No. 24-1016

IN THE
Supreme Court of the United States

RISEANDSHINE CORPORATION, DBA RISE BREWING,
Petitioner,

v.

PEPSICO, INC.,
Respondent.

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

SUPPLEMENTAL BRIEF FOR PETITIONER

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The government agrees that the courts of appeals are divided: There is, it admits, a "circuit conflict on the question whether inherent strength is a factual matter." U.S. Br. 18. And it agrees the decision below is on the wrong side of that split. The Second Circuit, the government declares, "erred in suggesting that the assessment of a trademark's inherent strength presents a pure question of law to be decided by a court." *Id.* at 11. Inherent strength is instead "a predominantly factual question that would ordinarily be resolved by a jury." *Id.* at 13 (capitalization altered). But the government nonetheless urges this Court to leave that split unresolved. The government's rationales for that result defy the record and empirical research.

The Second Circuit's position is clear and entrenched. The court has now "reiterated in no uncertain terms that 'a mark's inherent strength is a legal question.'" Pet. App. 6a (quoting *City of New York ex rel. FDNY* v. *Henriquez*, 98 F.4th 402, 413 (2d Cir. 2024)) (brackets omitted). There is nothing "ambiguous," U.S. Br. 12, about that. The Second Circuit—driven by the economic engine of New York—is trademark central. Its approach thus has sweeping ramifications for trademark plaintiffs and the Seventh Amendment jury-trial right.

Empirical studies refute the government's contention that the Second Circuit's "mischaracterization of the inherent-strength sub-factor" of the likelihood-of-confusion analysis is "unlikely to affect the resolution of that ultimate question." U.S. Br. 12. They show that "inherently distinctive marks" not only score "better on *each* of the core factors" relevant to likelihood of confusion; the degree of distinctiveness also correlates closely with case outcomes. Barton Beebe, *An Empirical Study of the Multifactor Tests for Trademark Infringement*, 94 Cal. L. Rev. 1581, 1635 (2006) (emphasis added). Classification of inherent strength as legal or factual thus often determines whether courts respect trademark holders' Seventh Amendment right to have a jury decide infringement, or whether courts arrogate infringement determinations to themselves.

This case exemplifies the problem. The district court entered a preliminary injunction based in part on testimony from PepsiCo witnesses who admitted PepsiCo chose Rise's mark *because* it was inherently distinctive. Pet. App. 84a, 91a. The Second Circuit vacated the injunction based on its own view that Rise's mark was an inherently weak "cliché." *Id.* at 56a. Bound by that determination on remand, the district court granted summary

judgment to PepsiCo on the merits, rejecting as a matter of law a case the court previously would have sent to a jury. Review is warranted.

ARGUMENT

I. THE CONFLICT IS CLEAR AND UNAMBIGUOUS

The decision below leaves no doubt about the Second Circuit's answer to the question presented: "'[A] mark's inherent strength,'" the court held, "'is a *legal* question.'" Pet. App. 6a (emphasis added; brackets omitted). That holding could not be clearer—or more clearly mistaken. A mark's inherent strength, the government and every other court of appeals agrees, is "a predominantly *factual* question that would ordinarily be resolved by a jury." U.S. Br. 13 (emphasis added; capitalization altered).

Rather than take the Second Circuit at its word, the government hedges, suggesting the Second Circuit's "approach is ambiguous." U.S. Br. 12. But the government identifies nothing ambiguous in the decision below (there is no ambiguity). Instead, the government cites the 2022 decision vacating the preliminary injunction entered at the outset of this case. *Id.* at 19. That now four-year-old decision, the government asserts, is unclear on whether the Second Circuit views inherent strength as a "*pure* question of law," or merely as "*predominantly* legal." *Ibid.* The court of appeals saw no such ambiguity. In the decision below, the Second Circuit expressly rejected Rise's "argu[ment] that the inherent strength [of a mark] is a question of fact." Pet. App. 6a. Inherent strength, the court held, is "'a legal question.'" *Ibid.* Period.

Contrary to the government's suggestion (U.S. Br. 19), that ruling was not case-specific. The Second Circuit declared that its own intervening *Henriquez* decision—issued after the original panel decision the government invokes—"reiterated" that "'inherent strength is a *legal* question.'" Pet. App. 6a (emphasis added). That categorical pronouncement reflects the Second Circuit's now-well-settled rule.[1] And even if the court had suggested that inherent strength can somehow flip-flop between legal and factual depending on the record (it did not), there would still be a conflict; no other circuit has a "might-be-factual-or-legal-depending-on-other-facts" rule.

True, the decision below recognized that *earlier* circuit precedent had "suggested that inherent strength is a question of fact." Pet. App. 7a. But it read its own prior decision in this case (at the preliminary-injunction stage) as nonetheless "concluding" "that the inherent strength of [a] mark was a *legal* determination." *Ibid.* (emphasis added). And it read its own intervening decision in *Henriquez* as reiterating that holding in clear terms as well. The government appears to suggest the Second Circuit said inherent strength is a "predominantly" legal determi-

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[1] Insofar as the government invokes the fact that the Second Circuit disposed of this case by summary order, that cannot make a difference. This Court has repeatedly granted review in cases the Second Circuit disposed of by summary order. See, *e.g.*, *Kirtsaeng* v. *John Wiley & Sons, Inc.*, 579 U.S. 197, 201 (2016); *FCC* v. *Fox Television Stations, Inc.*, 567 U.S. 239, 252 (2012); *CIGNA Corp.* v. *Amara*, 563 U.S. 421, 435 (2011); *Boyle* v. *United States*, 556 U.S. 938, 943 (2009). If anything, the Second Circuit's use of a summary order reflects its understanding that, rather than breaking new ground, the issue was "squarely settled" by *Henriquez*. *Domond* v. *U.S. I.N.S.*, 244 F.3d 81, 85 (2d Cir. 2001); see also *United States* v. *Siraj*, 533 F.3d 99, 100 (2d Cir. 2008) (summary order appropriate where case is governed by "well settled law").

nation. U.S. Br. 19. It did not. But the conflict is square regardless. Every other circuit—and the government—says *the opposite*: that it is a factual determination, or at least predominantly so. See U.S. Br. 12, 18; Pet. 10-13; Cert. Reply Br. 3-4. The error and the conflict remain acute. Review is warranted.

II. THE QUESTION IS IMPORTANT

The government tries to dismiss inherent strength as a "sub-factor" "unlikely to have a significant effect" on infringement litigation. U.S. Br. 3. The data shows the opposite. Because a mark's inherent strength impacts *every* other factor in the likelihood-of-confusion analysis, the classification of inherent strength as legal or factual often determines not only who *wins*, but who *decides* the ultimate question of infringement—a jury or a judge. That has critical implications for mark holders' Seventh Amendment rights and for the integrity of our system of trademark protection as a whole.

Many circuits recognize mark strength as "the most important," "paramount," or "central" consideration; still more list it as the first consideration.[2] The decision below itself declares mark strength to be "among the most

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[2] See, *e.g.*, Pet. App. 50a ("strength" is "often the most important factor"); *Variety Stores, Inc.* v. *Wal-Mart Stores, Inc.*, 888 F.3d 651, 661 (4th Cir. 2018) ("strength" of the mark "is 'paramount' "); *Maker's Mark Distillery, Inc.* v. *Diageo N. Am., Inc.*, 679 F.3d 410, 424 (6th Cir. 2012) (strength and similarity are the "most important" factors); *Spireon, Inc.* v. *Flex Ltd.*, 71 F.4th 1355, 1362 (Fed. Cir. 2023) ("Our court * * * like every other circuit in the infringement context, considers the strength of the prior user's mark as a central factor in the likelihood of confusion analysis."); *Springboards to Educ., Inc.* v. *Houston Indep. Sch. Dist.*, 912 F.3d 805, 812, 814 (5th Cir. 2019) (listing strength as first factor); *H&R Block, Inc.* v. *Block, Inc.*, 58 F.4th 939, 947 (8th Cir. 2023) (same); *JL Beverage Co.* v. *Jim Beam Brands Co.*, 828 F.3d 1098, 1106 (9th Cir. 2016) (same).

important" factors in the likelihood-of-confusion analysis. Pet. App. 12a. The government's effort to downplay its importance thus lacks credibility. Empirical studies, moreover, show that a mark's strength is often outcome-determinative as a statistical matter. One study found that plaintiffs won in 46% of cases where mark strength favored their position, while defendants won in 71% of cases where mark strength went the other way. See Daryl Lim, *Trademark Confusion Revealed: An Empirical Analysis*, 71 Am. U. L. Rev. 1285, 1316-1317 (2022). And although the government dismisses inherent strength as just a "sub-factor" of mark strength, U.S. Br. 3, that "sub-factor" too is often decisive. The data suggests there is "a surprisingly good correlation between inherent strength and success in the multifactor test." Beebe, *supra*, at 1634. "[I]nherently distinctive marks did better on *each* of the core factors," making the overall "win rate" for holders of such marks "significantly higher" than for holders of "non-inherently distinctive marks." *Id.* at 1637 (emphasis added). Win rates "steadily declined with the inherent strength of [the plaintiff's] mark." *Ibid.*[3]

That strong correlation between inherent strength and ultimate success underscores not only the importance of inherent strength, but the importance of *who* decides it. Where courts insist that the inherent-strength determination is for them to decide as a matter of law—as the Second Circuit does—they are correspondingly more likely to withdraw consideration of the other (related) factors, and the ultimate question of infringement, from the jury. That

[3] Jury instructions similarly reflect the decisive role inherent strength plays in the analysis. The pattern instructions in the Ninth Circuit—which treats inherent strength as factual—tell jurors not to move on if they do not find a mark to have either inherent or acquired distinctiveness. See 9th Cir. Model Civil Jury Instr. No. 15.10.

makes the classification of inherent strength critical to safeguarding the jury's role in trademark law.

The "'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." U.S. Br. 13 (quoting *Jack Daniel's Props., Inc.* v. *VIP Prods. LLC*, 599 U.S. 140, 147 (2023)) (emphasis added). "[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., Inc.* v. *Hana Bank*, 574 U.S. 418, 422 (2015) (emphasis added); see U.S. Br. 12. "Making that kind of judgment" is simply "not 'one of those things that judges often do' better than jurors." *Hana*, 574 U.S. at 425 n.2. Rather, throughout our Nation's history, this Court has recognized that "twelve men know more of the common affairs of life than does one man, [and] that they can draw wiser and safer conclusions from admitted facts thus occurring than can a single judge." *Sioux City & P. R. Co.* v. *Stout*, 84 U.S. 657, 664 (1873); see *Georgia* v. *Brailsford*, 3 U.S. 1, 4 (1794) (Jay, C.J., charging the jury in an original action that "it is presumed[ ] that juries are the best judges of facts"); *TSC Indus., Inc.* v. *Northway, Inc.*, 426 U.S. 438, 450 n.12 (1976) (noting "the jury's unique competence in applying the 'reasonable man' standard").

The Second Circuit's position, that inherent strength is a question for the *court*, thus not only undermines mark holders' Seventh Amendment rights; it also takes that issue from the body best suited to answer it—the jury.

III. This Case Is An Excellent Vehicle

This case illustrates the contrast between the Second Circuit's approach and that of the other circuits. Indeed,

the court of appeals' misclassification of inherent strength as a question of law dictated the outcome of this case.

A. Inherent strength was *the* driving factor in the proceedings below. At the outset of this case, the district court enjoined PepsiCo's use of the "RISE" trademark, finding it likely infringed petitioner's mark. Pet. App. 91a. The court reached that conclusion following an evidentiary hearing featuring eight different witnesses, including one expert, and extensive written submissions. *Id.* at 72a-74a. Applying the Second Circuit's eight-factor balancing test, the court found that five factors favored Rise—the others favored neither party. *Id.* at 79a-90a (citing *Polaroid Corp.* v. *Polarad Elecs. Corp.*, 287 F.2d 492 (2d Cir. 1961)). Mark strength "tilt[ed] slightly in [Rise's] favor," based partly on evidence of the mark's inherent strength. *Id.* at 84a. Among other things, PepsiCo's own Chief Marketing Officer admitted that PepsiCo chose to name its product "'RISE' following surveys that found the term had 'an emotional meaning' that appealed to consumers." *Ibid.*

The Second Circuit vacated the injunction based almost exclusively on the panel's view that the "RISE" mark was inherently weak as a matter of law. Pet. App. 51a. The district court's "fail[ure] to recognize" that supposed weakness, the court of appeals declared, affected both "its determination that [mark strength] favored [Rise]," *and* "its ultimate conclusion that [Rise] was likely to succeed on the merits." *Ibid.* In other words, the panel recognized that inherent strength was central to the outcome. Departing from the evidentiary record (and usurping the district court's fact-finding role at that stage), the court of appeals then expounded at length about its own views of the connections between the word "rise" and caffeinated beverages. "Rising," the court asserted, "is generally associated with the morning, a time when many crave a

cup of coffee, relying on its caffeine to jumpstart their energy for the day." *Id.* at 56a. Indeed, the court free-associated, "[t]he word 'Rise'" may "refer directly to energy itself; after consuming caffeine, one's energy levels can be expected to 'rise.'" *Ibid.* "Because the word 'Rise' is so tightly linked with the perceived virtues of coffee," the court concluded, "the mark is inherently weak and commands a narrow scope of protection." *Id.* at 57a.

The Second Circuit's holding, based on its subjective, fact-free assessment of the mark, dictated the rest of the analysis. Turning to the marks' similarity—an undisputedly *factual* question—the court of appeals found that the district court committed "clear error" in finding the marks "'confusingly similar.'" Pet. App. 61a. That was so, not because the district court misread the *evidence*, but because (in the Second Circuit's view) the supposed inherent weakness of the Rise mark meant that the products' "shared use of the term 'Rise' in large bold letters" could not support a finding of similarity *as a matter of law*. Pet. App. 62a; see *ibid.* (inherent weakness precluded finding of confusing similarity absent "more striking visual similarities"). The court of appeals did not even consider the remaining factors in the multi-factor test—let alone what the district court called "credible evidence on incidents of *actual* confusion." *Id.* at 71a (emphasis added).

The Second Circuit's determination of inherent strength dictated the outcome of ensuing proceedings as well. On remand, the district court concluded that "the Circuit's finding as a matter of law that [Rise's] mark is weak, its conclusion that it is 'clear error' to find that the parties' products are similar," and its "statement" that Rise had "'chose[n] a weak mark in a crowded field,'" left the court with no choice but to grant summary judgment

to PepsiCo. Pet. App. 42a. The Second Circuit's decision affirming the judgment did not meaningfully expand on that analysis.

B. The government urges that Rise never challenged the district court's determination that the similarity-of-the-marks factor favored PepsiCo. U.S. Br. 20. But that determination was *compelled* by the Second Circuit's earlier holding that it was "clear error" to find the marks similar *because* of the marks' purported weakness—a holding Rise has challenged at every step. Pet. App. 6a, 42a, 61a-63a. For the same reason, the government's suggestion (U.S. Br. 20) that Rise has not challenged the Second Circuit's "ultimate determination that PepsiCo was entitled to summary judgment" is as incoherent as it is mistaken. Rise has consistently maintained that "[t]he Second Circuit *erred* in treating conceptual strength as a legal question, *and that error resolved* the likelihood-of-confusion analysis in this case." Pet. 1 (emphasis added). The government asserts it is unclear whether recasting inherent strength as a factual question would change the outcome in this case. But the *only time* in the long history of this case where a court treated inherent strength as a question of fact, Rise *prevailed*. Pet. App. 80a.

The government errs in urging that deciding the proper characterization of one factor in a "multi-factor" test would "be in tension with this Court's usual practices." U.S. Br. 21. This Court did exactly that in *Andy Warhol Foundation for the Visual Arts, Inc.* v. *Goldsmith*, 598 U.S. 508 (2023). The "*only* question before this Court" in that case was the content of "the first" of four factors used to assess the fair-use defense. *Id.* at 525 (emphasis added). The Court granted review to clarify that single factor, even though the lower courts had analyzed all four. *Id.* at 523, 525. Similarly, in *Michigan* v. *Bryant*, 562 U.S. 344 (2011),

the Court granted review to clarify "one factor—albeit an important factor—that informs the ultimate inquiry" of when statements made in a police interrogation are "nontestimonial." *Id.* at 366. Review to address inherent strength—a critical factor that profoundly influences the ultimate resolution of the infringement inquiry—is similarly warranted here.

CONCLUSION

The petition should be granted.

Respectfully submitted.

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