitted). The relevance and overall importance of any particular factor depends on the circumstances of the specific case. See, *e.g.*, Restatement (Third) of Unfair Competition § 21 cmt. a (1995) (Third Restatement).

Although the specific factors that inform the likelihood-of-confusion analysis vary somewhat from circuit to circuit, all circuits treat the senior mark's strength as a relevant consideration. See, *e.g.*, 1 McCarthy § 11:73, at 1153 ("All courts agree that 'stronger' marks are given 'stronger' protection."). Determining a mark's strength does not involve a yes-or-no inquiry but instead requires an assessment of where along a spectrum of strength that mark falls. To make that determination, the court evaluates "how likely it is that confusion will result from the challenged mark," *id.* § 11:74, at 1157, based on how much the mark is "remembered" and "associated in the public mind" with the source of a product, *id.* § 11:73, at 1156 (quoting *James Burrough Ltd. v. Sign of the Beefeater, Inc.*, 540 F.2d 266, 276 (7th Cir. 1976)). "The stronger the mark, the more likely it is that encroachment on it will produce confusion," *First Savings Bank, F.S.B. v. First Bank Sys., Inc.*, 101 F.3d 645, 653 (10th Cir. 1996) (citation omitted), while "the weaker the mark, the less protection it receives," *Florida International University Board of Trustees v. Florida National University, Inc.*, 830 F.3d 1242, 1256 (11th Cir. 2016) (citation omitted).

The strength of a mark depends in part on an assessment of its distinctiveness, which is relevant to a mark's "conceptual" or "inherent" strength—a subfactor of a mark's overall strength that evaluates "the inherent potential of the term at the time of its first use."

1 McCarthy § 11:73, at 1153. “[T]he more ‘distinctiveness’ a mark has, the greater is its ‘strength’ for the purpose of determining if there is a likelihood of confusion.” *Id.* § 11:75, at 1162. To determine the strength of a suggestive mark, a further analysis is sometimes necessary. Because “the strength of [a] mark turns on its origin-indicating quality[] in the eyes of the purchasing public,” a suggestive mark may still be conceptually weak or only moderately strong, *Lang v. Retirement Living Public Co.*, 949 F.2d 576, 581 (2d Cir. 1991) (citation and internal quotation marks omitted), if, for instance, there is significant “prior use of a mark’s text in other marks, particularly in the same field of merchandise or service,” *Variety Stores, Inc. v. Wal-Mart Stores, Inc.*, 888 F.3d 651, 662 (4th Cir. 2018) (citation omitted). In that case, “[c]onsumers are unlikely to associate a mark with a unique source.” *Ibid.* (citation omitted); see *Star Indus., Inc. v. Bacardi & Co.*, 412 F.3d 373, 385 (2d Cir. 2005), cert. denied, 547 U.S. 1019 (2006).

In assessing the strength of a particular mark, the court also considers the mark’s “commercial” or “acquired” strength, which reflects the “actual customer recognition value of the mark at the time registration is sought or at the time the mark is asserted in litigation to prevent another’s use.” 1 McCarthy § 11:73, at 1153. Because a mark’s overall strength depends on both its inherent and commercial strength, an inherently strong mark may have little overall strength if it lacks commercial strength. See *id.* § 11:80, at 1174.

#### **B. Factual And Procedural Background**

1. Petitioner RiseandShine Corporation, doing business as Rise Brewing, sells nitro-brewed, canned coffee nationwide. See Pet. App. 46a. RiseandShine uses

“RISE” as a mark for its product, and the company has registered “RISE” as a word and design mark. *Ibid.*; see D. Ct. Doc. 80, at 17 (July 26, 2021) (explaining that “RISE is the prominent, distinctive portion of” the company’s marks).<sup>\*</sup> When RiseandShine filed suit, Respondent PepsiCo, Inc., was selling a caffeinated, canned energy drink nationwide. Pet. App. 47a. PepsiCo used the mark “MTN DEW RISE ENERGY,” *ibid.*, but referred to its product as simply “Mtn Dew RISE” or “RISE,” D. Ct. Doc. 80, at 18.

RiseandShine filed suit in federal district court, alleging that PepsiCo had infringed its “RISE” mark. RiseandShine moved for a preliminary injunction restricting PepsiCo’s use of its “MTN DEW RISE ENERGY” mark. See Pet. App. 64a-97a. In its ruling, the district court held that the “RISE” mark was suggestive, *id.* at 82a, and that the evidence RiseandShine had submitted tilted “slightly” in favor of finding acquired strength, *ibid.*; see *id.* at 82a-83a. The court concluded that RiseandShine had shown a “sufficient likelihood of success on the merits” by virtue of “the degree of similarity between” the two marks, “the proximity of” RiseandShine’s and PepsiCo’s “areas of commerce,” and “credible testimony of actual confusion.” *Id.* at 91a. Based on that holding and on its analysis of the other relevant factors, see *id.* at 91a-94a, the district court granted RiseandShine’s motion for a preliminary injunction, *id.* at 94a.

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<sup>\*</sup> RiseandShine has registered “RISE BREWING CO.” as a word mark and the RISE BREWING CO. logo as a design mark. Pet. App. 46a. In its registration, the company disclaimed “‘BREWING CO.’” thus making “RISE” “the prominent, distinctive portion of the registered RISE Marks.” D. Ct. Doc. 80, at 17.

2. In a published decision, the court of appeals vacated the preliminary injunction. See Pet. App. 45a-63a. The court held that the district court had “erred in its evaluation of what is often the most important factor—the strength of [RiseandShine’s] mark—as well as in its finding of similarity in the appearance of the products.” *Id.* at 50a.

The court of appeals concluded that, in conducting the strength-of-the-mark inquiry, the district court had “failed to recognize the inherent weakness of [RiseandShine’s] mark.” Pet. App. 51a. The court agreed with the district court that RiseandShine’s mark is suggestive, but added that “labeling a mark as ‘suggestive’ is not the end of the inquiry.” *Id.* at 54a. The court of appeals explained that “[b]ecause suggestive marks, by their nature, seek to suggest the qualities of the product, it can be difficult to distinguish weak suggestive marks from descriptive ones.” *Ibid.* The court found “RISE” to be conceptually weak because of “[t]he close associations between the word ‘Rise’ and coffee,” specifically “[c]offee’s capacity to wake one up and lift one’s energy, which is what the ‘RISE’ mark suggests.” *Id.* at 56a-57a. The court also concluded that “[a] survey of the use of the term ‘Rise’ in the beverage market further underlines the weakness of the mark,” *id.* at 57a, because a number of companies use the term “in the same way as [RiseandShine] does—to allude to increased energy, particularly in the morning hours,” *id.* at 58a.

The court of appeals held that the district court had committed “legal error” by failing “to note \* \* \* the strong logical associations between ‘Rise’ and coffee,” which “place the mark at the low end of the spectrum of suggestive marks.” Pet. App. 55a. While acknowledging circuit precedent treating “the classification of a

mark [as] a factual matter,” the court of appeals cited other precedents establishing “that there is an undeniable legal element in the determination of how much strength a given mark commands.” *Ibid.* The court stated that “[b]etween descriptive and suggestive marks, there may be some room for difference of opinion; nonetheless, the discretion allowed to a factfinder in finding inherent strength is minimal at best.” *Id.* at 55a n.1. The court of appeals concluded that, “[g]iven the inherent weakness of ‘Rise’ for coffee, the [strength] factor [did] not favor” RiseandShine, *id.* at 59a, because the mark’s lack of inherent strength was not offset by evidence of acquired strength, see *id.* at 61a.

The court of appeals further held that the district court’s “finding of similarity in the appearance of the products,” Pet. App. 50a, constituted “clear error,” *id.* at 61a; see *id.* at 61a-63a. The court of appeals based that conclusion primarily on its ruling that “the word ‘Rise’ in this context is not distinctive,” and on a comparison between the designs of the energy-drink cans each company had produced, finding that the “overall appearances” of the two companies’ cans “are very dissimilar.” *Id.* at 62a.

3. On remand, the district court granted PepsiCo’s motion for summary judgment. See Pet. App. 15a-44a. In assessing the inherent strength of RiseandShine’s trademark, the court found the summary-judgment record to be “substantially similar” to the earlier-compiled preliminary-injunction record, and it therefore treated the court of appeals’ conclusions in the first appeal as “binding” in the summary-judgment proceedings. *Id.* at 28a. The district court ruled on that basis that the court of appeals’ prior decision “compel[led] a finding that \* \* \* [‘RISE’] is inherently weak as a matter of

law.” *Id.* at 29a. In analyzing the similarity between the two companies’ marks, the district court again treated the court of appeals’ prior judgment as binding because “the record has not changed since the Second Circuit’s decision.” *Id.* at 35a; see *id.* at 34a-35a.

In making the ultimate determination whether RiseandShine was entitled to summary judgment, the district court considered RiseandShine’s mark’s strength and the similarity of the marks along with the other relevant factors. See Pet. App. 41a-43a. The court viewed the court of appeals’ analysis in the first appeal as requiring it to place significant weight on the strength and similarity factors. See *id.* at 42a. The court thus found that, because RiseandShine’s “RISE” mark was weak, it received “only an extremely narrow scope of protection.” *Ibid.* (citation omitted). The court also observed that its finding of “a lack of similarity [could] be grounds for summary judgment in and of itself.” *Ibid.* The district court concluded that, because “[t]he remaining \* \* \* factors are insufficient to overcome the weakness of the mark and the Circuit’s finding of dissimilarity,” PepsiCo was entitled to judgment “on [RiseandShine’s] federal and state trademark and unfair competition claims.” *Id.* at 43a.

4. The court of appeals issued an unpublished summary order affirming the district court’s grant of summary judgment to PepsiCo. See Pet. App. 1a-14a. In rejecting RiseandShine’s argument that “inherent strength is a question of fact,” the court explained that it had recently “reiterated in no uncertain terms that ‘a mark’s inherent strength is a legal question.’” *Id.* at 6a (brackets omitted) (quoting *City of New York ex rel. FDNY v. Henriquez*, 98 F.4th 402, 413 (2d Cir. 2024)). The court of appeals thus held that the district court

“was bound by the previous panel’s determination that ‘RISE’ [is], as a matter of law, an inherently weak mark for a coffee product because of the mark’s logical association with the product.” *Id.* at 7a.

The court of appeals also rejected RiseandShine’s other claims of error. The court thus held that the company had failed to raise “triable issues of fact regarding the acquired strength of its mark,” Pet. App. 8a; see *id.* at 8a-10a, and that the district court had not erred “in treating the likelihood of confusion question as a matter of law,” *id.* at 10a. Based on those holdings, and on the prior panel’s ruling that the companies’ products are not similar, see *id.* at 12a, the court of appeals affirmed the district court’s ultimate “determination that there was not a likelihood that consumers would be confused by PepsiCo’s use of the term ‘Rise,’” *id.* at 11a.

#### DISCUSSION

The court of appeals erred in suggesting that the assessment of a trademark’s inherent strength presents a pure question of law to be decided by a court. That error, however, does not warrant this Court’s review.

In addressing a different trademark issue, this Court explained that questions turning “upon an ordinary consumer’s understanding of the impression that a mark conveys” are ordinarily submitted to juries. *Hana Fin., Inc. v. Hana Bank*, 574 U.S. 418, 422 (2015). That principle applies to determinations concerning a trademark’s inherent strength. In deciding whether the defendant’s allegedly infringing conduct created a likelihood of consumer confusion, the strength of the plaintiff’s mark depends on “the effect of [the] mark[ ] upon the mind of the consuming public.” 1 *McCarthy* § 11:73, at 1156 (citation omitted). Assessment of a mark’s inherent strength is a subcomponent of that inquiry.

Like the trademark-strength assessment as a whole, determining a mark's inherent strength turns on the extent to which the consuming public associates the mark with a particular source of goods. "[W]hen the relevant question is how an ordinary person or community would make an assessment, the jury is generally the decisionmaker that ought to provide the fact-intensive answer." *Hana Fin.*, 574 U.S. at 422. And while determining a trademark's inherent strength "involves the application of a legal standard," *id.* at 423, this particular "mixed question," *id.* at 424 (citation omitted), is one in which the factual component predominates.

Despite the court of appeals' erroneous suggestion that the inherent-strength inquiry is purely legal, the petition for a writ of certiorari should be denied. Even as to the nature of the inherent-strength analysis, the Second Circuit's approach is ambiguous. And the inherent-strength inquiry is simply one component of the overall strength-of-the-mark assessment, which itself is one factor to be weighed along with other criteria in a multi-factor, likelihood-of-confusion analysis. The ultimate question for the courts below was whether, given the summary-judgment record in this case, a reasonable jury could conclude that PepsiCo's allegedly infringing conduct was likely to cause consumer confusion as to the source of goods. The Second Circuit's mischaracterization of the inherent-strength sub-factor as purely legal is unlikely to affect the resolution of that ultimate question, in this case or more generally. Further review is not warranted.

**A. The Inherent Strength Of A Trademark Is A Predominantly Factual Question That Would Ordinarily Be Resolved By A Jury**

1. “Confusion as to source is the *bête noire* of trademark law.” *Jack Daniel’s Props., Inc. v. VIP Prods. LLC*, 599 U.S. 140, 147 (2023). Thus, “[t]he keystone” in an infringement case is whether the plaintiff has established a “likelihood of confusion” by consumers as to the source of the product displaying the allegedly infringing mark. *Ibid.* (citation and internal quotation marks omitted). The circuits have developed somewhat different multi-factor tests to analyze whether a likelihood of confusion exists, with the court of appeals here using an eight-factor test developed in *Polaroid Corp. v. Polarad Electronics Corp.*, 287 F.2d 492 (2d Cir.), cert. denied, 368 U.S. 820 (1961). But while the tests differ in some respects, they all consider a mark’s strength as a factor, and they all analyze trademark strength by considering both its inherent strength and its acquired or commercial strength.

2. In *Hana Financial*, this Court held that the question of tacking—which allows a party to use the priority date of an old mark when seeking protection for a revised version of that mark—is properly submitted to the jury in an infringement suit. See 574 U.S. at 419-420, 422-423. Under established trademark principles, tacking is appropriate when “two marks \* \* \* create the same, continuing commercial impression so that consumers consider both as the same mark.” *Id.* at 422 (citation and internal quotation marks omitted). The Court explained that “when the relevant question is how an ordinary person or community would make an assessment, the jury is generally the decisionmaker that ought to provide the fact-intensive answer.” *Ibid.*

The Court in *Hana Financial* recognized that “the ‘legal equivalents’ test” used to determine whether trademark tacking is appropriate in a particular instance “involves the application of a legal standard.” 574 U.S. at 423. The Court explained, however, that “the application-of-legal-standard-to-fact sort of question, commonly called a mixed question of law and fact, has typically been resolved by juries.” *Id.* at 423-424 (citation, ellipsis, and internal quotation marks omitted). The Court observed that “[t]he ‘mixed’ analysis that takes place during the tacking inquiry is no different.” *Id.* at 424. The Court further explained that, to ensure that the jury correctly understands the legal standard that governs the tacking inquiry, the trial court should “craft careful jury instructions that make that standard clear.” *Ibid.*

Three Terms later, this Court addressed the standard of review that an appellate court should apply in reviewing a trial court’s resolution of a mixed question. See *U.S. Bank N.A., Tr. ex rel. CWC Capital Asset Mgmt. LLC v. Village at Lakeridge, LLC*, 583 U.S. 387 (2018). The Court explained that, for standard-of-review purposes, “[m]ixed questions are not all alike.” *Id.* at 395-396. When resolving a particular mixed question involves “amplifying or elaborating on a broad legal standard,” thereby “developing auxiliary legal principles of use in other cases[,] appellate courts should typically review a [trial-court] decision *de novo*.” *Id.* at 396. “[O]ther mixed questions,” by contrast, “immerse courts in case-specific factual issues,” and in that circumstance, “appellate courts should usually review a decision with deference.” *Ibid.* “In short,” the Court observed, “the standard of review for a mixed question all depends—

on whether answering it entails primarily legal or factual work.” *Ibid.*

The question in *Hana Financial, supra*, was whether the tacking issue should be decided by the judge or by the jury when a jury trial is conducted; the question in *U.S. Bank, supra*, concerned the standard of review that an appellate court should apply in reviewing a trial court’s resolution of a particular mixed question. Here, by contrast, the disputed question is whether RiseandShine’s suit should go to trial at all. Nevertheless, this Court’s decisions in *Hana Financial* and *U.S. Bank* bear directly on the issue presented in this case. The question at summary judgment is whether the record reveals a “genuine dispute as to any material fact,” Fed. R. Civ. P. 56(a), *i.e.*, whether the summary-judgment “evidence is such that a reasonable jury could return a verdict for the nonmoving party,” *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). The more fact-intensive a particular mixed question is, the greater the jury’s latitude in resolving it, and the more hesitant a court at summary judgment should be (provided that material facts are disputed) to conclude that the issue has a single, legally dictated answer.

3. Like tacking, a trademark’s inherent strength turns on “its meaning to consumers.” *United States Patent & Trademark Office v. Booking.com B.V.*, 591 U.S. 549, 560 (2020); cf. 1 McCarthy § 11:73, at 1156 (Trademark strength reflects “the effect of [a] mark[] upon the mind of the consuming public.”) (citation omitted). For example, to assess whether a particular mark is inherently distinctive (which informs its inherent strength), a decisionmaker must determine whether “prospective purchasers are likely to perceive it as a designation that

\* \* \* identifies goods or services produced or sponsored by a particular person.” Third Restatement § 13(a); see *id.* § 13 cmt. c (explaining that for inherently distinctive marks, “prospective purchasers can be expected to view” or “perceive” the mark as indicating the source of a good or to “place primary emphasis on [the mark’s] identifying” significance). That consumer-oriented analysis is fact-intensive and mark-specific, so that “a term that is in one category for a particular product may be in quite a different one for another,” *Abercrombie & Fitch Co. v. Hunting World, Inc.*, 537 F.2d 4, 9 (2d Cir. 1976), and may even be generic if the term has “enter[ed] [the] public discourse” and become a “part of our vocabulary,” *Mattel, Inc. v. MCA Records, Inc.*, 296 F.3d 894, 900 (9th Cir. 2002), cert. denied, 537 U.S. 1171 (2003). Inherent strength, like trademark tacking, therefore “operates from the perspective of an ordinary purchaser or consumer.” *Hana Fin.*, 574 U.S. at 420.

This case illustrates the predominantly factual nature of the inherent-strength inquiry. In holding that the district court had committed “legal error” at the preliminary-injunction stage by failing “to note \* \* \* the strong logical associations between ‘Rise’ and coffee,” Pet. App. 55a, the court of appeals pointed to the connection “[i]n its ordinary usage” between the term “Rise” and waking up and energy, *id.* at 56a; the linkage between that term and “the perceived virtues of coffee,” *id.* at 57a; and existing uses of the mark, see *id.* at 57a-59a. Those considerations bear little resemblance to the factors that courts consider in deciding pure questions of law, such as the meaning of disputed statutory provisions. See *Loper Bright Enters. v. Raimondo*, 603 U.S. 369, 385 (2024). The court of appeals’ conclusion that there is a “strong logical association[] between ‘Rise’

and coffee,” Pet. App. 55a, does not reflect the application of legal analysis or expertise, but instead represents the court of appeals’ fact-dependent assessment of ordinary consumers’ experience and perceptions.

To be sure, the inherent-strength inquiry has a legal *component*. Although the inquiry turns on ordinary consumers’ perceptions, the *term* “inherent strength” will likely be unfamiliar to most jurors, so appropriate instructions will be necessary to explain that concept to the jury. Cf. *Hana Fin.*, 574 U.S. at 424 (explaining that “insofar as petitioner is concerned that a jury may improperly apply the relevant legal standard [for trademark tacking], the solution is to craft careful jury instructions that make that standard clear”). But given the inquiry’s focus on “the perspective of an ordinary purchaser or consumer,” *id.* at 420, and the likelihood that resolution of inherent-strength controversies will “immerse courts in case-specific factual issues,” *U.S. Bank*, 583 U.S. at 396, assessment of a trademark’s inherent strength involves the sort of predominantly factual question as to which the factfinder’s determination should be given significant deference on appeal. For the same reasons, when a court at summary judgment determines whether a reasonable jury could rule for the non-moving party, it should bear in mind the jury’s primary role in resolving inherent-strength disputes.

4. Citing *Ornelas v. United States*, 517 U.S. 690 (1996), and *Santa Fe Independent School District v. Doe*, 530 U.S. 290 (2000), PepsiCo argues that an inquiry can be predominantly legal even if it “operat[es] from the perspective of an ordinary person.” Br. in Opp. 36; see *id.* at 36-37. The Court in *Ornelas* held that “the ultimate questions of reasonable suspicion and probable cause to make a warrantless search should be

reviewed *de novo*” on appeal, 517 U.S. at 691, even though the terms “reasonable suspicion” and “probable cause” are “commonsense, nontechnical conceptions” that cannot be “reduced to a neat set of legal rules,” *id.* at 695-696 (citation and internal quotation marks omitted). In *Santa Fe Independent School District*, the Court held that “[w]hether a government activity violates the Establishment Clause is in large part a legal question,” 530 U.S. at 315 (citation and internal quotation marks omitted), even though the inquiry at that time turned in part on “whether an objective observer \* \* \* would perceive [the challenged activity] as a state endorsement” of religion, *id.* at 308 (citation omitted). Those cases, however, each involved “a constitutional standard,” where there is “a strong presumption that determinations under that standard are subject to *de novo* review.” *Bufkin v. Collins*, 604 U.S. 369, 384 (2025); see *U.S. Bank*, 583 U.S. at 396 n.4 (explaining that, “[i]n the constitutional realm, \* \* \* the role of appellate courts” in clarifying applicable constitutional standards “favors *de novo* review even when answering a mixed question primarily involves plunging into a factual record”).

**B. Even Though The Court Of Appeals’ Error Created A Circuit Conflict, This Court’s Review Is Not Warranted**

RiseandShine correctly identifies a circuit conflict on the question whether inherent strength is a factual matter. See Pet. 10-13; Cert. Reply Br. 3-4. Notwithstanding that split, RiseandShine’s petition does not present “compelling reasons” justifying further review. Sup. Ct. R. 10.

First, the court of appeals’ approach in this case is not entirely clear even with respect to the proper characterization of the inherent-strength inquiry. To be

sure, the court in the summary-judgment appeal described inherent strength as a “legal question,” Pet. App. 6a (citation omitted), and the court in the earlier preliminary-injunction appeal found that the district court had committed “legal error” in characterizing RiseandShine’s mark as inherently strong, *id.* at 55a. The Second Circuit’s published opinion in the preliminary-injunction appeal, however, also stated that “[b]etween descriptive and suggestive marks, there may be some room for difference of opinion; nonetheless, the discretion allowed to a factfinder in finding inherent strength is minimal at best.” *Id.* at 55a n.1. Although that language suggests that the Second Circuit viewed the inherent-strength inquiry as *predominantly* legal, it is hard to reconcile with the proposition that inherent strength is a *pure* question of law. Read in context, the earlier panel’s statement that the district court had committed “legal error,” *id.* at 55a, may simply reflect the court of appeals’ view that no reasonable factfinder could have found RiseandShine’s mark to be inherently strong.

Second, the ultimate question before the courts below in the current appeal was whether, based on the summary-judgment record compiled in the district court, a reasonable jury could find a likelihood of consumer confusion between the parties’ competing marks. The court of appeals recognized that “[t]he likelihood of confusion analysis \* \* \* could be submitted to a jury if there were enough evidence for a reasonable jury to make the predicate findings to establish a likelihood of confusion,” but it concluded that “[i]n this case \* \* \* the district court properly decided the evidence was insufficient to proceed to trial.” Pet. App. 11a n.2. The court of appeals did not rest that conclusion on its

assessment of inherent strength standing alone. Rather, inherent strength is simply one subfactor in a multi-factor (in the Second Circuit, eight-factor, see *id.* at 50a) balancing test used to assess the likelihood of consumer confusion.

Relying on a visual comparison of the two companies' products, the district court held that the similarity-of-the-marks factor weighs in favor of PepsiCo, see Pet. App. 34a-35a, and the court explained that this factor can be dispositive at the summary-judgment stage, see *id.* at 42a. RiseandShine did not contest this determination in the court of appeals. See *id.* at 3a. RiseandShine also has not contested the court of appeals' holding that its mark lacks commercial, *i.e.*, acquired strength. See, *e.g.*, *id.* at 9a.

It is therefore far from clear whether summary judgment would have been denied if the Second Circuit had viewed the inherent strength of RiseandShine's trademark as a predominantly factual, mixed question. RiseandShine also has identified no sound reason to suppose that this Court's resolution of the question presented would have a significant practical impact on the disposition of trademark-infringement cases more generally.

Indeed, RiseandShine's request for review of the inherent-strength subfactor stands in tension with the established principle that this Court "reviews judgments, not statements in opinions." *Black v. Cutter Labs.*, 351 U.S. 292, 297 (1956). RiseandShine does not seek review of the Second Circuit's ultimate determination that PepsiCo was entitled to summary judgment on the overall likelihood-of-confusion issue. Nor does RiseandShine ask this Court to determine whether likelihood-of-confusion should be treated as a legal,

factual, or mixed question. (In the summary-judgment appeal, the Second Circuit stated both that “the likelihood of confusion test is a question of law,” Pet. App. 10a, and that the likelihood-of-confusion question “could be submitted to a jury if” the evidence warranted that step, *id.* at 11a n.2—propositions that are not obviously reconcilable.) Granting the petition for a writ of certiorari to determine the proper characterization of the inherent-strength subfactor, in isolation from the larger multi-factor likelihood-of-confusion analysis, would be in tension with this Court’s usual practices and would not meaningfully clarify the proper analytic approach in trademark-infringement cases. Further review is not warranted.

#### CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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