No. 24-1016

In the

Supreme Court of the United States

RISEANDSHINE CORPORATION,
DBA RISE BREWING,

Petitioner,

v.

PEPSICO, INC.,

Respondent.

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

BRIEF FOR PETITIONER

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QUESTION PRESENTED

Courts in every circuit consider several factors in determining whether an alleged trademark infringer's use "is likely to cause confusion" under 15 U.S.C. § 1114. Chief among those factors is the trademark's strength, that is, its level of distinctiveness. Twelve circuits consider a trademark's conceptual strength a question of fact. The Second Circuit stands alone in considering it a question of law.

The question presented is: Whether trademark strength is a question of fact in a likelihood-of-confusion analysis under 15 U.S.C. § 1114.

PARTIES TO THE PROCEEDING AND RULE 29.6 DISCLOSURE STATEMENT

Petitioner RiseandShine Corporation, dba Rise Brewing, is the sole plaintiff in the district court and the sole appellant in the court of appeals. Respondent PepsiCo. Inc. is the sole defendant in the district court and the sole appellee in the court of appeals.

Rise Brewing is not publicly traded and has no parent corporation, and no publicly held corporation owns 10% or more of its stock.

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

PARTIES TO THE PROCEEDING AND RULE 29.6 DISCLOSURE STATEMENT ii

TABLE OF CONTENTS. iii

TABLE OF CITED AUTHORITIES v

OPINIONS BELOW. 1

JURISDICTION 1

STATUTORY PROVISIONS INVOLVED 1

STATEMENT 2

I. Background 2

II. Legal Framework 4

III. Procedural History 7

SUMMARY OF ARGUMENT 10

ARGUMENT. 13

I. A Trademark's Conceptual Strength Is A Question Of Consumer Perception 13

Table of Contents

Page

A. Trademark Distinctiveness Is a Matter of Consumer Perception 14

B. The Statutory Text Confirms That Consumer Perception Anchors Determinations of Trademark Strength 15

C. The Legislative History Confirms That Trademark Determinations Hinge on Consumer Perception 18

II. Consumer-Perception Questions Are Issues Of Fact 21

A. This Court's Precedent Treats Consumer-Perception Inquiries as Questions of Fact. 21

B. Longstanding Trademark Practice Confirms the Jury's Role 25

CONCLUSION 36

TABLE OF CITED AUTHORITIES

Page

CASES:

A & H Sportswear, Inc. v. Victoria's Secret Stores, Inc.,
237 F.3d 198 (3d Cir. 2000) 28

A.J. Canfield Co. v. Honickman,
808 F.2d 291 (3d Cir. 1986) 28

Abercrombie & Fitch Co. v. Hunting World, Inc.,
537 F.2d 4 (2d Cir. 1976) 5

Anheuser-Busch, Inc. v. Stroh Brewery Co.,
750 F.2d 631 (8th Cir. 1984). .29

B&B Hardware, Inc. v. Hargis Indus., Inc.,
575 U.S. 138 (2015) 5-6

Bayer Co. v. United Drug Co.,
272 F. 505 (S.D.N.Y. 1921) 10, 15, 16

Blinded Veterans Ass'n v. Blinded Am. Veterans Found.,
872 F.2d 1035 (D.C. Cir. 1989). 31

Champions Golf Club, Inc. v. The Champions Golf Club,
78 F.3d 1111 (6th Cir.1996) 6

Page

City of Monterey v. Del Monte Dunes at Monterey, Ltd., 526 U.S. 687 (1999) .35

City of New York by and through FDNY v. Henriquez, 98 F.4th 402 (2d Cir. 2024) .9, 31

Comm'r v. Duberstein, 363 U.S. 278 (1960) .25

Dairy Queen, Inc. v. Wood, 369 U.S. 469 (1962) .26

Dayton Bd. of Educ. v. Brinkman, 443 U.S. 526 (1979) .25

Dimick v. Schiedt, 293 U.S. 474 (1935) .35

Donchez v. Coors Brewing Co., 392 F.3d 1211 (10th Cir. 2004) .30

DuoProSS Meditech Corp. v. Inviro Med. Devices, Ltd., 695 F.3d 1247 (Fed. Cir. 2012) .31

Equine Techs., Inc. v. Equitechnology, Inc., 68 F.3d 542 (1st Cir. 1995) .28

Page

Fortune Dynamic, Inc. v. Victoria's Secret Stores Brand Mgmt., Inc., 618 F.3d 1025 (9th Cir. 2010) 30

Forum Corp. of N. Am. v. Forum, Ltd., 903 F.2d 434 (7th Cir. 1990) 29

G. Heileman Brewing Co. v. Anheuser-Busch Inc., 873 F.2d 985 (7th Cir. 1989). .29

Hanover Star Milling Co. v. Metcalf, 240 U.S. 403 (1916) 5

Hana Financial, Inc. v. Hana Bank, 574 U.S. 418 (2015) . . . 11, 12, 13, 21, 22, 23, 24, 32, 34

In re David Crystal, Inc., 296 F.2d 771 (C.C.P.A. 1961) 17

In re Dial-A-Mattress Operating Corp., 240 F.3d 1341 (Fed. Cir. 2001) 30

In re Hutchinson Tech. Inc., 852 F.2d 552 (Fed. Cir. 1988) 28

In re Mavety Media Grp., Ltd., 33 F.3d 1367 (Fed. Cir. 1994) 27

Page

Jack Daniel's Props., Inc. v. VIP Prods. LLC,
599 U.S. 140 (2023). 5

James Burrough Ltd. v. Sign of Beefeater, Inc.,
540 F.2d 266 (7th Cir. 1976). 6

KP Permanent Make-Up, Inc. v. Lasting Impression I, Inc.,
543 U.S. 111 (2004). 5

Lane Cap. Mgmt. v. Lane Cap. Mgmt.,
192 F.3d 337 (2d Cir. 1999) 12-13, 30, 31

Magic Wand, Inc. v. RDB, Inc.,
940 F.2d 638 (Fed. Cir. 1991) .16

Maker's Mark Distillery, Inc. v. Diageo N. Am., Inc.,
679 F.3d 410 (6th Cir. 2012). 6

Markman v. Westview Instruments, Inc.,
517 U.S. 370 (1996) 22, 23

Mishawaka Rubber & Woolen Mfg. Co. v. S.S. Kresge Co.,
316 U.S. 203 (1942). 19

Pierce v. Underwood,
487 U.S. 552 (1988). 24

Page

Pizzeria Uno Corp. v. Temple,
747 F.2d 1522 (4th Cir. 1984) 28

Polaroid Corp. v. Polarad Electronics Corp.,
287 F.2d 492 (2d Cir. 1961) 7

Pullman-Standard v. Swint,
456 U.S. 273 (1982) 12, 25

Railroad Co. v. Stout,
84 U.S. 657 (1873) 25

Singleton v. Bolton,
3 Douglas Reports 293 (1783) 26

Thomson v. Winchester,
36 Mass. (19 Pick.) 214 (1837) 26

Tumblebus Inc. v. Cranmer,
399 F.3d 754 (6th Cir. 2005) .29

Two Pesos, Inc. v. Taco Cabana, Inc.,
505 U.S. 763 (1992) 5, 15

U.S. Bank N.A. v. Village at Lakeridge, LLC,
583 U.S. 387 (2018) 12, 24

Union Carbide Corp. v. Ever-Ready, Inc.,
531 F.2d 366 (7th Cir. 1976) 28

Page

Union Nat. Bank of Texas, Laredo, Tex. v. Union Nat. Bank of Texas, Austin, Tex., 909 F.2d 839 (5th Cir. 1990) .29

United States Patent & Trademark Office v. Booking.com B.V., 591 U.S. 549 (2020). 5, 11, 13, 14, 15

United States v. Yellow Cab Co., 338 U.S. 338 (1949). 25

Wedgwood Homes, Inc. v. Lund, 659 P.2d 377 (Or. 1983). 20

Welding Servs., Inc. v. Forman, 509 F.3d 1351 (11th Cir. 2007). 30

Xtreme Lashes, LLC v. Xtended Beauty, Inc., 576 F.3d 221 (5th Cir. 2009). .28

Zatarains, Inc. v. Oak Grove Smokehouse, Inc., 698 F.2d 786 (5th Cir. 1983) 28-29

STATUTES & OTHER AUTHORITIES:

U.S. Const., Amend. VII. 26

15 U.S.C. § 1052 . . . . .17, 18

Page

15 U.S.C. § 1064 . . . . .16, 18

15 U.S.C. § 1114 . . . . .1, 10

15 U.S.C. § 1125 . . . . 16, 17, 18

15 U.S.C. § 1127 4

28 U.S.C. § 1254 1

5th Cir. Civil Jury Instructions (2024) 32

9th Cir. Manual of Model Civil Jury Instructions (2025) 32

Fed. R. Civ. P. 52 25

H.R. Rep. No. 79-219 (1945) 19

A. Gilson LaLonde, Gilson on Trademarks (2d ed. 2026) 12, 26, 34

J. Thomas McCarthy, McCarthy on Trademarks and Unfair Competition (5th ed. 2026) 5, 6, 11, 12, 14, 27, 33, 34

Restatement (First) of Torts (1938) 18

Restatement (Third) of Unfair Competition (1995) 1

Page

S. Rep. No. 79-1333 (1946) 19

Trademark Law Revision Act of 1988, Pub. L. No. 100-667, 102 Stat. 3935 20

Trademark Law Revision Act of 1987: Hearing on S. 1883 Before the Subcomm. on Patents, Copyrights and Trademarks of the S. Comm. on the Judiciary, 100th Cong. (1988) 20, 21

Trademark Law Revision Act of 1988: Hearing on H.R. 4156 Before the Subcomm. on Courts, Civil Liberties, and the Admin. of Justice of the H. Comm. on the Judiciary, 100th Cong. (1988) 20

OPINIONS BELOW

The opinion of the court of appeals affirming summary judgment in favor of PepsiCo (Pet. App. 1a-14a) is unpublished. The opinion and order of the district court granting summary judgment to PepsiCo (Pet. App. 15a-44a) is unpublished. The opinion of the court of appeals vacating the preliminary injunction awarded to Rise Brewing (Pet. App. 45a-63a) is reported at 41 F.4th 112. The amended opinion of the district court granting Rise Brewing a preliminary injunction (Pet. App. 64a-97a) is unpublished.

JURISDICTION

The court of appeals entered judgment on December 19, 2024. Pet. App. 1a. The petition for a writ of certiorari was filed on March 19, 2025, and granted on June 29, 2026. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Section 32(1) of the Lanham Act, 15 U.S.C. § 1114(1), provides in relevant part:

> (1) Any person who shall, without the consent of the registrant—
>
> (a) use in commerce any reproduction, counterfeit, copy, or colorable imitation of a registered mark in connection with the sale, offering for sale, distribution, or advertising of any goods or services on or in connection with which such use is likely to cause confusion, or

to cause mistake, or to deceive * * * shall be liable in a civil action by the registrant for the remedies hereinafter provided.

STATEMENT

I. Background

In 2014, three life-long friends founded Rise Brewing in an East Village, New York apartment. CA. App. 57. They had tired of finding only ready-to-drink coffee products loaded with sugar and artificial ingredients on store shelves, so they sought to create something better, a canned nitro cold-brew coffee made from simple, organic ingredients. CA. App. 57-58. Rise Brewing began selling canned coffee in May 2015 and marked the cans with its "RISE" mark:

Pet. App. 16a-17a.

Rise Brewing has registered "RISE BREWING CO." as both a word mark, Reg. No. 5,168,377, and a design mark, Reg. No. 5,333,635 (together, the "RISE mark"). Pet. App. 16a, 46a. Within a few years, Rise Brewing secured nationwide distribution through some of America's largest retailers, including Walmart, Publix, and Kroger. Pet. App. 46a.

Rise Brewing invested heavily in its brand. Between 2015 and 2021, it spent about $17.5 million on advertising and promotion, all of which bore some version of the RISE mark. Pet. App. 16a. That investment paid dividends: Rise Brewing's canned nitro coffee won BevNet's "Best New Product" award in 2017; *Beverage Industry* magazine's 2018 "Beverage Innovation of the Year"; the 2018 NEXTY Best New Organic Beverage Award from New Hope Network; and People Magazine's 2019 "Best Canned Coffee" award. Pet. App. 82a-83a. Rise Brewing also collaborated with well-known sports franchises to expand brand awareness. Pet. App. 9a. Until PepsiCo's 2021 market entry, Rise Brewing was the exclusive user of "RISE" as the principal term identifying a single-serving canned caffeinated beverage in the United States. Pet. App. 83a.

Before PepsiCo launched its competing MTN DEW RISE ENERGY products, it was aware of Rise Brewing's canned coffee products and considered acquiring the company. Pet. App. 39a. But rather than acquire or partner with the small company whose brand it admired, PepsiCo created a directly competing caffeinated beverage using the same principal word "RISE" in all capital letters. Pet. App. 39a, 61a. PepsiCo's Chief Marketing Officer testified that PepsiCo selected "RISE" for its new product after surveys showed that the word has "an emotional meaning" that resonates with consumers and connotes "morning" and getting "their day started right." Pet. App. 74a, 84a.

In 2021, PepsiCo launched its artificially flavored, caffeinated “MTN DEW RISE ENERGY” beverage nationwide in more than 170,000 retailers—a distribution footprint that dwarfed Rise Brewing’s. Pet. App. 17a, 48a. The packaging was strikingly similar: “RISE” appeared in large, bright, bold capital letters on the top third of the can, against a light-colored background—infringing the trademark Rise Brewing had used since 2015. Pet. App. 17a, 48a.

The predictable happened. Almost immediately after PepsiCo’s launch, Rise Brewing began receiving reports of actual consumer confusion. Not isolated incidents, but a pattern. Rise Brewing soon learned the breadth of the confusion, which spanned in-store promotions, “product ordering,” “product placements in stores,” “proposed sponsorship,” and “at regular consumer tastings.” Pet. App. 17a, 72a-73a. The problem became so pervasive that Rise Brewing’s brand ambassador described confusion in stores and at product tastings as the “norm * * * not the exception.” Pet. App. 73a.

II. Legal Framework

A trademark includes any “word, name, symbol, or device, or any combination thereof” 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) (internal quotation marks omitted) (quoting *Hanover Star Milling Co. v. Metcalf,* 240 U.S. 403, 412 (1916)).

Courts classify marks along a spectrum of "increasing distinctiveness": generic, descriptive, suggestive, arbitrary, or fanciful. *Two Pesos, Inc.* v. *Taco Cabana, Inc.*, 505 U.S. 763, 768 (1992); *Abercrombie & Fitch Co.* v. *Hunting World, Inc.*, 537 F.2d 4, 9 (2d Cir. 1976) (Friendly, J.) (setting out the formulation). "The latter three categories of marks"—suggestive, arbitrary, and fanciful—"are deemed inherently distinctive and are entitled to protection" because "their intrinsic nature serves to identify a particular source of a product." *Two Pesos*, 505 U.S. at 768. Descriptive marks are entitled to protection upon a showing of "acquired distinctiveness." *Id.* at 769. Generic terms are ordinarily not entitled to trademark protection. *United States Patent & Trademark Office* v. *Booking.com B.V.*, 591 U.S. 549, 554 (2020).

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. See 3 J. Thomas McCarthy, McCarthy on Trademarks and Unfair Competition § 23:19 (5th ed. 2026); *B&B Hardware, Inc.*

v. *Hargis Indus., Inc.*, 575 U.S. 138, 154 (2015) (describing the factors as "not fundamentally different"). Although the specific factors vary somewhat from circuit to circuit, all circuits treat the senior mark's strength as a relevant factor, and "often the most important factor." See Pet. App. 50a; 1 McCarthy § 11:73 (explaining that "[a]ll courts agree that 'stronger' marks are given 'stronger' protection").

"Strength" in the context of likelihood of confusion reflects how readily consumers associate a mark with a particular source. "The stronger the mark, the more likely it is that encroachment on it will produce confusion." *Champions Golf Club, Inc.* v. *The Champions Golf Club*, 78 F.3d 1111, 1117 (6th Cir.1996). A mark's overall strength depends on two components. First up is the mark's "inherent" or "conceptual" strength, meaning where the mark falls on the distinctiveness spectrum based on its intrinsic ability to identify source. The other is the mark's "commercial" strength, meaning the degree of consumer recognition the mark has actually obtained in the marketplace. See 1 McCarthy §§ 11:73, 11:80; *Maker's Mark Distillery, Inc.* v. *Diageo N. Am., Inc.*, 679 F.3d 410, 419-420 (6th Cir. 2012).

Inherent or conceptual strength—the primary subject here—reflects "the inherent potential of the term at the time of its first use." 1 McCarthy § 11:73. Determining where a mark falls along the distinctiveness spectrum is not a mechanical exercise. Instead, a mark's strength is "measured by customer perception." *Ibid.* (citing *James Burrough Ltd.* v. *Sign of Beefeater, Inc.*, 540 F.2d 266, 276 (7th Cir. 1976) ("What is intended by references to 'strong' and 'weak' marks is the effect of such marks upon the mind of the consuming public.")).

III. Procedural History

In 2021, Rise Brewing filed suit in federal district court alleging that PepsiCo infringed its RISE mark. Pet. App. 66a. Rise Brewing also moved for a preliminary injunction restricting PepsiCo's use of the "MTN DEW RISE ENERGY" mark. Pet. App. 66a.

The district court granted the preliminary injunction. Pet. App. 64a-97a. The court applied the Second Circuit's eight-factor test for likelihood of confusion set out in *Polaroid Corp.* v. *Polarad Electronics Corp.*, 287 F.2d 492 (2d Cir. 1961). Pet. App. 79a. The court found that the RISE mark was suggestive—and therefore inherently distinctive—and that the strength-of-mark factor "tilt[ed] slightly" in favor of Rise Brewing. Pet. App. 82a-84a. The district court also found that the similarity between the two marks "tips strongly" in Rise Brewing's favor, that the products were proximate, and that the evidence of actual confusion "weighs in favor of" Rise Brewing, crediting the testimony of multiple witnesses. Pet. App. 85a-89a. Weighing all eight factors, including "the degree of similarity between" the two marks, "the proximity of" the parties' "areas of commerce," and "credible testimony of actual confusion," the district court found that Rise Brewing had shown "a sufficient likelihood of success on the merits" and enjoined PepsiCo from displaying any mark confusingly similar to Petitioner's RISE mark in connection with the "promotion, sale or distribution of single-use, canned energy beverages." Pet. App. 91a, 94a-97a.

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 Brewing]" *and* "its ultimate conclusion that [Rise Brewing] was likely to succeed on the merits." Pet. App. 51a. Departing from the evidentiary record, the court of appeals 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." Pet. App. 56a. Indeed, the court free-associated, "[t]he word 'Rise' may also refer directly to energy itself; after consuming caffeine, one's energy levels can be expected to 'rise.'" Pet. App. 56a. "[B]ecause 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." Pet. App. 57a. The court held that Rise Brewing's advertising expenditures were insufficient "to counterbalance the inherent weakness of its mark." Pet. App. 61a.

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 indisputably factual question—the court of appeals ruled that the district court erred in finding the marks confusingly similar. Pet. App. 61a. That was so, not because the district court had misread the evidence, but because (in the Second Circuit's view) the supposed inherent weakness of the RISE mark meant 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 also Pet. App. 62a (explaining that 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 the district court's identification of "credible evidence on incidents of actual confusion." Compare Pet. App. 63a with Pet. App. 71a.

On remand, the district court granted PepsiCo's motion for summary judgment. Pet. App. 15a-44a. The court found the summary judgment record to be "substantially similar" to the preliminary injunction record and thus treated the court of appeals' conclusions as "binding" on remand. Pet. App. 28a. The district court ruled that the court of appeals' decision "compel[led] a finding that * * * ['RISE'] is inherently weak as a matter of law." Pet. App. 29a. The court concluded that, because the Second Circuit had declared the RISE mark weak, it received "only an extremely narrow scope of protection." Pet. App. 42a. The court concluded that "the remaining * * * factors are insufficient to overcome the weakness of the mark," and that PepsiCo was thus entitled to summary judgment. Pet. App. 43a.

Rise Brewing appealed, and the Second Circuit affirmed. Pet. App. 1a-14a. The court rejected Rise Brewing's argument that "inherent strength is a question of fact," explaining that it had recently "reiterated in no uncertain terms that 'a mark['s] inherent strength is a legal question.'" Pet. App. 6a (alteration in original) (quoting *City of New York by and through FDNY* v. *Henriquez*, 98 F.4th 402, 413 (2d Cir. 2024)). The court held that the district court "correctly concluded that it was bound by the previous panel's determination that

'RISE' was, as a matter of law, an inherently weak mark for a coffee product." Pet. App. 7a.

The result: a small business that spent $17.5 million building a nationally recognized brand, that produced evidence of actual consumer confusion so pervasive it was "the norm * * * not the exception," and whose trademark rights were initially vindicated by a trial court's award of a preliminary injunction, was denied the right to present its case to a jury. The reason: a panel at the court of appeals unilaterally decided, as a matter of law, that the RISE mark is not inherently strong enough to serve as a trademark when used for a canned caffeinated beverage.

The Court granted certiorari on June 29, 2026.

SUMMARY OF ARGUMENT

Trademark strength is a question of fact in a likelihood-of-confusion analysis under 15 U.S.C. § 1114. As Judge Learned Hand explained a century ago in a foundational case, "[t]he single question, as I view it, in all these cases, is merely one of fact: What do the buyers understand by the word for whose use the parties are contending?" *Bayer Co.* v. *United Drug Co.*, 272 F. 505, 509 (S.D.N.Y. 1921).

Central to the investigation of a trademark's overall strength is its inherent strength. Inherent strength probes how consumers perceive the relationship between a mark and the goods it identifies, that is, how distinctive it is. Does the mark name the product, describe it, suggest it, or serve as an arbitrary or fanciful source identifier for it? Placing the mark within that framework requires a factfinder to assess consumer perception, and consumer-perception determinations are questions of fact for a jury. The Second Circuit's contrary rule—treating inherent strength as a legal question—permits a judge to resolve a central merits dispute by substituting judicial supposition for consumer experience. Its rule conflicts with this Court's precedent, the statutory framework, the legislative history, and the consensus of all other circuits, not to mention an abundance of legal scholarship.

I. This Court held in *Booking.com* that a mark's character—its position on the spectrum of distinctiveness—"depends on its meaning to consumers" and is determined by "how consumers in fact perceive th[e] term." 591 U.S. at 560-561 & n.6. Inherent strength asks the same question: How do ordinary consumers perceive a mark at the time of its first use? See 1 McCarthy § 11:73.

The statutory text confirms that consumer perception is the touchstone. It repeatedly asks what the relevant public understands, recognizes, or associates with a source, and it predicates registration, dilution, and infringement on consumer perception. The legislative history and leading trademark treatises likewise describe questions related to mark strength as evidence-based consumer-perception inquiries.

II. Consumer-perception inquiries are, consistently and correctly, questions of fact. In *Hana Financial, Inc.* v. *Hana Bank*, the Court held that what a mark means to consumers—there, whether two marks create the same commercial impression for a "tacking" inquiry—is a question of fact, and "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." 574 U.S. 418, 422-423 (2015). And in *U.S. Bank N.A.* v. *Village at Lakeridge, LLC*, the Court explained that the standard of appellate review of a mixed question of law and fact depends "on whether answering it entails primarily legal or factual work." 583 U.S. 387, 396 (2018). The Court explained that when the question involves "case-specific factual issues"—there, evaluating the nature of a relationship—the question is primarily factual in nature, and appellate court review is deferential. *Ibid.* Similarly, in *Pullman-Standard* v. *Swint*, 456 U.S. 273, 288 (1982), as in other cases, this Court held that matters of state of mind are appropriately reviewed as questions of fact. The principles of those decisions apply here: the factfinder determines how consumers perceive a particular mark along the distinctiveness spectrum.

Leading commentators agree. Two foundational trademark treatises, McCarthy on Trademarks and Unfair Competition and Gilson on Trademarks, articulate the point without restraint. They confirm that the entire "likelihood of confusion" inquiry "is a factual issue that is to be submitted to a jury" (3 McCarthy § 23:73) and that post-*Hana Financial* "[i]t will now be difficult if not impossible for courts to continue to hold that likelihood of confusion is a question of law" (2 A. Gilson LaLonde, Gilson on Trademarks § 8.05[1][b][i] (2d ed. 2026)). And all circuit courts, save the Second, establish that a mark's inherent strength is a question of fact determined from a consumer's perspective. The Second Circuit alone treats inherent strength as a legal question, despite earlier recognizing that the factfinder determines "what the perception of the purchasing public is." *Lane Cap. Mgmt.*

v. *Lane Cap. Mgmt.*, 192 F.3d 337, 344 (2d Cir. 1999). This Court should reverse the Second Circuit and align its isolated view.

ARGUMENT

Whether a trademark is inherently strong or weak is a question of fact. This truism flows from the nature of the inquiry itself. Determining a mark's inherent or conceptual strength requires assessing how "consumers in fact perceive the term" in relation to the product it identifies. *Booking.com*, 591 U.S. at 560-561. That inquiry "operates from the perspective of an ordinary purchaser or consumer" and is therefore a question of fact. *Hana Fin.*, 574 U.S. at 420.

I. A Trademark's Conceptual Strength Is A Question Of Consumer Perception

The conceptual strength of a trademark is assessed by answering a single question: How distinctive is the mark to ordinary consumers in connection with the product at issue? The answer requires no interpretation of a statute, no construction of a contract, and no elucidation of a legal rule. It requires understanding how ordinary people in the real world perceive a word.

Determining where a mark falls along the distinctiveness spectrum, from generic to fanciful or somewhere in between, is fundamentally intertwined with consumer impressions. The ultimate question is not what a word or symbol means in the abstract, considered in isolation from the record, or what logical inferences a judge can draw sitting alone in chambers. The question is what consumers perceive when they encounter the mark in connection with the relevant goods. Dictionary definitions may inform that inquiry as one form of evidence bearing on the range of meanings a word can carry, but their definitions are not dispositive; a factfinder must still weigh the evidence alongside marketplace usage, any surveys, and other proof of how ordinary consumers actually understand the term in connection with the goods. As Professor McCarthy's treatise explains, mark strength is determined in "the mind of the consuming public." 1 McCarthy § 11:73; see also Restatement (Third) of Unfair Competition § 21, cmt. i (1995) (explaining that mark strength "depends on the degree to which the designation is associated by prospective purchasers with a particular source").

This Court's precedent, the statutory framework, and the legislative history confirm this understanding.

A. Trademark Distinctiveness Is a Matter of Consumer Perception

In *Booking.com*, this Court considered whether the combination of a generic term ("booking") with a top-level domain name (".com") is necessarily generic as a matter of law. The PTO had proposed "a nearly per se rule that would render 'Booking.com' ineligible for registration" regardless of consumer perception of the mark. *Booking.com*, 591 U.S. at 557. The PTO had argued that "when a generic term is combined with a generic top-level domain like '.com,' the resulting combination is generic." *Ibid.* The Court rejected that view, holding that whether a mark is generic (the first classification along the distinctiveness spectrum) is determined by consumer perception. *Id.*

at 559-561. The Court explained: "Whether any given 'generic.com' term is generic, we hold, 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." *Ibid.* (emphasis added).

Booking.com is directly relevant. Genericness is merely an example of the inherent strength inquiry, which at its core is a question of where a mark falls along the spectrum of distinctiveness. See *Two Pesos*, 505 U.S. at 768 (describing a single spectrum from generic to fanciful); *Bayer*, 272 F. at 509 (explaining that "aspirin" had become generic and that the "single question" in determining that the mark lacked protectable strength was one "of fact: What do the buyers understand by the word for whose use the parties are contending?"). Because determining "whether a term is generic depends on its meaning to consumers" (*Booking.com*, 591 U.S. at 560), so too must determinations of where other terms fall along the distinctiveness spectrum. Like the per se rule this Court rejected in *Booking.com*, the Second Circuit's approach of resolving inherent strength as a "legal question" based on a panel's assessment departs from the relevant factual inquiry focused on consumer perception of the mark.

B. The Statutory Text Confirms That Consumer Perception Anchors Determinations of Trademark Strength

Across multiple provisions of the statutory scheme governing trademarks, Congress directed that questions of distinctiveness, registrability, infringement, and whether a mark is strong enough to be "famous" are assessed from the vantage of the consuming public—not a court's abstract linguistic analysis.

Most directly, the Trademark Clarification Act of 1984 sets forth a consumer-perception standard for determining whether a registered mark has become generic: "The primary significance of the registered mark *to the relevant public* rather than purchaser motivation shall be the test for determining whether the registered mark has become the generic name of goods or services on or in connection with which it has been used." 15 U.S.C. § 1064(3) (emphasis added). Judicial interpretation confirms the point. "By the words 'relevant public' for a product sold in the marketplace, the Clarification Act means the relevant public which does or may purchase the goods or services in the marketplace." *Magic Wand, Inc.* v. *RDB, Inc.*, 940 F.2d 638, 640 (Fed. Cir. 1991) (explaining that the statute "codified the time-honored test for genericness articulated by Judge Learned Hand in *Bayer Co.* v. *United Drug Co.*, 272 F. 505 (S.D.N.Y. 1921): 'What do the buyers understand by the word for whose use the parties are contending?'").

Other statutory provisions reinforce that stance. The dilution provisions define a "famous" mark—eligible for protection against dilution—as one that "is widely recognized *by the general consuming public* of the United States as a designation of source of the goods or services of the mark's owner." 15 U.S.C. § 1125(c)(2)(A) (emphasis added). Fame is thus measured specifically by reference to consumer recognition. And the factors Congress specified for assessing fame, including "[t]he extent of actual recognition of the mark," confirm that the inquiry is an empirical one directed to consumer awareness. *Ibid.*

The broader statutory framework is consistent. Section 1052's opening clause provides that, unless a statutory bar applies, "[n]o trademark by which the goods of the applicant may be distinguished from the goods of others shall be refused registration." 15 U.S.C. § 1052. The concept of "distinguishing" goods inherently requires an audience of consumers from whose perspective the mark either does or does not serve as a source identifier. See *In re David Crystal, Inc.*, 296 F.2d 771, 773 (C.C.P.A. 1961) (considering evidence of "12 affidavits * * * expressing opinions in various ways that the 'spaced colored bands at the top'" distinguish the goods and "indicate * * * to the purchasing public that the socks are the product of" the registrant). Section 1052(d) bars registration of a mark that "so resembles" a prior mark "as to be likely, when used on or in connection with the goods of the applicant, to cause confusion, or to cause mistake, or to deceive"—a test that is, by its terms, an inquiry into consumer perception. 15 U.S.C. § 1052(d). And Section 1052(f) makes the consumer-perception foundation even more explicit by providing the acquired-distinctiveness pathway: a mark that might otherwise be refused registration may be registered if it "has become distinctive of the applicant's goods in commerce." 15 U.S.C. § 1052(f). Whether a mark has "become distinctive" is, by definition, a question about whether consumers have come to recognize it as a source indicator.

Similarly, the infringement provisions in Section 1125(a) predicate liability on whether a challenged use "is likely to cause confusion, or to cause mistake, or to deceive as to the affiliation, connection, or association of such person with another person, or as to the origin, sponsorship, or approval of his or her goods, services, or commercial activities by another person." 15 U.S.C. § 1125(a)(1)(A). That inquiry turns on whether the consuming public will be confused about source or affiliation—the same consumer-perception inquiry that underlies the strength analysis. See Restatement (First) of Torts § 728, cmt. a (1938) ("The issue of confusing similarity is an issue of fact as to the probable or actual reactions of purchasers.").

Taken together, these provisions establish a consistent statutory architecture in which consumer perception is the touchstone. It holds true whether analyzing what a mark signifies (§ 1064(3)), whether it is famous (§ 1125(c)), whether it distinguishes goods (§ 1052), or whether it causes confusion (§ 1125(a)). That Congress repeatedly anchored these inquiries in what consumers understand, recognize, and perceive confirms that trademark strength is fundamentally about consumer perception.

C. The Legislative History Confirms That Trademark Determinations Hinge on Consumer Perception

The legislative history of the Lanham Act and the Trademark Law Revision Act of 1988 confirm what the statutory text makes plain: the federal trademark system is built around issues of consumer perception. The legislative history confirms that a mark's strength, like many issues in trademark law, demands inquiry into a purchaser's state of mind.

1. Congress grounded trademark protection in consumer perception. The committee reports accompanying the Lanham Act articulate a dual purpose for trademark legislation:

> The purpose underlying any trade-mark statute is twofold. One is to protect the public so it may be confident that, in purchasing a product bearing a particular trade-mark which it favorably knows, it will get the product which it asks for and wants to get. Secondly, where the owner of a trade-mark has spent energy, time, and money in presenting to the public the product, he is protected in his investment from its misappropriation by pirates and cheats.

S. Rep. No. 79-1333, at 3 (1946); H.R. Rep. No. 79-219, at 2 (1945). Both reports adopted Justice Frankfurter's formulation about the purpose of trademark legislation: "The protection of trade-marks is the law's recognition of the *psychological* function of symbols." S. Rep. No. 79-1333, at 3 (emphasis added) (quoting *Mishawaka Rubber & Woolen Mfg. Co.* v. *S.S. Kresge Co.*, 316 U.S. 203, 205 (1942)); H.R. Rep. No. 79-219, at 2 (same). The history explains that "[t]rade-marks, indeed, are the essence of competition, because they make possible a choice between competing articles *by enabling the buyer* to distinguish one from the other." S. Rep. No. 79-1333, at 4 (emphasis added); H.R. Rep. No. 79-219, at 3 (emphasis added).

Congress thus anchored the entire Lanham Act in a characterization of trademarks as instruments that operate on the human mind—specifically, on consumer perception. The word "psychological" is Congress's own descriptor, adopted from this Court's precedent. A mark's strength—its capacity to enable consumers to distinguish one product from another—is thus a question about consumer understanding, not a question of legal taxonomy.

2. The Trademark Law Revision Act of 1988, Pub. L. No. 100-667, 102 Stat. 3935, confirms that mark strength turns on consumer perception. When Congress considered the addition of dilution protection in the Act, it confronted the question of how to measure a mark's strength. The answer from the USTA Trademark Review Commission and hearing testimony was unequivocal: by reference to consumer perception.

The USTA Trademark Review Commission's report, incorporated into the hearing record, defined in unmistakably factual terms the inquiry into whether a mark had become sufficiently well known to consumers that it should receive protection from being diluted. The report declared that a mark's "distinctive quality must be proven by demonstrating what the mark signifies to the consuming public," and a mark warrants dilution protection only when it "has come to signify plaintiff's product in the minds of a significant portion of consumers." Trademark Law Revision Act of 1987: Hearing on S. 1883 Before the Subcomm. on Patents, Copyrights and Trademarks of the S. Comm. on the Judiciary, 100th Cong. 74 (1988) (statement of USTA) (quoting *Wedgwood Homes, Inc.* v. *Lund*, 659 P.2d 377, 380 (Or. 1983) (en banc)); see also Trademark Law Revision Act of 1988: Hearing on H.R. 4156 Before the Subcomm. on Courts, Civil Liberties, and the Admin. of Justice of the H. Comm. on the Judiciary, 100th Cong. 81-82 (1988) (statement of USTA) (same).

The hearing testimony reinforced the point. When Senator Hatch pressed witnesses on the subjectivity of the proposed dilution factors, they confirmed that "much of trademark law depends on the state of mind of the purchasing public" and that these "subjective factors can be measured by various objective types of evidence, ranging from public perception surveys to sales figures and advertising expenditures." Trademark Law Revision Act of 1987: Hearing on S. 1883 Before the Subcomm. on Patents, Copyrights and Trademarks of the S. Comm. on the Judiciary, 100th Cong. 332-333 (1988) (response to written questions of Sen. Hatch).

The legislative history thus reveals a consistent congressional design in which trademark issues are resolved by reference to consumer perception. From the Act's foundational purpose—recognizing "the psychological function of symbols"—to the acknowledgment that much of trademark law turns on "the state of mind of the purchasing public," the statutory framework is built on empirical questions about how consumers perceive marks in the marketplace.

II. Consumer-Perception Questions Are Issues Of Fact

When a legal inquiry turns on how ordinary consumers perceive a mark, it presents a question of fact. An inherent-strength analysis is precisely such an inquiry. This Court's precedent and longstanding trademark practice—in the circuit courts, in model jury instructions, and per leading commentators—confirm this understanding.

A. This Court's Precedent Treats Consumer-Perception Inquiries as Questions of Fact

1. In *Hana Financial*, this Court unanimously held that the "tacking" inquiry in trademark law—whether two marks "create the same, continuing commercial

impression" such that a user may claim the benefit of the priority date of an older mark for a newer, modified mark—is a question of fact for a jury. 574 U.S. at 419-420. The reasoning rested on the nature of the inquiry. Tacking "operates from the perspective of an ordinary purchaser or consumer" (*id.* at 420), and "[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" (*id.* at 422).

The Court rejected the argument that the tacking standard is too legal or technical for juries, explaining that "[m]aking that kind of judgment" based on consumer perception is "not 'one of those things that judges often do' better than jurors." *Id.* at 425 n.2 (quoting *Markman* v. *Westview Instruments, Inc.*, 517 U.S. 370, 388 (1996)). The Court emphasized that "[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." *Id.* at 422.

On that front, the inherent-strength inquiry is indistinguishable. Like tacking analyses, inherent-strength analyses require assessing how consumers perceive a mark. Tacking determinations consider whether consumers would perceive two marks as conveying the same commercial impression, and inherent-strength determinations consider where consumers perceive a mark to fall on the spectrum between generic and fanciful. Both inquiries "operate[] from the perspective of an ordinary purchaser or consumer" and thus "fall[] comfortably within the ken of a jury." *Id.* at 420, 422. Because juries decide whether two marks convey the same "commercial impression," they should equally decide the impression a single mark conveys and thus decide the mark's strength.

PepsiCo may respond that inherent-strength analyses are a traditionally judicial function, akin to interpreting the meaning of words in statutes or contracts. But that framing confuses the interpretation of written instruments with the assessment of consumer perception. Statutory and contractual interpretation ask what an enacting legislature or contracting parties intended by specific text—an inquiry resolved through legal conventions such as canons of construction and the parol evidence rule. Inherent-strength analyses, by comparison, ask what ordinary consumers perceive when they encounter a mark associated with a product.

Markman illustrates the distinction. 517 U.S. 370. This Court assigned claim construction to judges precisely because it involves "the construction of written instruments," which is "one of those things that judges often do and are likely to do better than jurors unburdened by training in exegesis." 517 U.S. at 388. *Hana Financial* distinguished *Markman* on this ground, explaining that the tacking inquiry "involves a factual judgment about whether two marks give the same impression to consumers," and that "[m]aking that kind of judgment is, as discussed above, not 'one of those things that judges often do' better than jurors." 574 U.S. at 425 n.2 (quoting *Markman*, 517 U.S. at 388).

The inherent-strength inquiry involves the same kind of factual judgment. It does not ask what a legislature or contracting party meant by the trademark; it asks how ordinary consumers perceive the mark as it appears on a particular product. That perspective-dependent question turns on the real-world cognitive reactions of ordinary people—not interpretive canons, drafting history, or textual conventions. It therefore belongs to the factfinder, just as *Hana Financial* held for tacking.

2. In *U.S. Bank*, this Court set forth the framework for distinguishing questions of fact from questions of law for appellate review. The Court explained that for "mixed questions" of law and fact, the appropriate standard of review depends on "whether answering [the question] entails primarily legal or factual work." 583 U.S. at 396. When the inquiry requires primarily factual work, deferential review applies; when it requires primarily legal work, de novo review applies. *Ibid.*

The Court identified a key marker for distinguishing the two. When a mixed question will "immerse courts in case-specific factual issues—compelling them to marshal and weigh evidence, make credibility judgments, and otherwise address what we have (emphatically if a tad redundantly) called 'multifarious, fleeting, special, narrow facts that utterly resist generalization'"—"appellate courts should usually review a decision with deference." *Id.* at 396 (quoting *Pierce* v. *Underwood*, 487 U.S. 552, 561-562 (1988)). Conversely, when the question requires courts to "expound on the law"—that is, when resolution requires "developing auxiliary legal principles" or "elaborating on a broad legal standard"—de novo review applies. *Ibid.*

The inherent-strength inquiry falls squarely on the factual side of this framework. Determining how ordinary consumers perceive the relationship between a mark and a product does not require "developing auxiliary legal principles" or resolving abstract questions about the meaning of legal standards. The legal standard—the distinctiveness spectrum—is well established. The factual inquiry, however, requires assessing where a mark falls on that spectrum based on consumer perception.

3. This Court has repeatedly held that matters of state of mind are most appropriately viewed as questions of fact, subject to the "clearly erroneous" standard under Rule 52 of the Federal Rules of Civil Procedure. See *Pullman-Standard*, 456 U.S. at 288 (explaining that "[t]reating issues of intent as factual matters for the trier of fact is commonplace") (citing *Dayton Bd. of Educ.* v. *Brinkman*, 443 U.S. 526, 534 (1979) (determining whether the defendants had intentionally maintained a racially segregated school system was a factual question)); *Comm'r* v. *Duberstein*, 363 U.S. 278, 286-288 (1960) (holding that intent or motive of the donor of a gift is a question of fact); *United States* v. *Yellow Cab Co.*, 338 U.S. 338, 341 (1949) (explaining that questions of the "design, motive and intent with which men act" are factual issues). Because the principal focus of the conceptual-strength-of-mark analysis is precisely a matter of state of mind—specifically, how consumers perceive the mark—strength is an inherently factual inquiry.

B. Longstanding Trademark Practice Confirms the Jury's Role

The role of the jury is deeply rooted in trademark law, and the Court should not disrupt the prevailing paradigm by endorsing the Second Circuit and PepsiCo's shared view. This Court has long recognized that questions about how ordinary people perceive things in daily life belong to juries. In *Railroad Co.* v. *Stout*, 84 U.S. 657, 664 (1873), the Court explained that "twelve men know more of the common affairs of life than does one man" and can "draw wiser and safer conclusions from admitted facts thus occurring than can a single judge." How ordinary consumers perceive the RISE mark when they see it on a can of coffee at the grocery store is precisely such a "common affair[] of life." Consumers are ordinary people making ordinary purchasing decisions; jurors—themselves consumers—are thus better positioned to assess those affairs than a single judge reasoning from "logical associations" in chambers. Pet. App. 55a.

As Gilson notes, "[a]t the time of the Constitution, an action to redress trademark infringement was brought under law, not equity." 2 Gilson § 8.04 [2][k]. "In the late 1700s, infringement would have been classified as 'fraud for which an action [at law] would lie.'" *Id*. § 8.04[2][a][i] & n.37 (alteration in original) (quoting *Singleton* v. *Bolton*, 3 Douglas Reports 293 (1783)).

Because trademark infringement was originally an action at law, the right to a jury on factual trademark issues has deep historical roots. Early American trademark cases were commonly tried to a jury. See, e.g., *Thomson* v. *Winchester*, 36 Mass. (19 Pick.) 214 (1837). Courts have long instructed juries to assess trademark infringement issues. This Court later confirmed that principle in holding that a claim for money "damages based upon a charge of trademark infringement" was "subject to cognizance by a court of law" and thus triggers the Seventh Amendment right to a jury trial. *Dairy Queen, Inc*. v. *Wood*, 369 U.S. 469, 477, 479 (1962).

The historical practice of submitting factual questions to juries is reflected in modern commentary, which likewise rejects judicial usurpation of the consumer-perception inquiry. Professor McCarthy's treatise makes the point sharply: One judge who characterized the descriptive-suggestive issue as "a 'legal one, requiring no outside facts or surveys and having little to do with the perception of the average person,'" was "twice in error." 1 McCarthy § 11:70. "Viewing the descriptive-suggestive issue as a 'legal' one is contrary to the weight of authority. So also contrary to all authority is the view that the perception of the judiciary is the issue and the perception of customers is irrelevant." *Ibid.* (citation omitted). The inherent-strength inquiry does not ask what a judge thinks a word means in the abstract as a legal matter; it asks what the purchasing public understands the mark to signify.

Also well established is the recognition that "appellate judges are a part of the composite of the general public, but they represent only a tiny fraction of the whole, which necessarily encompasses a wondrous diversity of thought." *In re Mavety Media Grp., Ltd.*, 33 F.3d 1367, 1371 (Fed. Cir. 1994). A single judge's impression of what a mark conveys cannot substitute for the purchasing public's understanding.

1. The historical practice of submitting consumer-perception questions to juries is also evident in the broad consensus among the federal courts of appeals, which overwhelmingly treat inherent strength as a question of fact. Outside the Second Circuit, the circuits consistently ground their analysis of conceptual strength in consumer perception and treat the question as one of fact. Trademark owners across the nation have long operated under that paradigm.

The First and Third Circuits expressly assess classification from the purchaser's perspective. The

First Circuit asks "what the purchasing public would think when confronted with the mark as a whole" and treats classification as factual. *Equine Techs., Inc.* v. *Equitechnology, Inc.*, 68 F.3d 542, 544-545 (1st Cir. 1995) (quoting *In re Hutchinson Tech. Inc.*, 852 F.2d 552, 552-554 (Fed. Cir. 1988)). The Third Circuit likewise asks whether consumers must use "'imagination, thought, or perception' to determine what the product is" and whether consumers are "likely to perceive the mark as a signifier of origin." *A & H Sportswear, Inc.* v. *Victoria's Secret Stores, Inc.*, 237 F.3d 198, 221-222 (3d Cir. 2000) (quoting *A.J. Canfield Co.* v. *Honickman*, 808 F.2d 291, 297 (3d Cir. 1986)). The "[l]evel of distinctiveness and mark strength are factual determinations" reviewed for clear error, and classification is a useful guide in assessing—but is not dispositive of—conceptual strength. *Id.* at 221-223.

The Fourth and Fifth Circuits likewise evaluate the descriptive-suggestive distinction from the consumer's perspective. The Fourth Circuit asks whether a mark "imparts information directly" or instead requires "some operation of the imagination to connect it with the goods." *Pizzeria Uno Corp.* v. *Temple*, 747 F.2d 1522, 1528 (4th Cir. 1984) (quoting *Union Carbide Corp.* v. *Ever-Ready, Inc.*, 531 F.2d 366, 379 (7th Cir. 1976)). Applying clear-error review, it rejected the district court's classification of UNO as descriptive. *Id.* at 1533-1534. Similarly, when considering whether a mark is suggestive or descriptive for determining protectability, the Fifth Circuit considers whether consumers must "use 'imagination, thought and perception'" and considers "the context in which a term appears, and the audience to which it is directed." *Xtreme Lashes, LLC* v. *Xtended Beauty, Inc.*, 576 F.3d 221, 232-234 (5th Cir. 2009) (quoting *Zatarains, Inc.* v.

Oak Grove Smokehouse, Inc., 698 F.2d 786, 792 (5th Cir. 1983)) (citing *Union Nat. Bank of Texas, Laredo, Tex.* v. *Union Nat. Bank of Texas, Austin, Tex.*, 909 F.2d 839, 846-847 (5th Cir. 1990)). Whether the context makes a mark descriptive is "a matter best weighed by a jury." *Id.* at 233-235 (reversing summary judgment on protectability and likelihood of confusion).

The Sixth and Seventh Circuits similarly focus on the mental process by which consumers connect a mark with goods or services. The Sixth Circuit upheld under clear-error review a finding that TUMBLEBUS was suggestive because a consumer encountering the term in isolation would not necessarily know it referred to mobile-gymnastics instruction rather than, for example, a mobile laundry service using tumble-dryers. *Tumblebus Inc.* v. *Cranmer*, 399 F.3d 754, 762-763 (6th Cir. 2005). The Seventh Circuit likewise asks what "mental process" connects an "incongruous or figurative" name with the product. *Forum Corp. of N. Am.* v. *Forum, Ltd.*, 903 F.2d 434, 443-445 (7th Cir. 1990) (reversing a district court's classification as clearly erroneous) (quoting G. *Heileman Brewing Co.* v. *Anheuser-Busch Inc.*, 873 F.2d 985, 997 (7th Cir. 1989)).

The Eighth and Ninth Circuits make the point particularly clear. The Eighth Circuit states that "[t]he test * * * is what consumers, not persons in the trade, understand the term to be." *Anheuser-Busch, Inc.* v. *Stroh Brewery Co.*, 750 F.2d 631, 638 (8th Cir. 1984). It treats "the question of the proper category in which a term is to be placed for trademark purposes" as "a question of fact" reviewed for clear error. *Ibid.* The Ninth Circuit similarly explains that conceptual strength depends largely on "the obviousness of [the mark's] connection to the good or service" where "[t]he less obvious the connection, the stronger the mark, and vice versa." *Fortune Dynamic, Inc.* v. *Victoria's Secret Stores Brand Mgmt., Inc.*, 618 F.3d 1025, 1032-1033 (9th Cir. 2010). Finding a factual dispute over the meanings of DELICIOUS as applied to footwear, the court held that "a jury should assess the conceptual strength" of the mark because "the decision as to whether a mark is descriptive or suggestive is frequently made on an intuitive basis rather than as a result of a logical analysis susceptible of articulation." *Id.* at 1033-1034 (internal quotation marks omitted).

The Tenth and Eleventh Circuits are equally explicit about whose perception controls. The Tenth Circuit holds that "[t]he categorization of a mark is a factual question" and that the factfinder must determine "what the perception of the purchasing public is." *Donchez* v. *Coors Brewing Co.*, 392 F.3d 1211, 1216 (10th Cir. 2004) (quoting *Lane Cap.*, 192 F.3d at 344). When addressing the protectability of a mark, the Eleventh Circuit likewise treats both inherent and acquired distinctiveness as factual. *Welding Servs., Inc.* v. *Forman*, 509 F.3d 1351, 1357 (11th Cir. 2007) ("Distinctiveness is a question of fact, whether the question is inherent distinctiveness or acquired distinctiveness.").

The Federal and D.C. Circuits apply the same consumer-centered approach. In the Federal Circuit's view, "[p]lacement of a term on the fanciful-suggestive-descriptive-generic continuum is a question of fact" informed by evidence of "the relevant purchasing public's understanding." *In re Dial-A-Mattress Operating Corp.*, 240 F.3d 1341, 1344-1345 (Fed. Cir. 2001); accord

DuoProSS Meditech Corp. v. *Inviro Med. Devices, Ltd.*, 695 F.3d 1247, 1252-1254 (Fed. Cir. 2012) (whether a mark is merely descriptive is factual, and a mark's commercial impression "must be viewed through the eyes of a consumer"). Considering the question of genericness, the D.C. Circuit similarly asks "whether the public perceives the term primarily as the designation of the article." *Blinded Veterans Ass'n* v. *Blinded Am. Veterans Found.*, 872 F.2d 1035, 1041 (D.C. Cir. 1989).

The Second Circuit's approach stands apart. In this case, the court "reiterated in no uncertain terms that 'a mark['s] inherent strength is a legal question.'" Pet. App. 6a (alteration in original) (quoting *Henriquez*, 98 F.4th at 413). That view conflicts, however, with the court's earlier view. In *Lane Capital*, the court held in the context of protectability that "[t]he classification of a mark is a factual question" and that the factfinder's function is to determine, "based on the evidence before it, what the perception of the purchasing public is." 192 F.3d at 344-345. The court cautioned that the factfinder "is not the designated representative of the purchasing public" and that the factfinder's "own perception of the mark is not the object of the inquiry." *Ibid*. The Second Circuit's affirmance of summary judgment in *Lane Capital* adheres to that rule: a court may resolve a factual question when the evidence permits only one reasonable conclusion, but it may not convert the factual inquiry into a legal one. *Id*. at 345-347.

Rise Brewing's dispute with PepsiCo demonstrates the problem of the Second Circuit's evolved approach, where judges decide core jury issues. The court expounded on the supposed close associations between the word "rise" and caffeine, getting up in the morning, and coffee generally. Pet. App. 55a-56a. But that was the court's own subjective impression of what "RISE" means to consumers—not a finding grounded in evidence of how ordinary consumers actually perceive the mark in the marketplace. That is why the inquiry is factual: reasonable people can disagree about what a mark means to consumers, and the resolution of that disagreement is a question for a jury.

2. The established practice of treating mark strength as factual is also reflected in the courts of appeals' model jury instructions. See, *e.g.*, 9th Cir. Manual of Model Civil Jury Instructions 15.18 (2025) (instructing the jury to consider "[t]he strength or weakness of [plaintiff's] mark"); 5th Cir. Civil Jury Instructions Chapter 14 – Trademarks § 14.10 (2024) (instructing the jury to consider "the type and strength of each allegedly infringed mark"). These instructions reflect the broad historical understanding and practice whereby mark strength is a factual question for the jury—not a legal question for the judge.

PepsiCo may respond that treating inherent strength as factual would deter courts from resolving infringement cases on summary judgment or unduly hamstring judges. But that concern mistakes the effect of the rule. Treating inherent strength as a factual question does not disable summary judgment; it requires courts to ask whether a reasonable jury could find otherwise. This Court made precisely that point in *Hana Financial*: "If the facts warrant it, a judge may decide a tacking question on a motion for summary judgment or for judgment as a matter of law." 574 U.S. at 423. The same is true of inherent strength. When the evidence of consumer perception permits no reasonable jury to find a mark strong, a court may grant summary judgment. The factual characterization changes the standard of decision, not the availability of dispositive motions.

PepsiCo's own conduct confirms that the inquiry is factual. PepsiCo's Chief Marketing Officer testified that the company selected "RISE" only after commissioning consumer surveys that revealed the term carried "an emotional meaning" consumers found appealing. Pet. App. 84a. PepsiCo did not treat the mark's significance as something that could be determined from the word in isolation; it obtained and relied on empirical evidence of how consumers would receive it.

Nor would the rule enable nuisance suits over common words as PepsiCo has suggested. Rule 56's requirement of a genuine dispute of material fact provides all the gatekeeping defendants need against frivolous claims. Properly instructed juries, paired with summary judgment's built-in safety valve, protect defendants using common words that consumers do not perceive as source identifiers. When the record contains evidence from which ordinary consumers could draw different conclusions about a mark's meaning or source-identifying power, however, those factual issues remain for the jury.

3. Leading commentators uniformly view conceptual strength as factual. The leading trademark treatises—McCarthy on Trademarks and Unfair Competition and Gilson on Trademarks—independently confirm the factual nature of the conceptual-strength inquiry. McCarthy's treatise is unequivocal: "[T]rademark 'strength' [is] measured by customer perception," and "placement of a designation on the spectrum of distinctiveness is an issue of fact." 1 McCarthy §§ 11:3, 11:73; see also 2 McCarthy

17:26 ("[M]ost issues in trademark law" are "question[s] of fact to be determined from the perspective of the ordinary purchaser."); 3 McCarthy § 23:73 ("In the trial court, likelihood of confusion is a factual issue that is to be submitted to a jury.").

Gilson's treatise similarly explains that "mark strength" is one of the trademark issues "typically deemed [a] question[] of fact and likely * * * allocated to the jury." 2 Gilson § 8.04 [2][g]. The treatise presents authority from most circuits for the proposition that "placement on the fanciful-suggestive-descriptive-generic continuum is a question of fact" and that "whether a mark is arbitrary or merely descriptive is ordinarily a question of fact." *Id.* § 8.04, n.154; see also *id.* § 8.05[1][c] ("[w]here a mark falls on the generic-fanciful continuum is a question of fact, reviewable only for clear error," and "whether a mark is inherently distinctive in the first place" is "a question of fact").

Gilson relies on this Court's precedent in confirming that juries are best suited to assess the perceptions of ordinary consumers. The notion, Gilson explains, applies "with full force" to the likelihood-of-confusion inquiry because "'[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.'" 2 Gilson § 8.05[1][b][i] (quoting *Hana Fin.*, 574 U.S. at 422). Gilson concludes that "[i]t will now be difficult if not impossible for courts to continue to hold that likelihood of confusion is a question of law." *Ibid.* Because the overall likelihood-of-confusion analysis is factual, the component factors that feed that analysis—including a mark's conceptual strength—likewise present factual questions. It would be anomalous to treat the whole as a factual inquiry while treating a critical input as a legal inquiry.

In short, the legal standard for inherent strength is well settled, and the Court should not disrupt the status quo. The distinctiveness spectrum provides the governing framework. The companion determination—which the Second Circuit erroneously treated as a legal question—is the fact-bound inquiry of where a particular mark falls on that spectrum based on consumer perception.

The consequences are not merely theoretical. In this case, the Second Circuit's legal conclusion that "RISE" is inherently weak was the dispositive factor that led to summary judgment for PepsiCo. Pet. App. 42a-43a. This Court has recognized that "[i]n actions at law predominantly factual issues are in most cases allocated to the jury" to "preserve the right to a jury's resolution of the ultimate dispute." *City of Monterey* v. *Del Monte Dunes at Monterey, Ltd.*, 526 U.S. 687, 720 (1999) (internal quotation marks omitted). Indeed, "[m]aintenance of the jury as a fact-finding body is of such importance and occupies so firm a place in our history and jurisprudence that 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). Rise Brewing was denied the opportunity to present its evidence to a jury because the court of appeals treated the strength inquiry as one for judges alone. The Court should reverse.

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be reversed and the case remanded for further proceedings consistent with this Court's opinion.

Respectfully submitted,

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