

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 OF
PROFESSOR SEPEHR SHAHSHAHANI
AS *AMICUS CURIAE*
IN SUPPORT OF NEITHER PARTY**

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INTEREST OF AMICUS CURIAE

Sepehr Shahshahani is a Professor of Law at Washington University in St. Louis.¹ He has taught Civil Procedure, Intellectual Property, and Trademark Law and has written on various topics in IP and civil procedure, including the fact-law distinction. This brief draws substantially on this scholarship, especially *Fact-Law Confusion* (Aug. 11, 2026) (unpublished manuscript) (https://papers.ssrn.com/abstract_id=7234039). As an expert in civil procedure and trademark law, Professor Shahshahani has an interest in the sound development and application of law in these fields.

SUMMARY OF ARGUMENT

The question presented is whether inherent trademark strength, one component of one factor in the multifactor likelihood-of-confusion inquiry, is a question of fact or law. This brief does not advocate a particular answer to that question, but it fleshes out the implications of an answer for the allocation of decisionmaking authority between judge and jury. It explains that judges have an important role in deciding the question of inherent strength, and the ultimate question of likelihood of confusion, even if inherent strength is classified as a question of fact or a mixed question of fact and law in which factual considerations predominate. The prominent role of judges is

¹ No counsel for any party authored this brief in whole or in part, and no person other than amicus and his counsel made a monetary contribution to fund the preparation or submission of this brief, except that Washington University School of Law may pay the expenses involved in filing this brief.

firmly anchored in federal procedural law; it also draws strength from principles and policies of trademark law and intellectual property law more broadly. The Court should underscore this prominent role.

The most straightforward way to do so would be to classify inherent strength as a question of law, committing it exclusively to judges. But the question has factual aspects, so there might be good reason to classify it as one of law dependent on subsidiary findings of fact or a mixed question of law and fact in which factfinding sometimes predominates. Regardless of how the question is classified, judges should and do play an important role in answering it. The presence of important factual inquiries does *not* imply that the question is exclusively—or even typically—for juries. The Court should disavow such an implication.

In federal civil procedure, questions of law are always for judges, but questions of fact are not always for juries. The commonplace that “questions of fact are for juries” means that juries *may* decide questions of fact, not that they *must*. With questions of fact, what determines whether the decision is for judge or jury is not the nature of the *question* but how clear its *answer* is: A judge may decide a question of fact when its answer is sufficiently clear. For example, on summary judgment, a judge may (and, if moved by a party, must) answer a question of fact when reasonable jurors could not disagree over the answer.

This is consistent with the Seventh Amendment. The Seventh Amendment right to a jury trial on an issue guarantees the *eligibility* of the issue for trial by

jury, not the *necessity* of such a trial. A contrary conclusion would vitiate a century or so of common practice in federal courts—most obviously in summary judgment and judgment as a matter of law—with disastrous consequences for the administration of justice.

Beyond these principles of federal procedural law, which apply in all civil cases, there is reason to be particularly solicitous of judges' role in trademark cases. Trademark-infringement law is circular: Whether a competitor's use of a similar mark infringes a senior user's trademark depends on whether consumers think that products bearing the two marks come from the same source, but that depends on whether the law allows the competitor to use the similar mark. The consequence of this circularity is that the law not only ratifies, but shapes, consumer perceptions. A responsible judge cannot escape the fact that trademark law is not just about what kind of consumers we have but also about what kind of consumers we want to have. Do we want a society in which consumers of the future think, for example, that only one company can use "Rise" to market its caffeinated beverages (even if a nontrivial portion of consumers think so now)? The answer has implications for competition and freedom of speech, our cherished First Amendment right. Judges are guardians of this right. They should not punt the answer to "consumer perceptions."

Nor have they. In widely followed and celebrated trademark decisions, this Court and other courts have declined to be a passive receptacle of consumer perceptions, engaging instead in shaping consumer

perceptions that advance the competition-promoting and speech-enhancing purposes of trademark law.

More broadly, courts in copyright, patent, and trademark cases often answer fact-intensive questions: questions about the effects of an allegedly infringing use on potential markets for a copyrighted work (the fourth fair-use factor), the nature of a copyrighted work (the second fair-use factor), the state of science or technology (implicating nonobviousness in patent law), and even a person's mental state (implicating various doctrines in trademark law). Such judicial factfinding is justified, among other considerations, by the centrality of IP to constitutionally venerated values of artistic-scientific progress and free speech.

The Court should underscore judges' prominent role, regardless of how it classifies the question of inherent trademark strength. It should encourage summary judgment and judgment as a matter of law when the evidence warrants, and it should clarify that the role of courts is not just to passively register consumer perceptions but to participate in shaping them to promote the purposes of trademark law.

ARGUMENT

I. Questions of Fact and Fact-Heavy Mixed Questions Are Not Necessarily, or Even Usually, for Juries

A. The Question and Why It Matters

The question presented is whether inherent trademark strength—which is one of two components of trademark strength, which in turn is one of eight (or so) factors in the test for likelihood of confusion—is a question of fact or law. The answer matters for at least two reasons: It affects whether the judge or the jury decides, and it affects the standard of appellate review. This brief focuses on the first issue.

B. Questions of Fact and Fact-Heavy Mixed Questions Are Not Necessarily for Juries

It is a commonplace that questions of law are for judges and questions of fact are for juries. (In the context of allocating decisionmaking authority, this brief uses “judge(s)” and “court(s)” synonymously.) Pure questions of law are *always* for judges: A court, not a jury, gets to decide, say, whether the Constitution permits public schools’ segregation of schoolchildren by race, *see Brown v. Bd. of Educ.*, 347 U.S. 483 (1954), or whether trade dress is protectable without proof of secondary meaning, *see Two Pesos, Inc. v. Taco Cabana, Inc.*, 505 U.S. 763 (1992); *Wal-Mart Stores, Inc. v. Samara Bros.*, 529 U.S. 205 (2000).

It does not follow, however, that questions of fact are always for juries. Rather, the truism that questions of fact are for juries means that questions of fact

(unlike questions of law) *may* be decided by juries—but they may also be decided by courts, in appropriate circumstances. Specifically, a question of fact may be decided by a court if the answer to the question is sufficiently clear. What qualifies as “sufficiently clear” changes as a case moves forward in litigation, with the court acquiring greater authority to decide in later stages.

At the pleading stage, the court must assume the truth of all properly pleaded factual allegations in a complaint. *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007); *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). This presumption of truth guarantees that the judge will not weigh in on the truth of factual claims—for now—leaving that to be determined later in litigation.

But even at this early stage, the court may find facts that are capable of judicial notice. *See, e.g., Tellabs, Inc. v. Makor Issues & Rts., Ltd.*, 551 U.S. 308, 322 (2007); 5B *Wright & Miller’s Federal Practice & Procedure* § 1357 (4th ed. 2026). This applies to facts that are “not subject to reasonable dispute” because they are “generally known” within the jurisdiction or “can be accurately and readily determined from sources whose accuracy cannot reasonably be questioned.” Fed. R. Evid. 201(b).

Courts may also weigh in on facts at the pleading stage by refusing to accept “allegations that are sufficiently fantastic to defy reality as we know it: claims about little green men, or the plaintiff’s recent trip to Pluto, or experiences in time travel.” *Iqbal*, 556 U.S. at 696 (Souter, J., dissenting). Such “fantastic”

allegations are not common, but courts readily reject them when they appear, often in *pro se* pleadings, and often about mind control or suchlike. *See, e.g., Moyer v. IBM Corp.*, No. 02 CIV.8894 GEL, 2003 WL 256931, at *2 (S.D.N.Y. Feb. 3, 2003); *Aboussa v. New Hampshire*, 695 F. Supp. 3d 239, 242–44 (D.N.H. 2023).

Note that the authority of courts to reject fantastic factual allegations is distinct from the idea of plausibility pleading under *Twombly* and *Iqbal*. The plausibility requirement targets the plausibility of *entitlement to relief*—assuming the factual allegations are true—whereas the authority to reject fantastic allegations is an authority to deny the truth of pleaded facts. *See* Shahshahani, *supra*, at 12–14.

So, in most contexts, only facts subject to judicial notice or “fantastic” allegations justify a court’s foray into factfinding at the pleading stage.² When the case moves past pleadings and discovery to the summary-judgment stage, courts acquire greater authority to weigh in on facts.

At this stage, the court should send a question to the jury only if it entails a “genuine dispute” of “material fact.” Fed. R. Civ. P. 56(a). A “material” fact is one that “might affect the outcome of the suit under the governing law.” *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986).

² In other contexts, such as the *in forma pauperis* statute, 28 U.S.C. § 1915, Congress has authorized greater pleading-stage judicial scrutiny of facts. *See* Shahshahani, *supra*, at 14 n.57.

More to the point for present purposes, a “genuine” dispute is one in which both sides have something substantial to say for themselves—a truly two-sided dispute, not a “one-sided” one. *Id.* at 248, 251–52. When a party moves for summary judgment, a dispute counts as genuine only if the evidence is such that a reasonable jury could find for the nonmoving party. *Id.* at 248. The inquiry is the same when a judge rules on a motion (or renewed motion) for judgment as a matter of law under Rule 50: “whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law.” *Id.* at 251–52; *see also id.* at 250–51.

Anderson also says that “the weighing of the evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of a judge.” *Id.* at 255. But it would be an elementary mistake to read that statement as requiring a jury trial whenever adjudicating a dispute entails weighing evidence—that is, whenever there is *some* evidence on both sides. *See* Shahshahani, *supra*, at 16–18. That interpretation reads “genuine” out of “genuine dispute” in the text of Rule 56(a). And it contradicts *Anderson* itself, which affirms that “a scintilla of evidence in support of the [nonmovant’s] position will be insufficient; there must be evidence on which the jury could reasonably find for the [nonmovant].” 477 U.S. at 252. A blanket no-weighing-of-evidence rule also disregards the Court’s subsequent jurisprudence. *See Scott v. Harris*, 550 U.S. 372, 380 (2007) (“When opposing parties tell two different stories, one of which is blatantly contradicted by the record, so that no reasonable jury could believe it, a court should not adopt that version of the facts for

purposes of ruling on a motion for summary judgment.”). Indeed, it is rare on summary judgment for there to be *no* evidence on one side of a dispute; the question, almost always, is whether the evidence is enough to convince a reasonable jury, which requires the judge’s “weighing of the evidence.”

Instead of establishing a never-weigh-evidence rule, the above-quoted passage in *Anderson* is simply saying this: Once the judge has determined that there is sufficient evidence for a reasonable jury to find for either side, it’s not the judge’s job to go further and decide which side should win. *See Anderson*, 477 U.S. at 249 (“[A]t the summary judgment stage the judge’s function is not himself to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial.”); Shahshahani, *supra*, at 17–18.

To summarize, the judge may decide a question of fact and take it away from the jury when the weight of considerations bearing on the answer is sufficiently one-sided. The requisite threshold of one-sidedness permitting the judge to decide is lowered as a civil case moves forward: from “judicial notice” and “fantastic” before discovery to “no reasonable jury” after discovery. That being true of “pure” questions of fact, it is true *a fortiori* of “mixed” questions of fact and law in which the factual predominates over the legal.

Courts often decide questions of fact and fact-heavy mixed questions. *See, e.g., New York Times Co. v. Sullivan*, 376 U.S. 254, 286–88 (1964) (assessing whether a Times official’s belief about the veracity of

an advertisement was “reasonable” and held in “good faith” and probing the factual details surrounding the Times’ retraction of the advertisement and its failure to check the advertisement against news stories in its files to hold that the record evidence did not support a finding of “actual malice”). Such judicial factfinding is not limited to constitutional cases. *See, e.g., Sony Corp. of America v. Universal City Studios*, 464 U.S. 417, 442–56 (1984) (delving into the prevalence and economic impact of customers’ use of VCRs to record television programs for later viewing (“time shifting”)—including whether it suppressed demand for copyright owners’ works, led to people watching less television, or decreased the value of copyrighted works, as well as the difficulty, extent, and impact of fast-forwarding through commercials—to hold that time shifting is fair use); *see also infra* Part II (discussing more IP examples). In these cases the Court undeniably weighed evidence, found facts, and drew inferences from facts.

The Court has been explicit that the fact-intensive nature of a question does not prevent judges from answering it. In *Hana Financial v. Hana Bank*, the Court held that the availability of “trademark tacking,” whereby the senior user of a mark is permitted to modify it without losing priority over other users, is a determination to be made by juries because it depends on “an ordinary consumer’s understanding of the impression that a mark conveys,” a “fact-intensive” inquiry. 574 U.S. 418, 420–22 (2015). But it hastened to add that this holding does not imply that the trademark-tacking question is *always* for juries:

This is certainly not to say that a judge may never determine whether two marks may be tacked. 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. . . . We hold only that, when a jury trial has been requested and when the facts do not warrant entry of summary judgment or judgment as a matter of law, the question whether tacking is warranted must be decided by a jury.

Id. at 422.

C. Labeling a Question as “Usually” for Juries Is Dangerously Misleading

As the previous Section shows, the idea that factual or fact-intensive questions are *always* for juries is easy to refute. But one might believe that some factual questions are *usually* or *presumptively* or *normally* for juries, such that a judge deciding them would be anomalous or improper. This belief has been articulated by different courts and the leading civil-procedure treatise. *See* Shahshahani, *supra*, at 32–34 (collecting examples from caselaw and treatise). It finds expression most often in the contexts of assessing state of mind (intent, knowledge, good faith, and the like) and reasonableness. *Id.* And it might seem applicable to some questions (including mark strength) in trademark law, which often involves

assessing consumer perceptions. But the idea that some questions are “usually” for juries is wrong.

Taken as descriptive, the idea is entirely unsupported. Nowhere do those asserting that certain questions are usually for juries engage in any empirical assessment of the frequency with which such questions went to the jury when the judge-jury issue was litigated. So the “usually” idea is useless as a description of what has happened before.

It is worse than useless—it is dangerous—as a prescription for what *should* happen in a given case. An estimate of how frequently summary judgment or judgment as a matter of law was granted on an issue in previous cases would not say anything about the proper decision in *this* case. The idea that the win rate on a motion in previous cases should inform the court’s decision on the motion in the case at bar contravenes the principle of judging each case on its own merits.

It would be silly to think, for example, that the plaintiff win rate in previous contract cases has any bearing on whether a given defendant breached her contract. Nor would the inference be justified if the win rate were empirically well known rather than baldly asserted: Imagine the outrage that would rightly ensue if, in instructing the jury in a prisoner civil-rights action, the judge were to opine that “these claims are rarely found to have merit” or, in a criminal case, “defendants who go to trial are overwhelmingly found guilty.”

In fact, propagating the idea that certain questions are “usually” for juries and “rarely” appropriate for summary judgment would result in changing the effective summary-judgment standard for those questions. For if the judge goes into it thinking “I should not be granting summary judgment on this issue,” then the movant must make an extra showing to overcome the judge’s hostile prior belief. The judge has effectively put a thumb on the scale against summary judgment and heightened the movant’s burden. Thus although the standard for summary judgment is nominally the same for all issues (the no-reasonable-jury standard), the judge’s hostile prior belief effectively requires a greater showing for some issues.³ The idea that summary judgment is not usually appropriate for certain issues will have a self-reinforcing quality, resulting in a more demanding standard for certain issues.

One might be tempted to think that even if the summary-judgment standard is the same for all issues, some issues are *by nature* less likely to satisfy that standard. As applied to inherent trademark strength, the idea would be that because the question is about consumer perceptions—which are inside consumers’ heads rather than externally manifest—the evidence is unlikely to be so “one-sided” as to satisfy *Anderson*’s no-reasonable-jury standard.

This form of impressionistic empiricism is misguided. To begin, strength can be judged by

³ For a mathematical proof of this proposition, see Shahshahani, *supra*, at 35 n.158.

objective indicators. For example, if a firm were to use “Whitening” as a mark for toothpaste or “Crunchy” for cookies, these marks would be classified as descriptive and hence inherently weak. *See, e.g., Aloe Creme Lab’s, Inc. v. Estee Lauder, Inc.*, 533 F.2d 256, 258 (5th Cir. 1976) (AFTER TAN for sun lotion); *Bernard v. Com. Drug Co.*, 964 F.2d 1338, 1341 (2d Cir. 1992) (Arthriticare for arthritis-relief gel).

What is more, impressionistic empiricism is faulty because it fails to take account of *selection*. Even if we assume that—in life in general—the evidence on some questions of fact is intrinsically less likely than on other questions to be one-sided, it does not follow that this will be so *in the sample of cases selected for litigation and proceeding to summary judgment*. Regardless of the question, parties would often not find it worthwhile to bear the costs of litigation if the answer is clear before discovery, or of pursuing the dispute all the way to summary judgment once discovery has revealed that the answer is clear. Even if some issues have a higher “natural” or “intrinsic” balance of one-sidedness than other issues, there is no evident reason to expect the same differential in one-sidedness across different issues to carry over to the summary-judgment stage—because of the selection of disputes for litigation and further selection to the termination of discovery and summary-judgment motions. It’s not obvious why one-sidedness at the point of filing for summary judgment should vary across different issues. *See Shahshahani, supra*, at 38–39.

The upshot is that inferring the one-sidedness of evidence on a question from the nature of the question is a tricky task. It requires knowledge of statistics (drawing credible inferences from empirical patterns) and game theory (analyzing strategic interaction), which judges typically lack. Nor is there an expert consensus on the issue that judges lacking the relevant expertise can conveniently import: There is a rich social-scientific literature on inference from litigated cases, but it does not speak to differences across different issues of fact, and it certainly does not throw up a straightforward answer. *See* Shahshahani, *supra*, at 39 nn.164–165. But although courts lack the institutional expertise to indulge in empirical inference based on the nature of the question, they do have the institutional expertise to do their job: judging each case by its own merits. They should stick to that.

In sum, there is no warrant in the law for the idea that certain questions, be it trademark strength or anything else, are “usually” for the jury and “rarely” appropriate for summary judgment. The Court should disavow that idea.⁴

⁴ Although the “usually” fallacy is common, the error is probably harmless in many cases: Courts repeat the mantra without relying on it in deciding the case. For example, *Hana Bank* says that juries “generally” decide questions regarding ordinary people’s assessment, 574 U.S. at 422, and that some mixed questions are “typically” resolved by juries, *id.* at 423–24, but in context these statements are best interpreted to mean that such questions *may* be decided by juries (i.e., not *always* by judges). This interpretation is fortified by the Court’s reminder that summary judgment and judgment as a matter of law remain viable. *See supra* p. 11 (quoting *Hana Bank*, 574 U.S. at 423). But even if the Court itself

D. Preserving Judges' Role in Factfinding Does Not Violate the Seventh Amendment

The Seventh Amendment right to a jury trial does not undercut judges' robust role in factfinding. Whether this right attaches is determined by a historical test: Courts must ask whether the *claim* ("cause of action") is one that "either was tried at law at the time of the founding or is at least analogous to one that was," and whether the *issue* (the "particular trial decision") fell to the jury at the Founding or "must fall to the jury in order to preserve the substance of the common-law right as it existed in 1791." *Markman v. Westview Instruments, Inc.*, 517 U.S. 370, 376 (1996). The jury-trial right attaches only if the answer to both questions is yes. *Id.*

Importantly, to say that the Seventh Amendment jury-trial right attaches does not mean that a jury trial must be had *regardless* of the state of evidence on the issue. It means the issue should be submitted to a jury *if* the evidence is such as to require submission. In other words, the Seventh Amendment right to a jury

is not confused by the "usually" fallacy, repeating it in an opinion is apt to mislead some judges. See Shahshahani, *supra*, at 46–48, 51–57 (discussing cases in which courts mistakenly inferred from the nature of a question that a jury must decide it). So it's important for the Court to disavow the idea.

trial guarantees the *eligibility* of an issue for a jury trial, not the *necessity* of a jury trial on the issue.⁵

The contrary interpretation would vitiate civil procedure as we know it. It would mean that taking judicial notice of incontrovertible facts and dismissing complaints containing “fantastic” allegations, *see supra* Section I.B, are unconstitutional, at least as applied to claims and issues triable to juries at the Founding. It would also invalidate legislation authorizing courts to dismiss *in forma pauperis* lawsuits resting on “clearly baseless” factual allegations. *See supra* note 2. More consequentially, interpreting the Seventh Amendment to require a jury trial on certain issues regardless of the evidence would hollow out summary judgment and judgment as a matter of law.⁶

Courts often decide issues that were triable to juries at the Founding. An obvious example is negligence in tort. Of course, this issue could go to the jury under Founding-era common law. *See, e.g.*, Patrick J. Kelley, *Restating Duty, Breach, and Proximate Cause in Negligence Law: Descriptive Theory and the Rule of Law*, 54 Vand. L. Rev. 1039, 1057 (2001). Yet, as every first-year law student learns, courts have decided the issue without

⁵ By contrast, the Sixth Amendment prohibits convicting a defendant of a serious crime except by a jury verdict, even if the evidence against the defendant is overwhelming and uncontradicted. *Sullivan v. Louisiana*, 508 U.S. 275, 277–78 (1993).

⁶ Not surprisingly, courts have summarily rejected the argument that summary judgment is unconstitutional. *See* Shahshahani, *supra*, at 31 n.141.

involving the jury in countless cases. *See, e.g., Parsons v. Crown Disposal Co.*, 936 P.2d 70, 71–72 (Cal. 1997); *Andre v. Pomeroy*, 320 N.E.2d 853, 855 (N.Y. 1974). *See generally* Kenneth Abraham, *The Forms and Functions of Tort Law* 104 (6th ed. 2022).

Nor is this a newfangled thing. In *Sioux City & Pacific Railroad Co. v. Stout*, the decision often cited on the wisdom and common sense of juries, the Court explained that juries are to be called upon not in every case posing the negligence question but only in “intermediate cases” where reasonable people’s judgments may differ. 84 U.S. 657, 662–63 (1873). That is not so different from *Anderson*’s canonical no-reasonable-jury standard. *Sioux City* shows that this standard is not only a cornerstone of modern civil litigation but also compatible with longstanding understandings of the allocation of judge-jury decisionmaking authority.

There is no warrant for the Court to upset this universal understanding. Requiring a jury trial on any issue triable to juries at the Founding, regardless of the evidence on the issue, would saddle the judicial system with unbearable burdens and break it.

II. Judges Have an Important Role to Play in Answering Fact-Intensive Questions in Trademark Law

The preceding Part explains that in federal civil procedure, judges play an important role in answering questions of fact and fact-intensive mixed questions.

This Part explains why that role is particularly important in trademark law.

A. The Circularity of Trademark Law Supports Judges' Prominent Role

Trademark law is distinctive in being circular:⁷ The test of infringement is whether consumers believe that the defendant's products bearing a similar mark come from the same source as plaintiff's, but consumers' beliefs depend on what they see in the market, which in turn depends on how much latitude the law gives competitors to use similar marks. Where the law does not permit parodic uses, consumers would believe that only BMW is allowed to put out a t-shirt bearing a snarky message about BMW, and so any such t-shirt must come from BMW; where the law does not allocate exclusive merchandising rights, consumers would *not* believe that a Washington Wizards jersey is necessarily authorized by the team, as it might simply be fan merchandise. Thus consumers' perceptions derive from what (they think) trademark law requires—not directly, in the sense of consumers reading the law books, but indirectly through their market observations.

⁷ Distinctive, but not unique. This sort of circularity, or feedback loop, occurs in other areas as well. For example, whether a person was subject to a “search” within the meaning of the Fourth Amendment depends on whether that person had a reasonable expectation of privacy in their conduct, but people's reasonable expectations of privacy depend on what sort of conduct the law finds worthy of protection.

Because of this circularity, courts would lose control of the law if they readily punt to juries on questions of fact. The danger is grave because the threshold percentage of consumers that gives rise to actionable likelihood of confusion is not especially high: Courts have said that an “appreciable” percentage (or number) of consumers is sufficient, but they have understandably refused to be pinned down on what “appreciable” means; they often find figures of just over 25 percent, and sometimes even 15 or 11 percent, to be enough. *See* 5 Thomas McCarthy, *McCarthy on Trademarks and Unfair Competition* §§ 32:185, 32:188 (5th ed. 2026). A relatively small percentage of confused consumers can thus lead to a legal prohibition on competitors’ use of a similar mark. Firms—not only plaintiff’s competitors but also other firms in similar contexts—will take their cues from this law, especially if they are risk-averse, making a market in which competitors stay far outside the borders of potentially infringing similarity. This overcorrection will in turn lead consumers to think that anything remotely similar to a senior user’s mark must be authorized by the user, further moving the law in a restrictive direction. Such restrictiveness can impair freedom of expression and inhibit robust competition.

Trademark law recognizes these dangers, so it leaves room for courts to step in and halt the degradation of consumer perceptions. For example, the Court has held that the defense of descriptive fair use does not require negating consumer confusion. *KP Permanent Make-Up, Inc. v. Lasting Impression I, Inc.*, 543 U.S. 111, 114 (2004). In this context, the law “tolera[tes] . . . a certain degree of confusion on the

part of consumers” in service of higher ends: “the undesirability of allowing anyone to obtain a complete monopoly on use of a descriptive term simply by grabbing it first” and the importance of “not depriv[ing] commercial speakers of the ordinary utility of descriptive words.” *Id.* at 121–22.

Even where conduct does not fall into safe harbors like fair use—for example where, as here, the defendant used something similar to plaintiff’s mark as part of the defendant’s own mark—the values undergirding these safe harbors have moved courts to take a decision away from the jury. An oft-anthologized example is *Louis Vuitton Malletier S.A. v. Haute Diggity Dog, LLC*, 507 F.3d 252 (4th Cir. 2007), where Louis Vuitton sued Haute Diggity Dog on confusion- and dilution-based theories of trademark infringement for selling “Chewy Vuitton” dog-chew toys imitating Louis Vuitton handbags. HDD’s conduct, though a parody of LV, was not protected by fair use because HDD had used Chewy Vuitton as its own mark. *See* 15 U.S.C. § 1115(b)(4) (immunizing certain uses “otherwise than as a mark”); 15 U.S.C. § 1125(c)(3) (immunizing certain uses “other than as a designation of source for the person’s own goods or services”). Nevertheless, the court relied heavily on the parodic character of the use in finding no actionable likelihood of confusion or dilution. *See Haute Diggity Dog*, 507 F.3d at 260–63, 267–68. The likelihood-of-confusion and likelihood-of-dilution inquiries are fact-intensive, reflected in the court’s analysis. *See Haute Diggity Dog*, 507 F.3d at 260–63, 267–68; *see also infra* pp. 27–28. Yet the court appropriately took the decision away from the jury by granting summary judgment for HDD.

Courts in trademark cases engage in factfinding even with respect to a person’s state of mind, a supposed *forte* of juries. *See* 10A *Wright & Miller’s Federal Practice & Procedure* § 2730 (4th ed. 2026). As the Second Circuit stated in a recent trademark case, “The summary judgment rule would be rendered sterile if mere incantation of intent or state of mind would operate as a talisman to defeat an otherwise valid motion.” *Solid 21, Inc. v. Breitling U.S.A., Inc.*, 96 F.4th 265, 279 (2d Cir. 2024) (quotation marks omitted); *see also Nora Beverages, Inc. v. Perrier Grp. of Am., Inc.*, 269 F.3d 114, 125 (2d Cir. 2001) (affirming summary judgment on the issue of good faith in fair-use defense); *Int’l Stamp Art, Inc. v. U.S. Postal Serv.*, 456 F.3d 1270, 1277 (11th Cir. 2006) (same); *Sorensen v. WD-40 Co.*, 792 F.3d 712, 725–26 (7th Cir. 2015) (same); *Groeneveld Transp. Efficiency, Inc. v. Lubecore Int’l, Inc.*, 730 F.3d 494, 514–16 (6th Cir. 2013) (finding that there was no intent to confuse and reversing the district court’s denial of a motion for renewed judgment as a matter of law); *Hornady Mfg. Co. v. Doubletap, Inc.*, 746 F.3d 995, 1003–04 (10th Cir. 2014) (affirming summary judgment on the issue of intent in likelihood of confusion); *Prudential Ins. Co. of Am. v. Shenzhen Stone Network Info. Ltd.*, 58 F.4th 785, 798–806 (4th Cir. 2023) (granting summary judgment on the issue of bad-faith intent to profit).

Trademark law also reserves an essential role for judges in answering the question of mark strength at issue in this case. Word marks are classified into four categories of distinctiveness: (1) *generic* marks, which simply denote the product, like “Cookie” for cookies,

(2) *descriptive* marks, which describe a quality or characteristic of the product, like “Crunchy” for cookies, (3) *suggestive* marks, which suggest the product, like Patagonia for outdoor wear, (4) *arbitrary* and *fanciful* marks, which have no connection to the product, like Apple for electronics (arbitrary) and Kodak for film (fanciful). *Abercrombie & Fitch Co. v. Hunting World, Inc.*, 537 F.2d 4, 9–11 (2d Cir. 1976) (Friendly, J.); *Two Pesos*, 505 U.S. at 768 (breaking the fourth category into two).⁸ Generic marks are never protected by trademark law; descriptive marks are protectable only if they have acquired “secondary meaning,” i.e., if “in the minds of the public, the primary significance of a mark is to identify the source of the product rather than the product itself,” *Samara Bros.*, 529 U.S. at 211 (cleaned up); and suggestive, arbitrary, and fanciful marks are “inherently distinctive,” meaning they are protectable even without secondary meaning. *Id.* at 210–11; *Abercrombie*, 537 F.2d at 9–11.

Two points about these categories underscore the importance of judges’ role. First, as this very case shows, it is routine for courts—not juries—to decide which category a mark falls into. *See, e.g., Abercrombie*, 537 F.2d at 11; *Hornady*, 746 F.3d at 1007; *RiseandShine*, 41 F.4th at 121. This despite the fact that distinguishing descriptive and suggestive marks—determining whether the mark “directly”

⁸ This distinctiveness spectrum was originally developed for ascertaining trademark *validity*, not infringement, but courts commonly draw on it in assessing inherent strength, as did the Second Circuit in this case. *See, e.g., Hornady*, 746 F.3d at 1007; *RiseandShine Corp. v. PepsiCo, Inc.*, 41 F.4th 112, 120–21 (2d Cir. 2022). *See generally* McCarthy, *supra*, § 11:80 (discussing trademark strength in the context of distinctiveness).

conveys to consumers an attribute of the product or whether the connection requires some “imagination,” *Hornady*, 746 F.3d at 1007; McCarthy, *supra*, § 11:67—is, by any commonsense understanding, a determination of fact; it’s a determination about how a consumer’s mind works. That courts routinely make this factual determination without calling on juries shows that what’s at stake is not merely *capturing* consumer perceptions but fashioning categories that *shape* consumer perceptions conducive to a competitive, speech-protective market.

The second point underscoring the importance of judges’ role is the law’s treatment of generic marks. As noted, generic marks are never protected against trademark infringement—by contrast to descriptive marks, which may be protected upon showing secondary meaning. This distinction shows that ascertaining distinctiveness/strength is not merely a matter of capturing existing consumer perceptions. If it were, then it would make no sense to allow the secondary-meaning route to protectability for descriptive marks but not for generic marks; the law would say instead that *any* mark is protectable if its “primary significance” to consumers is “to identify the source of the product,” *Samara Bros.*, 529 U.S. at 211, i.e., if it has secondary meaning. That the law identifies a category of marks as unprotectable *regardless of secondary meaning* shows the primacy of other trademark-law values over and above capturing consumer beliefs. It shows that the law protects the freedom to use the name of a

product to refer to the product—even if the name has become a source identifier for many consumers.⁹

B. The Centrality of Consumer Perceptions Does Not Undermine Judges’ Prominent Role

Petitioner, drawing on *Hana Bank*, argues that the centrality of consumer perceptions is a reason to classify inherent strength as a question of fact. See Brief for Petitioner at 10–12, *RiseandShine Co. v. PepsiCo, Inc.* (Sep. 8, 2026) (No. 24-1016); *Hana Bank*, 574 U.S. at 420–22. The Solicitor General argued the same. See Brief amicus curiae of United States at 2, 11–12, *RiseandShine Co. v. PepsiCo, Inc.* (May 20, 2026) (No. 24-1016) [hereinafter S.G. Brief].

That is not a bad argument. Depending on the case, there might be good reasons to classify inherent strength as a law-heavy or fact-heavy mixed question, or as a purely legal question (though not a purely factual one). That is why this brief does not take a

⁹ Unfortunately, the Court’s decision in *United States Patent & Trademark Office v. Booking.com B. V.*, 591 U.S. 549 (2020), lost sight of this important principle. In conceptualizing the question of genericness as purely a question of consumer perception, see *id.* at 556–57, 560, the majority failed to perceive the distinction in the law’s treatment of generic versus descriptive marks: The latter are protectable upon showing secondary meaning but the former are unprotectable even with secondary meaning. Regardless, the holding of *Booking.com* is narrow—it simply rejects a *per se* rule of genericity for “generic.com” marks, *id.* at 560–61, 564—and does not affect the present case.

position on which classification is best. The Court can't really go wrong as long as it's clear about the context.

There *is* ample room to go wrong, though, in drawing out what the fact-law classification implies about the allocation of jury-judge decisionmaking authority. It is one thing to say that the inherent-strength question has factual aspects and thus *may* sometimes be decided by juries; it is quite another thing—and quite wrong—to say that the question is *always* or even *primarily* for juries. *See supra* Part I; *but see* S.G. Brief, *supra*, at 17 (noting “the jury’s primary role in resolving inherent-strength disputes”).

If what the Solicitor General means by “the jury’s primary role” is that courts should be “hesitant” to grant summary judgment on the issue of inherent strength, *id.* at 15, then that implication should be emphatically repudiated. Whether courts should be “hesitant” in granting summary judgment on a factual question depends on how “one-sided” the evidence on the question is, *Anderson*, 477 U.S. at 251–52, not how “fact-intensive” the question is, S.G. Brief, *supra*, at 15. Courts should not abdicate their responsibility to say what the law is by readily deferring to “the jury’s primary role” in ascertaining consumer perceptions, because consumers’ perceptions are shaped by what (they think) trademark law is. *Supra* Section II.A.

Scholars have recognized the courts’ responsibility in shaping customer perceptions given trademark law’s circularity. *See, e.g.*, Alfred C. Yen, *The Constructive Role of Confusion in Trademark Law*, 93 N.C.

L. Rev. 77 (2014); Graeme B. Dinwoodie, *Trade Mark Law as a Normative Project*, [2023] Singapore J. Legal Studs. 305. Justices of the Court have likewise emphasized this responsibility in recent cases. *See Jack Daniel's Props., Inc. v. VIP Prods. LLC*, 599 U.S. 140, 163–64 (2023) (Sotomayor, J., concurring) (warning that “courts should treat the results of surveys with particular caution” because they may reflect consumers’ “mistaken belief” about the law, especially with respect to uses “implicating First Amendment concerns”); *Booking.com*, 591 U.S. at 564–65 (Sotomayor, J., concurring) (cautioning that “consumer-survey evidence may be an unreliable indicator of genericness” and noting that other sources may help courts determine whether a mark is generic or descriptive); *id.* at 572–73 (Breyer, J., dissenting) (noting that evidence of consumers associating a term with a single source “does not negate the generic nature of the term”).

Courts often resist the facile temptation to pass the buck on consumer perceptions to juries, as the many decisions cited in the preceding Section show. For example, much of what the celebrated opinion in *Haute Diggity Dog* says is, in an uncharitable interpretation, the judges’ *ipse dixit* about what or how consumers think: “It is a matter of common sense that the strength of a famous mark allows consumers immediately to perceive the target of the parody, while simultaneously allowing them to recognize the changes to the mark that make the parody funny or biting.” 507 F.3d at 261. “The differences are sufficiently obvious and the parody sufficiently blatant that a consumer encountering a ‘Chewy Vuiton’ dog toy would not mistake its source or sponsorship on the basis of mark similarity.” *Id.* at

262. Likewise, Justice Scalia’s opinion for a unanimous Court in *Samara Brothers* rests on intuitions about what consumers are “predisposed” to think when they encounter different symbols and designs. *See* 529 U.S. at 212–13. If the judge’s role were merely to be a passive receptacle and ratifier of existing consumer perceptions, such statements would aptly be criticized as ungrounded empirical speculation. Their wisdom becomes apparent only when we recognize that the judge’s role is also to participate in *shaping* consumer perceptions—perceptions that advance the overriding trademark-law values of competition and free speech.

The Solicitor General avers that determinations of inherent strength “bear little resemblance” to legal questions “such as the meaning of disputed statutory provisions.” S.G. Brief, *supra*, at 16. In fact, the resemblance is not so remote. If we take seriously the Court’s frequent exhortations to give words in a statute their ordinary meaning, then statutory interpretation would also seem to be about ordinary people’s perceptions. Thus if the centrality of popular perceptions were sufficient reason to assign the “primary role” to juries, *id.* at 17, then statutory interpretation would also be primarily for juries, at least for recently enacted statutes. *Cf. Markman*, 517 U.S. at 388 (contrasting judges’ skill in the “construction of written instruments” to “jurors unburdened by training in exegesis”). The wiser course is to acknowledge that in trademark law, not unlike statutory interpretation, the courts’ task is not simply to register the empirical fact of what people perceive but to determine what

would be *reasonable* to perceive given the ordinary meanings and associations of a word or symbol.¹⁰

C. Intellectual Property Jurisprudence Supports Judges’ Prominent Role

Beyond trademark law, policy and practice in intellectual property law writ large support allocating judges a robust role in answering factual questions. One prominent example is the fourth fair-use factor in copyright law, “the effect of the use upon the potential market for or value of the copyrighted work.” 17 U.S.C. § 107(4). Assessing this often requires a fact-intensive analysis of business and economic realities, which

¹⁰ In this case, the Second Circuit drew on such ordinary meanings and associations of the word “Rise,” considered in light of trademark law’s purposes, to hold that petitioner’s RISE mark is inherently weak. *RiseandShine*, 41 F.4th at 121–23. This brief takes no position on whether that determination was correct (a question not before the Court), but nothing in the *kind of inquiry* the court undertook, or in its act of deciding the question without involving the jury, is incompatible with inherent strength being a fact-intensive question. Nor did the appellate court’s vacatur of the district court’s preliminary injunction necessarily depend on the fact-law classification of inherent strength. Although the appellate panel’s later unpublished opinion on summary judgment held that “the likelihood of confusion test is a question of law,” *RiseandShine Corp. v. PepsiCo, Inc.*, No. 23-1176-CV, 2024 WL 5165388, at *3 (2d Cir. Dec. 19, 2024), the preliminary-injunction decision simply held that the district court’s failure to classify the RISE mark as weak “constituted legal error,” *RiseandShine*, 41 F.4th at 121. Of course, granting or denying a preliminary injunction, like granting or denying summary judgment or judgment as a matter of law, can “constitute[] legal error” even if premised on factual determinations, hence the *de novo* standard of review. See Shahshahani, *supra*, at 44–45; S.G. Brief, *supra*, at 19.

courts have not shied away from undertaking without the jury’s aid. *See, e.g., Sony*, 464 U.S. at 442–56; *Harper & Row Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 566–67 (1985); *Andy Warhol Found. for Visual Arts, Inc. v. Goldsmith*, 11 F.4th 26, 49–51 (2d Cir. 2021), *aff’d sub nom. Andy Warhol Found. for the Visual Arts, Inc. v. Goldsmith*, 598 U.S. 508 (2023); *Kelly v. Arriba Soft Corp.*, 336 F.3d 811, 821–22 (9th Cir. 2003); *Perfect 10, Inc. v. Amazon.com, Inc.*, 508 F.3d 1146, 1168 (9th Cir. 2007); *Authors Guild v. Google, Inc.*, 804 F.3d 202, 224–25 (2d Cir. 2015).

The second fair-use factor, “the nature of the copyrighted work,” 17 U.S.C. § 107(2), is also factual. The Court recently emphasized that this factor can be decisive and showed no hesitation in finding the relevant facts. *See Google LLC v. Oracle Am., Inc.*, 593 U.S. 1, 21–23, 26–29 (2021).

Another example of courts’ in-the-weeds factfinding comes from nonobviousness doctrine in patent law. Someone seeking to patent an invention must show that it represents a nonobvious advance over existing know-how. 35 U.S.C. § 103. Determining whether this requirement is satisfied requires ascertaining many technological facts: “the scope and content of the prior art are to be determined; differences between the prior art and the [patent] claims at issue are to be ascertained; and the level of ordinary skill in the pertinent art resolved.” *Graham v. John Deere Co.*, 383 U.S. 1, 17 (1966). Business facts—“commercial success, long felt but unsolved needs, failure of others, etc.”—may also matter. *Id.* So, although the ultimate (non)obviousness determination is a question

of law, it's one that depends heavily on underlying findings of fact. *Id.*

And the Court's major pronouncements on the doctrine are notable for their deep engagement with facts. *See Graham*, 383 U.S. at 19–26 (discussing in great detail the mechanisms for connecting a plow shank to the body of a tractor plow); *id.* at 26–36 (delving into innovations in pump sprayers for containers of liquid); *KSR Int'l Co. v. Teleflex Inc.*, 550 U.S. 398, 407–12, 420–28 (2007) (probing the technology of (1) electronic pedal-position sensors and (2) pedal-assembly systems with location-adjustable pedals to make inferences about combining prior-art references in these two fields).

Across these diverse IP contexts, courts' engagement in factfinding is justified by a host of considerations: the complex, technical nature of the facts, which tends to rub against the common-sense advantage of lay juries over judges, *see Sioux City*, 84 U.S. at 664; the importance of predictability, *see Markman*, 517 U.S. at 390–91; and the centrality of IP to constitutionally venerated values respecting artistic and scientific progress, human creativity, and free speech. Not all these considerations are strongly implicated in all cases. But, on balance, they point to the wisdom of preserving judges' robust role in factfinding.

CONCLUSION

Regardless of how it classifies the question of inherent trademark strength, the Court should emphasize that judges play a prominent role in answering it.

Respectfully submitted,

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