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IN THE SUPREME COURT OF THE UNITED STATES

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HANA FINANCIAL, INC., :

Petitioner : No. 13-1211

v. :

HANA BANK, ET AL. :

- - - - - x

Washington, D.C.

Wednesday, December 3, 2014

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 11:08 a.m.

APPEARANCES:

PAUL W. HUGHES, ESQ., Washington, D.C.; on behalf of Petitioner.

CARLO F. VAN DEN BOSCH, ESQ., Costa Mesa, Cal.; on behalf of Respondents.

SARAH E. HARRINGTON, ESQ., Assistant to the Solicitor General, Department of Justice; Washington, D.C.; on behalf of United States, as amicus curiae, supporting Respondents.

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1 P R O C E E D I N G S

2 (11:08 a.m.)

3 CHIEF JUSTICE ROBERTS: We will hear  
4 argument next this morning in Case 13-1211, Hana  
5 Financial v. Hana Bank.

6 Mr. Hughes.

7 ORAL ARGUMENT OF PAUL W. HUGHES

8 ON BEHALF OF THE PETITIONER

9 MR. HUGHES: Thank you, Mr. Chief Justice,  
10 and may it please the Court:

11 Trademark tacking is a legal fiction that  
12 permits an owner to modernize a mark without losing  
13 priority. The proponent of tacking must demonstrate  
14 that the later mark does not unreasonably expand the  
15 legal effect of the earlier mark.

16 To decide whether a change is a permissible  
17 modernization or an impermissible expansion, a court  
18 will consider the extent to which the new mark, if  
19 tacked, could unfairly squeeze out intervening users and  
20 it will examine the circumstances in which past cases  
21 have permitted tacking.

22 In assessing the legal effects of the marks,  
23 the Court will consider their aural and visual  
24 appearance and consumer impression. But tacking  
25 ultimately turns on the Court's judgment as to whether

1 the legal effect of the new mark is sufficiently  
2 identical to that of the old mark.

3 If viewed as a question of law, tacking  
4 would be unavailable here. The mark Hana Bank has a  
5 very different legal effect than the earlier mark Hana  
6 Overseas Korean Club as well as the intermediary mark  
7 Hana World Center. Three factors together, we believe,  
8 support the conclusion that tacking should be viewed an  
9 issue of law for the Court.

10 The nature of the issue itself is a legal  
11 comparison that courts are suited to make. Second,  
12 pragmatic considerations demonstrate that this is the  
13 kind of issue that should be put to a court. And third,  
14 the history of the issue demonstrates that a court has  
15 always resolved tacking without any particular role for  
16 a jury or factual --

17 JUSTICE ALITO: But infringement is a  
18 question for the jury, right?

19 MR. HUGHES: Your Honor, there is a circuit  
20 split on that question. I think there are reasons one  
21 could think that there is -- that infringement is -- is  
22 more like a factual question than -- than the tacking  
23 issue.

24 JUSTICE ALITO: If it is, then why wouldn't  
25 tacking be in the same category? Why aren't they --

1 they're similar. In -- in infringement, you ask whether  
2 they're confusingly similar. Tacking has a more  
3 demanding standard, but it's the same type of inquiry.  
4 So if one is for the jury, why wouldn't the other be for  
5 the jury?

6 MR. HUGHES: I think there are a couple of  
7 reasons, Your Honor. The first reason is the nature of  
8 the inquiry, I think, is quite different. The second  
9 are some of the pragmatic considerations of the stare  
10 decisis effects. But moving to -- to the first and most  
11 important issue, what's happening here is a legal  
12 comparison between the marks that requires an assessment  
13 of the legal effect of the earlier mark compared against  
14 the later mark. It's not a factual comparison as to  
15 whether or not the marks would have the likelihood to  
16 confuse a jury or even simply if -- if consumers would  
17 think that they are, in fact, the same kind of consumer  
18 impression. Rather, the test, as every court has  
19 formulated it, is whether or not the two marks are, in  
20 fact, legal equivalents. And I think that --

21 JUSTICE KENNEDY: So -- so under your view,  
22 a district court's finding they are reviewed in the  
23 court of appeals de novo?

24 MR. HUGHES: Yes, Your Honor. If this is a  
25 question of law, I think that finding of law would be

1 reviewed de novo. Now, factual determinations that  
2 could be made subsidiary to that, but --

3 JUSTICE KENNEDY: In this case, the key  
4 issue would be reviewed de novo.

5 MR. HUGHES: Yes, Your Honor.

6 JUSTICE SOTOMAYOR: So isn't the key issue  
7 the commercial impression of -- and meaning how these  
8 marks were used and the commercial impression?

9 MR. HUGHES: Your Honor, I don't think  
10 that's the ultimate inquiry. That's one of the factors  
11 that will be considered, but that ultimately what  
12 the Court must evaluate is whether or not they have the  
13 same legal effect. And I think an example might  
14 highlight this distinction.

15 In the blue brief at page 5, the first  
16 example we give is the example of the American Mobile  
17 Phone Paging. On the left side is the earlier mark,  
18 American Mobile Phone; on the right side is the mark  
19 that the company used three years later, American Mobile  
20 Phone Paging.

21 Now, if this were put to a jury and the sole  
22 question were, do these two marks seem to have the same  
23 consumer impression? I think many juries would say that  
24 they do, because the two marks use the same kind of  
25 font, they have the same star, they have the same

1 stripes. I think a jury would likely think that these  
2 are from the same company and give off the same  
3 impression.

4           However, the -- the TTAB, the Trademark  
5 Trial and Appeal Board, viewing this as a question of  
6 law denied tacking in this case and the Federal Circuit  
7 affirmed. I think that's the right answer and the right  
8 result. And the reasoning behind that is what happened  
9 in between these two marks. In between these two marks  
10 a competitor arrived on the scene using the mark  
11 American Paging, and the determination was made that  
12 American Paging and American Mobile Phone are different  
13 marks. So the -- the second in time, the American  
14 Paging folks had the right to use that mark.

15           But if tacking were allowed in this case,  
16 the effect would be years -- a few years after the fact  
17 to squeeze out the American Paging Company, even though  
18 they couldn't have known at the time that the American  
19 Mobile Phone was later going to try to register and then  
20 use the mark American Mobile Phone Paging. So I think  
21 this all goes to shows that if this is put to the jury,  
22 it's going to be a very different kind of result and  
23 the -- the inquiry can't simply be if a jury --

24           CHIEF JUSTICE ROBERTS:           I'm sorry. I lost  
25 you a little bit. Why -- why is it going to be a very

1 different type of result?

2 MR. HUGHES: Well, Your Honor, my submission  
3 is that a jury looking at these two marks, if  
4 instructed, just do they have the same consumer  
5 impression? At least many juries would -- would find  
6 that they do. What the jury is not asking is whether or  
7 not they have the same legal effect in the marketplace.  
8 That's --

9 CHIEF JUSTICE ROBERTS: Is the jury going to  
10 be instructed in any way on what you just told us was  
11 the reason we should view those as differently?

12 MR. HUGHES: I don't think it would, Your  
13 Honor. I think the jury, when this is put as a factual  
14 question as happened here, the jury is simply asked do  
15 these have the same consumer impression. The  
16 government's position and the Respondent's position in  
17 this case is that's simply the sole inquiry, as do they  
18 have the same --

19 CHIEF JUSTICE ROBERTS: Wouldn't there be  
20 evidence or instruction on, you know, consumer  
21 impression, you have to take into account what happened  
22 between these two marks?

23 MR. HUGHES: Well, I suppose, Your Honor,  
24 that an opponent's attacking could try to introduce  
25 evidence to that effect. But the -- the inquiry would



1 not be looking to the legal effect between the two  
2 marks, so there's no --

3 CHIEF JUSTICE ROBERTS: It seems to me that  
4 it's rather critical to the contrast you draw. I mean,  
5 what you're saying is the jury might get it right or the  
6 jury might get it wrong, and I would say, well, the  
7 Federal Circuit maybe got it right or the Federal  
8 Circuit got it wrong. But in terms of what the factual  
9 issues are going to be, and those would include what's  
10 happening between the two marks, it seems to me the jury  
11 has got information just the way the Federal Circuit. I  
12 don't see the difference between the two other than you  
13 think -- you think the one result is right and the other  
14 would be wrong.

15 MR. HUGHES: Well, Your Honor, I -- I think  
16 the nature of the inquiry, if it's put to a court, is  
17 different than just saying do these marks look like.  
18 The nature of the inquiry is what is the legal effect of  
19 the earlier mark in the marketplace. That's --

20 JUSTICE SCALIA: Well, why doesn't the -- it  
21 seems to me the question for the jury is -- is not  
22 whether they look alike, but whether they create the  
23 same commercial impression. And it seems to me the  
24 instructions to the jury would say these are the two  
25 marks, now what you ought to know is that after the

1 first mark there was a competitor who came into commerce  
2 called American Paging, and then the mark was changed  
3 from American Mobile Phone to American Mobile Phone  
4 Paging. Do you think that that second mark creates a  
5 different commercial impression than the first one? And  
6 I think a jury would say, heck, yes.

7 MR. HUGHES: Well, Your Honor, I think what  
8 a jury is not doing in that circumstance is it's not  
9 taking the prospective evaluation of the earlier mark  
10 against the later mark in figuring out just how much of  
11 a difference, of a change there was.

12 JUSTICE KENNEDY: Well, but suppose that an  
13 important part of the case was that when American Paging  
14 came along for a few years everybody in the United  
15 States knew that. The first mark, not many people knew  
16 about it. That it seems to me would be critical to the  
17 tacking inquiry, and that the consumer's knowledge, the  
18 consumer's expertise, in knowing how consumers behave,  
19 how consumers think is -- is immensely valuable.

20 MR. HUGHES: Well, there are a few things  
21 about that, Your Honor. I think, first off, that the  
22 tacking inquiry is not going to look just at these sole  
23 particular marks that happen to exist, but a court is  
24 going to take a broader perspective and to think about  
25 what are the whole range of marks that would be

1 preempted by the earlier and the later to figure out if  
2 what's happening -- if this kind of tacking is  
3 reasonable in the circumstance.

4 But -- but I think there is an additional  
5 reason to think that this should be better viewed as a  
6 question of law, because, similar to as the Court held  
7 in *Markman*, this would have stare decisis effect such  
8 that when a court makes a determination as to tacking  
9 that would have application in future cases involving  
10 those same kinds of marks. If it's viewed as a question  
11 of law, one could get different results using the same  
12 marks across different cases. And I think this is the  
13 kind of --

14 CHIEF JUSTICE ROBERTS: And if it's viewed  
15 as a question of fact?

16 MR. HUGHES: Yes, Your Honor, my apologies.  
17 If it's viewed as a question of fact, one could have  
18 different results.

19 JUSTICE SOTOMAYOR: Are there any facts that  
20 you think a jury could determine here or should  
21 determine in this kind of a case, in a tacking case?

22 MR. HUGHES: No, Your Honor. I think the  
23 whole inquiry should appropriately be submitted to -- to  
24 a judge. If a judge thought that there were  
25 particular things that -- that would be useful as

1 advisory questions, I think it could be submitted. But  
2 I think in the usual case, a judge would make --

3 JUSTICE SOTOMAYOR: How is the judge  
4 supposed to know that, what a consumer's impression  
5 would be generally?

6 MR. HUGHES: Well, you know, I think what --

7 JUSTICE SOTOMAYOR: Just to figure it out?

8 MR. HUGHES: Well --

9 JUSTICE SOTOMAYOR: Some evidence would have  
10 to be presented to him or her, right?

11 MR. HUGHES: It -- it's possible, but I  
12 think that's similar to what -- how a -- a judge in the  
13 context of claim construction would understand what one  
14 skilled in the art would -- would to be. They would  
15 look at the relevant considerations. They would put  
16 themselves into that frame of mind, and then they would  
17 make the -- the appropriate determination based on all  
18 the relevant factors.

19 And in making that determination --

20 JUSTICE GINSBURG: I thought the Court said  
21 if we're trying to type these things, claim construction  
22 is construction of a written instrument. That's the  
23 kind of thing --

24 MR. HUGHES: Yes, Your Honor.

25 JUSTICE GINSBURG: -- that judges do all the

1 time. But to determine whether there is -- whether the  
2 magic words, "same continuing commercial impression to  
3 consumers," then the one's that's better equipped to  
4 make that determination are people who are consumers,  
5 not jurists.

6 MR. HUGHES: Well, Your Honor, I think my  
7 response to that is that our fundamental contention is  
8 that inquiry, just what if -- the impression of  
9 consumers, is not the decisive or ultimate determination  
10 here. The ultimate determination --

11 JUSTICE GINSBURG: It's almost every  
12 hornbook statement of it is -- quotes that language.  
13 Even the Federal Circuit case that goes your way said  
14 that that -- that is, the question is whether the old  
15 and new mark convey the same continued commercial  
16 impression to consumers.

17 MR. HUGHES: Well, that is right, Your  
18 Honor. But also the Federal Circuit adds an additional  
19 factor, which is the aural and visual appearance, do the  
20 two marks have the same aural and visual appearance.  
21 And what I think that shows is if the courts are not  
22 looking at this as a factual comparison --

23 JUSTICE GINSBURG: Well, aural or visual  
24 appearance, shouldn't that also -- aural and visual to  
25 whom? To the people likely to buy these products, not

1 to the judge.

2 MR. HUGHES: Well, Your Honor, I think what  
3 both of these factors are showing is that these are --  
4 are proxy ways the courts are looking to determine if we  
5 can view these same -- these two marks as legally  
6 equivalent such that we can use this legal fiction of  
7 tacking that provides a very valuable benefit to the  
8 proponent of tacking that they can effectively go back  
9 in time and -- and alter their marks after the point.  
10 And so this is a constructive use theory, as the Ninth  
11 Circuit, in particular, identified.

12 In that kind of determination, whether or  
13 not that legal benefit would flow I think is the kind of  
14 thing that is appropriately put to a court because it's  
15 going to -- to turn on a judgment, not just of these  
16 marks, but what the relevant policy considerations are  
17 in the case, balancing the interests between the rights  
18 of the individual trademark owner to modernize or polish  
19 up their mark as against everyone else in the  
20 marketplace who has an interest and not having marks  
21 expanded unduly years after the fact in a way that --  
22 that was entirely unpredictable.

23 JUSTICE GINSBURG: As I understand your  
24 brief, you say, no, the test really isn't same  
25 continuing commercial impression to consumers. You are

1 saying it's the scope of -- the scope of the old and the  
2 new, and you can't use tacking to expand what the old  
3 would have meant.

4 MR. HUGHES: Yes, Your Honor.

5 JUSTICE GINSBURG: But if the answer to that  
6 is that of course you can't; if you are saying that the  
7 old one was the first use, then whatever the scope of  
8 the old one is, is it, and you can't add to it because  
9 of what you did later.

10 MR. HUGHES: I think that's --  
11 that's -- that's right, Your Honor. I think what out --  
12 our point is that whenever a mark is changed, there  
13 might be some minor alteration, and a court must make  
14 the determination as to the amount that the preemptive  
15 scope had changed. Is it material? Is it substantial?  
16 Or is it the -- the kind of small modernization that the  
17 tacking doctrine is designed to permit such that the  
18 mark owner can make these -- these small alterations.

19 And that's what is ultimately the legal  
20 judgment. A court must look to see how much of a change  
21 has been made in the later mark, understand that both  
22 how much of a change there is, how close the change in  
23 those factors are to the -- to the earlier mark, and --  
24 and then consider how that applies in that particular  
25 circumstance.

1 JUSTICE GINSBURG: Well, why -- wait.  
2 Explain why I was wrong in saying all they have to know  
3 is what was the scope of the original mark, the one that  
4 counts? The later change can't expand what was the  
5 original. So that seems to answer what you say -- you  
6 seem to say, this same continuing commercial, that's not  
7 it. It's what is the scope of the old mark and what is  
8 the scope of the new mark.

9 MR. HUGHES: Yes, Your Honor.

10 JUSTICE GINSBURG: And if the answer is that  
11 the new mark can't go beyond the scope of the old,  
12 that's the -- that's the end of that inquiry.

13 MR. HUGHES: Well, and I think -- I think  
14 that's right, Your Honor. That is -- that is our  
15 position. I think that's a determination, though, that  
16 only a court can judge what the -- what the legal scope  
17 of those two marks are because that requires a  
18 prospective assessment as to the range of marks.

19 JUSTICE GINSBURG: But what I -- what I was  
20 trying to suggest is you would never get to what the  
21 second mark scope is because what the scope of the first  
22 one is determinative.

23 MR. HUGHES: Well, and I think as we put it,  
24 Your Honor, that the scopes have to be virtually  
25 identical. We recognize that there could be some



1 difference in change because whenever a mark is changed  
2 there will be some daylight between the two. We  
3 recognize that that is inherent in tacking, that there  
4 will always be some change, some degree of squeeze-out.  
5 The judgment determination is how much of a change, how  
6 much of a squeeze-out is -- is -- is permissible in one  
7 case such that the two marks can be viewed as legally  
8 the same mark to allow the tacking doctrine to operate.

9       As another example just to point to that I  
10 think might come at this the opposite way, this -- in  
11 the red brief at page 50, there is the -- the example  
12 that the Respondents provide of D&J Master Clean, and  
13 this is an example where tacking was, in -- in -- in  
14 fact, allowed. In that context, the original mark was  
15 the mark "Servicemaster." The second-in-time competitor  
16 came on the scene using the mark "Master Clean." The  
17 third-in-time then, the -- the Servicemaster altered  
18 their mark to "Servicemaster Clean" and used that mark  
19 to exclude the intervening competitor, the "Master  
20 Clean" competitor. And the Court permitted tacking,  
21 again viewing this as a question of law.

22       The reason it allowed tacking in that  
23 particular case was it sought to understand how close  
24 the later mark or the -- the "Master Clean" mark, this  
25 intervening mark, was to the rights that the trademark

1 owner had in its original mark of "Servicemaster," and  
2 it made a judgment finding that it was reasonably  
3 foreseeable that "Servicemaster" would -- would adopt  
4 the mark "Servicemaster Clean," and thus there was  
5 nothing unfair in the marketplace to excluding "Master  
6 Clean," that the implications of tacking in that case  
7 were, in fact, appropriate.

8 And I think this -- this further shows the  
9 kind of legal determination and -- and reasoning that --  
10 that turns on the interests of all the market  
11 participants that is uniquely situated to -- to the role  
12 that a court can play.

13 CHIEF JUSTICE ROBERTS: Again, if I could  
14 just -- what is it that you think a jury could not be  
15 instructed on in addressing that same consideration?

16 MR. HUGHES: What I think a jury would not  
17 be able to do the way that a court can, is a jury cannot  
18 understand what the legal significance of Service Master  
19 compared to the legal significance of Master Clean. And  
20 what I mean by legal significance is what is the whole  
21 range of marks out there that each of those marks  
22 exclude. And then making the comparison to figure out  
23 just how much of a change has -- has occurred in the  
24 marketplace and then, of that change, how close is that  
25 to the original mark such that could it have been known

1 or foreseeable to the party who came in second on the  
2 scene that their mark would maybe later have been  
3 foreclosed from the marketplace. That's the kind of  
4 complex determination that is not put to a jury when  
5 tacking is viewed as a question of fact and I don't  
6 think it's the kind of complex determination that  
7 requires these perspective judgments that we  
8 typically think is -- so it's not the kind of historical  
9 application of law to fact that would be in the  
10 infringement context or in the other circumstances where  
11 we would think that a jury would be appropriately suited  
12 to resolve the question.

13           Additionally, though, we think that the  
14 pragmatic considerations bear heavily on this point. As  
15 I said earlier, the stare decisis implications of  
16 treating this as a consistent question of law is  
17 similar, I think, to what the Court held in *Markman*.

18           Additionally, though, treating this --

19           JUSTICE SCALIA:           Do you think consistency  
20 appears in the -- in the judicial opinions that have  
21 treated this as a question of law? I mean, what -- what  
22 is the judge -- does he get cases and look at -- look at  
23 what other cases have said is tackable and what isn't  
24 tackable?

25           MR. HUGHES:           Yes, Your Honor. In -- in

1 virtually every case -- and certainly every case that  
2 has treated this as a question of law, courts will point  
3 to the 3 or 5 or 10 most analogous examples and say this  
4 is the extent of the change that's been permitted and  
5 this is the extent of change that's not been permitted.  
6 And I do think this is one of those sorts of rules where  
7 it really gains content through the examples, through  
8 the past examples illustrate just how narrow this  
9 doctrine is.

10 CHIEF JUSTICE ROBERTS: Well, I guess the  
11 stare decisis point is -- is minimized, though, if you  
12 appreciate the fact that these marks are -- each one is  
13 sort of sui generis. I mean, I don't know what  
14 precedential value I can get from looking at, you know,  
15 the dolphin changes on page 50 by the fact that there is  
16 a case about the Loctite Corporation behind. I mean,  
17 I'm sure some are similar, but it seems to me that each  
18 one is -- is significantly different, so I don't know  
19 the significance of the stare decisis in this context.

20 MR. HUGHES: Well, I think it's significant  
21 in two ways. The first way is it's significant for the  
22 actual mark that is before the Court. So if -- if an  
23 authoritative court makes that determination, that would  
24 control in future cases involving those same kinds of  
25 marks. And when you have repeat litigants who often are

1 having to protect their trademark, it's the kind of  
2 circumstance where having consistency from case to case,  
3 even when they are going after a different infringer or  
4 a different market competitor, I think, is important.  
5 So it's similar --

6 JUSTICE SCALIA: Even -- even the ones  
7 you -- you point us to do -- do not impress me as  
8 establishing any kind of -- look on page 50, dolphin to  
9 dolphin, and the second dolphin is stylized in -- in  
10 cursive writing, right? And that is upheld as -- as  
11 tackable. Then on the next page, on 51, the second one  
12 from the bottom, it -- it's the opposite progression,  
13 turbo in cursive goes to turbo in -- in capital letters  
14 and that is not permitted. I cannot for the life of me  
15 decide why the one should be permitted and the other  
16 should not be permitted.

17 MR. HUGHES: Well, Your Honor, I think one  
18 of the --

19 JUSTICE SCALIA: And I'd much rather blame  
20 it on the jury than on the court.

21 (Laughter.)

22 MR. HUGHES: Well, Your Honor, I think  
23 what -- what happens in this presentation, one -- one  
24 thing I'd point the Court to is that in 1989, the  
25 American Mobile Phone case that we -- we began

1 discussing set forth just how narrow this tacking  
2 doctrine is. And the cases that have followed have  
3 hewed very closely to the narrowness of this doctrine.  
4 I think the presentation here is -- is a bit -- gives a  
5 different impression because it takes cases that were  
6 prior to the American Mobile Phone error when tacking  
7 was used in a -- a far more broad array of  
8 circumstances.

9 I think when you look to the post-1989  
10 cases, you find incredible consistency that tacking is  
11 denied in all but the most extraordinary case where the  
12 marks truly are effectively identical and have the same  
13 legal continuing impressions. So -- so I do think if  
14 you look to some early cases, you see different results.  
15 But looking to -- to the modern era of cases, there's  
16 far more consistency.

17 And further, to the extent that any sort of  
18 predictability can be established by treating these  
19 marks as having legal authoritative effect in creating  
20 that kind of predictability to the marketplace, I think,  
21 is better than the alternative of leaving it to simply a  
22 case-by-case, jury-by-jury determination.

23 The next point I'd like to make is this has  
24 always historically been treated as a question of -- of  
25 law for a court. We've -- we've taken -- we've looked

1 back in every tacking case from the early history, goes  
2 back to the early part of the 1900s up to the modern  
3 era, viewed this as solely a question for a court and  
4 there was never any particular role for a jury in making  
5 these determinations.

6 JUSTICE SOTOMAYOR: The problem there for  
7 you which is although those older cases were at a time  
8 when equity and law were separated and there were no  
9 rights to jury trials in equity. So once that  
10 distinction was done away with, you don't have the  
11 plethora of cases that you --

12 MR. HUGHES: Not all of the cases. That's  
13 correct, Your Honor. But some of the cases were decided  
14 as damages cases and were decided at law and did not  
15 involve any jury determination.

16 JUSTICE SOTOMAYOR: And you don't know how  
17 many of those cases the parties agreed to a bench trial.

18 MR. HUGHES: That's right, Your Honor, we do  
19 not know. But even the cases that did proceed as equity  
20 actions, there was never any view that this was the kind  
21 of factual determination that a court was taking  
22 substantial amounts of evidence on. Instead, the courts  
23 effectively compared the earlier mark to the later mark,  
24 they sometimes looked at precedent, they consulted the  
25 relevant policy considerations and then they made a

1 judgment. So even though it may have proceeded in  
2 equity -- and I agree, it doesn't shed dispositive light  
3 on it. The kind of analysis that the courts used --

4 JUSTICE SOTOMAYOR: Well, I doubt very much  
5 those -- in those earlier cases that lawyers were  
6 thinking of consumer reports and pictures and videos and  
7 all the other things they present today. I agree with  
8 you.

9 MR. HUGHES: Right.

10 JUSTICE SOTOMAYOR: So the cases were simple  
11 by their nature back then.

12 MR. HUGHES: But, Your Honor, in court --  
13 the courts today consider this a question of law apply  
14 that same kind of analysis. They look to the marks,  
15 they look to the relevant precedent and the guidance  
16 that can be drawn from those cases and then they make a  
17 determination taking all of the relevant considerations  
18 into account. So I do think that same kind of mode of  
19 analysis that was used historically is still used today  
20 in the Sixth Circuit and the Federal Circuit and the  
21 courts that view this as a question of law. So that  
22 consistent historical approach at least, I think, adds  
23 some light or adds some depth to our contention that  
24 this is appropriately viewed as a question of law.

25 As we alternatively argue, there are also, I



1 think, reasons to think that this is a doctrine that has  
2 equitable underpinnings, that this is meant to establish  
3 fairness for the -- the trademark litigants here. It's  
4 similar to unclean hands and -- and laches that also  
5 pervade trademark law. And if this is viewed also as --  
6 as an equitable question, it certainly would be an issue  
7 that goes to the judge and -- and not the jury.

8 I'll reserve my time for rebuttal.

9 CHIEF JUSTICE ROBERTS: Thank you, counsel.

10 Mr. Van Den Bosch.

11 ORAL ARGUMENT OF CARLO F. VAN DEN BOSCH

12 ON BEHALF OF THE RESPONDENTS

13 MR. VAN DEN BOSCH: Thank you, Mr. Chief

14 Justice, and may it please the Court:

15 The issue of trademark tacking should be  
16 treated as a question of fact for two principal reasons.  
17 First, the applicable standard examines whether two  
18 marks convey the same commercial impression, not  
19 judicial impression, commercial impression to be viewed  
20 from the perspective of the relevant consumer. A jury  
21 with its collective consumer insight is always going to  
22 provide a better proxy --

23 JUSTICE SOTOMAYOR: Why don't you deal with  
24 the example that the Chief Justice presented of the  
25 American Packing Company or that was discussed

1 earlier. What would the jury do with that knowledge?

2 MR. VAN DEN BOSCH: One critical  
3 consideration in the American Mobile Phone paging case  
4 is that in that case, the two marks that were sought to  
5 be tacked were, in fact, used on -- on very different  
6 products. And that's the type of extrinsic evidence  
7 that should be considered by a jury in determining  
8 whether there is truly a continuum.

9 I'll take that a step further. In the Van  
10 Dyne Crotty case in the Federal Circuit, which is the  
11 first circuit to deem it a question of law, a critical  
12 consideration there was that the third-in-time mark had  
13 effectively purchased a first-in-time mark in order to  
14 try and leapfrog a second-in-time mark. In reality in  
15 that case, the two marks that were sought to be tacked  
16 were used by two different parties on two different sets  
17 of products. To allow tacking in that case would be a  
18 legal fiction. Clearly, there's no continuum. Although  
19 the court there decided to treat tacking as an issue of  
20 law, it could have treated it as an issue of fact and  
21 still decided the issue because it's one of these  
22 outlier cases, and --

23 JUSTICE SCALIA: It can be taken away  
24 from the jury you're saying? If -- if no jury could  
25 possibly find tacking appropriate, the Court could issue

1 a judgment as a matter of law.

2 MR. VAN DEN BOSCH: Absolutely, Justice  
3 Scalia. The judge can always set the out of bounds of  
4 what is permitted under the tacking doctrine. I also  
5 agree with Your Honor that if you look at the case law  
6 dealing with tacking -- and by and large, all of these  
7 cases that were cited in the papers were decided by  
8 judges due to the procedural posture of the case --  
9 there is a great amount of inconsistency and it  
10 highlights the fact that -- that seeking a body of  
11 precedence in -- in this case is completely  
12 impracticable.

13 Predictability in tacking law is not  
14 achievable. What we should aim for is reliability --

15 JUSTICE SCALIA: Of course you -- you need  
16 some predictability for a judge for disallow a jury  
17 verdict as a matter of law, right.

18 MR. VAN DEN BOSCH: Yes, that is correct.

19 JUSTICE SCALIA: I mean, you've got to admit  
20 there is some predictability.

21 MR. VAN DEN BOSCH: There is always some  
22 predictability, but it's -- it's very challenging,  
23 still, in -- in tacking cases.

24 CHIEF JUSTICE ROBERTS: Well, you emphasize  
25 that the consumer perspective is what's important, but

1 there are other aspects of tacking as well that seem  
2 more suited to a court than to a jury.

3 MR. VAN DEN BOSCH: Well, the -- the  
4 critical test, again, is commercial impression which is  
5 a consumer standard. The -- the -- the other point is  
6 that it involves a great amount of extrinsic evidence  
7 which is evidence-based which should go to the jury.  
8 This case provides a perfect example of why marketplace  
9 context and extrinsic evidence is so critical, because  
10 in this case, the -- the jury found priority on the  
11 basis of a 1994 advertisement, not just upon a single  
12 phrase Hana Overseas Korean Club, but upon an  
13 advertisement that contained the -- the marked Hana Bank  
14 seven times in the Korean language.

15 So it could be viewed as a very simple  
16 priority case. The jury heard evidence that this --  
17 this advertisement was published in Korean language  
18 publications, that the -- the relevant consumers of both  
19 parties were by and large Korean Americans who -- who  
20 both spoke and read the Korean language, who viewed this  
21 ad as being a Hana Bank ad. It's no different from a  
22 bank for, say -- I'm sorry, an advertisement for, say,  
23 Wells Fargo home loans. Simply because it advertises  
24 that product doesn't mean consumers won't view this as  
25 an ad for -- for Wells Fargo.

1 JUSTICE KENNEDY: If we -- when we write  
2 this opinion, will we have to have in the back of our  
3 minds what effect it will have on likelihood of  
4 confusion, the likelihood of confusion issue? Is -- is  
5 there some way that we should treat this as quite --  
6 quite discrete from that?

7 MR. VAN DEN BOSCH: Justice Kennedy, the --  
8 the likelihood of confusion issue is not part of the  
9 question presented, but as a practical --

10 JUSTICE KENNEDY: I -- I recognize that.

11 MR. VAN DEN BOSCH: As a practical matter, I  
12 think that practitioners --

13 JUSTICE KENNEDY: Is it the elephant in the  
14 room or something like that? I don't know what --

15 MR. VAN DEN BOSCH: Quite possibly.

16 JUSTICE KENNEDY: -- The metaphor is? --

17 MR. VAN DEN BOSCH: Well, if -- if you look  
18 at the circuits that have adopted tacking as a matter of  
19 law, they've only done so -- this is the Federal Circuit  
20 and the Sixth Circuit -- because they also treated  
21 likelihood of confusion as a -- as a matter of law. And  
22 picking up on that reasoning from Van Dyne-Crotty, every  
23 other circuit that has looked at it as also fallen in  
24 lockstep with how they treat likelihood of confusion.  
25 The majority of ten circuits obviously treat likelihood

1 of confusion as a -- as a factual matter, again because  
2 it hinges very heavily on -- on consumer impression.

3 All circuits send likelihood of confusion to  
4 the jury for -- for a determination. The -- the -- the  
5 individual likelihood of confusion factors are -- are  
6 treated as issues of fact. One of those factors is a  
7 comparison of the two marks, just as you have in  
8 tacking, and that comparison is also always treated as  
9 an issue of fact.

10 The question presented --

11 JUSTICE GINSBURG: What about the point that  
12 the question really is what was the scope of each --  
13 what was the scope of the original mark and the later  
14 one?

15 MR. VAN DEN BOSCH: Yes, Justice Ginsburg,  
16 the preemptive scope argument is one that did not arise  
17 until the reply papers. It's inconsistent, in our view,  
18 with the -- the applicable standard, the commercial  
19 impression standard, because the Petitioner here is --  
20 is promoting a -- a prospective analysis of the  
21 preemptive scope of the marks, which is -- which is in  
22 contrast with the retrospective analysis we have in  
23 tacking where we essentially look at two priority dates  
24 which have already occurred. It's a -- it's a rearview  
25 test. So -- so they are entirely inconsistent.

1           Furthermore, the -- the scope issue is one  
2 that's already embodied in the likelihood of confusion  
3 test, because there you essentially compare two marks  
4 for their respective preemptive scope, and that is, by  
5 and large, a task for the jury as well. So the --  
6 the -- the novel preemptive scope argument rings hollow.

7           The issue presented here is a decidedly  
8 narrow one: Should this be an issue of fact or one of  
9 law? It is a similar issue that was presented to this  
10 Court in the Martin case, but it's -- it's quite  
11 distinct in the sense that Martin dealt with the issue  
12 of patent claim construction. And as Your Honor noted,  
13 that essentially involves the construction of a legal  
14 instrument. It's a highly sophisticated analysis, and  
15 in that case, the Court opined that it was appropriate  
16 to take this -- this -- this issue away from -- from the  
17 jury because it was something that a judge simply did  
18 better. It was too sophisticated. Because a nuanced  
19 interpretation of language in a patent claim could have  
20 a quite dramatic impact on the scope of the patent.

21           Here, in contrast, we're talking about  
22 consumer impression. It's a relatively simple inquiry.  
23 And a -- a body of jurors with its collective insight  
24 is -- is going to provide a better perspective than a  
25 single judge sitting in -- in relative isolation.

1 The --

2 JUSTICE GINSBURG: What about obviousness in  
3 patent law? That' -- that, I take it, is also a  
4 legal -- legal issue.

5 MR. VAN DEN BOSCH: Obviousness is a factual  
6 issue, is my understanding. And also the -- the issue  
7 of -- the ultimate issue, infringement, where we are to  
8 compare a patented device against an accused device, is  
9 ultimately a factual issue for the jury, just as it is  
10 in -- in trademark law where we compare two marks for  
11 potential infringement.

12 Generally speaking, comparative analysis  
13 is -- is often treated as a -- as a factual issue,  
14 whether it be a comparison of handwriting samples, et  
15 cetera.

16 Petitioner also argued that -- that there is  
17 a -- a fairness element to the tacking analysis, and  
18 goes so far as to suggest this is an equitable defense .  
19 This is not an equitable defense. This is something  
20 that goes to the affirmative elements of the plaintiff's  
21 case, those elements being priority and likelihood of  
22 confusion. Tacking is just one means of defeating the  
23 priority component.

24 So -- so the sense that -- that simply  
25 because there is a fairness component does not turn this



1 into an equitable -- equitable defense. Equitable --  
2 equitable defenses arises once the plaintiff has  
3 established its -- its affirmative case and effectively  
4 excuse the defendant's conduct. Here, again, we don't  
5 get to the point of considering -- of considering  
6 defenses like you would have laches, unclean hands, et  
7 cetera.

8 In this case, I should note there were  
9 findings specifically of laches and -- and unclean  
10 hands, and the judge appropriately took an advisory  
11 verdict from the jury. Ultimately, when the case was  
12 appealed to the Ninth Circuit Court of Appeals,  
13 the court only commented on the tacking component of the  
14 defense judgment. So the -- the laches and -- and  
15 unclean hands components are in play as well.

16 CHIEF JUSTICE ROBERTS: Are there any of the  
17 features that your friend says have to go to the court  
18 that you think could not be addressed in jury  
19 instructions?

20 MR. VAN DEN BOSCH: I -- I -- I think  
21 certainly all of these elements could be addressed in  
22 jury instructions. In this case, it was the Petitioner  
23 who proposed the instruction. The proposed instruction  
24 did not even make reference, incidentally, of the legal  
25 equivalents standard that -- that they are now

1 promoting. It only mentioned the commercial impression  
2 standard, and the judge issued instruction which was  
3 near identical to the one sought by the Petitioner.

4 In certain cases, in some of these outlier  
5 cases, a judge could certainly instruct a jury to  
6 consider things relating to, say, foreign equivalents,  
7 whereas here we have a -- a mark that was used in a  
8 different language. It could instruct the jury to  
9 consider specifically the relevant group of consumers.  
10 To a large extent, those types of instructions already  
11 are embodied in the -- in the likelihood of confusion  
12 instructions.

13 JUSTICE SCALIA: Would you repeat what you  
14 said about the -- the other defenses, laches and what  
15 else?

16 MR. VAN DEN BOSCH: Laches and unclean  
17 hands.

18 JUSTICE SCALIA: And those are still  
19 available on -- on remand?

20 MR. VAN DEN BOSCH: Potentially so, yes.  
21 They -- they have not been ruled on by the Ninth  
22 Circuit yet.

23 If the Court has no further questions, I  
24 will simply point out that both the intellectual --  
25 the -- sorry, the International Trademark Association

1 and the American Intellectual Property Law Association,  
2 as well as Professor McCarthy in his treatise on  
3 trademarks, agree with us wholeheartedly that this  
4 should be an issue of fact, and I would ask that  
5 the Court simply affirm the judgment below.

6 Thank you.

7 CHIEF JUSTICE ROBERTS: Thank you, counsel.  
8 Ms. Harrington.

9 ORAL ARGUMENT OF SARAH E. HARRINGTON  
10 FOR UNITED STATES, AS AMICUS CURIAE,  
11 SUPPORTING RESPONDENTS

12 MS. HARRINGTON: Thank you, Mr. Chief  
13 Justice, and may it please the Court:

14 I'd like to start by responding to  
15 Petitioner's argument that the tacking inquiry is a  
16 legal inquiry only. Every court that has considered  
17 tacking has agreed that the standard for tacking is  
18 whether two marks create the same commercial impression.  
19 And, in fact, in the district court in this case that  
20 was the jury instruction that the Petitioner requested,  
21 exactly that instruction. That was the instruction that  
22 was given.

23 There was no argument on appeal to the court  
24 of appeals that the jury was improperly instructed. It  
25 wasn't until this Court granted certiorari that

1 Petitioner has changed its tune. Initially Petitioner  
2 said: I know the test for tacking isn't the commercial  
3 impression test; the test is whether two marks are  
4 legally equivalent. And then in the reply it shifted  
5 gears again and said: Oh no, now the test is whether  
6 two marks have the same preemptive scope.

7 But if you ask the decisionmaker to tell you  
8 whether two marks are legally equivalent or whether two  
9 marks have the same preemptive scope, the decisionmaker,  
10 even if that person was a judge, couldn't tell you the  
11 answer to that unless the judge knew what it means for  
12 two marks to be legally equivalent or for two marks to  
13 have the same preemptive scope. And the answer to both  
14 of those questions is that the marks have to have the  
15 same commercial impression and if they have the same  
16 commercial impression you can tack them. And then what  
17 we say about that is that they are legally equivalent.

18 But that's just a label that we attach to  
19 two marks that we know can be tacked because they have  
20 the same commercial impression. That's not the test for  
21 inquiring whether you can actually tack two marks.

22 JUSTICE KAGAN: You're saying essentially  
23 that legally equivalent just means equivalent for the  
24 purpose of deciding this legal question?

25 MS. HARRINGTON: That's right, but that

1 doesn't tell you what question you need to ask to find  
2 out if they are legally equivalent.

3           And the same thing for preemptive scope.           If  
4 you said, well, what's the preemptive scope of a mark,  
5 well, you figure that out by looking at its commercial  
6 impression. And so the legal equivalence and preemptive  
7 scope labels are just -- they just describe things about  
8 marks that can be tacked. But they don't tell you  
9 whether two marks can be tacked. They're things that  
10 you know after you know --

11           JUSTICE SOTOMAYOR:           I'm a little confused  
12 about that because there is a plethora of quotations  
13 from the case law that tacking should be a limited thing  
14 and not expansive and the -- his scope point.

15           MS. HARRINGTON:           Absolutely.

16           JUSTICE SOTOMAYOR:           And how do you  
17 communicate that to the jury, because by nature the  
18 evidence the jury is going to see is the changed  
19 product, and the question in terms of are they going to  
20 be confused by it, they're not, because they're going to  
21 know it's the same manufacturer.

22           MS. HARRINGTON:           Right. Well, I think it's  
23 important to keep separate the tacking question and the  
24 likelihood of confusion question. Tacking goes to  
25 priority, which is sort of one element of an

1 infringement suit. Likelihood of confusion is a  
2 different element.

3 Tacking is a constructive use doctrine  
4 that's about priority. And so when juries are comparing  
5 two marks for the purposes of determining whether they  
6 should be tacked, those are a different pair of marks  
7 than they're comparing when they're determining whether  
8 there's likelihood of confusion.

9 JUSTICE SOTOMAYOR: That almost suggests to  
10 me that a lot of these older cases were decided wrong.  
11 Unless the jury knows about how limited this --

12 MS. HARRINGTON: And certainly the jury will  
13 know that because they will be instructed about when  
14 tacking is appropriate. And in this case, at  
15 Petitioner's request, the jury was instructed that the  
16 marks should be allowed to be tacked only if they create  
17 the same continuing commercial impression.

18 I think the word "same" signals the  
19 narrowness of the doctrine. And certainly if a party  
20 were concerned that that standard tacking instruction  
21 were not sufficient, a party could ask for a more  
22 stringent type of instruction. That didn't happen in  
23 this case.

24 JUSTICE GINSBURG: What part does the judges  
25 in setting the boundaries by deciding the question

1 either on summary judgment or judgment as a matter of  
2 law, that -- I -- my thought was that a judge would not  
3 let -- that the bounds of the doctrine were decided by  
4 the judge when he puts the question to the jury.

5 MS. HARRINGTON: That's right. I mean, a  
6 judge in these cases plays the same important roles that  
7 a judge plays in every civil jury trial, which is to say  
8 that the judge decides the legal rules and instructs the  
9 jury on that, and then the judge also will decide merits  
10 determinations if the evidence that's presented could  
11 only lead to one reasonable conclusion about those  
12 determinations.

13 And so when a judge decides a tacking issue  
14 on summary judgment or motion to dismiss, the judge is  
15 setting the outer bounds of the tacking doctrine and just  
16 the same way it does in any other issue that comes up in  
17 a civil trial that would be tried to a jury. And we  
18 don't discount that. I mean, the judge plays a very  
19 important role. But ultimately the question whether two  
20 marks give the same continuing commercial impression is  
21 a question that must be answered from the perspective of  
22 the ordinary consumer of the relevant goods. That is  
23 really essentially a factual question.

24 And it's certainly true that a judge could  
25 decide that question, as in fact judges do in bench

1 trials and in suits for injunctive relief and on motions  
2 for summary judgment. But the question isn't -- when  
3 you have a jury impaneled, the question isn't whether a  
4 judge could decide the question. The question is could  
5 the jury also decide the question. Is there something  
6 about this question that a judge is really well-equipped  
7 to answer and the jury is really ill-equipped to answer?

8           That was the situation in Markman.           That's  
9 really an outlier situation and that doesn't come up  
10 here because here again the focus is really on the  
11 consumer impression. And what's a jury? A jury is a  
12 collection of ordinary consumers. And so in some ways a  
13 jury is actually better equipped to answer that question  
14 than a judge might be.

15           JUSTICE KAGAN:           I assume the same would be  
16 true of likelihood of confusion if that's the argument,  
17 right, that the jury serves as a focus group in the same  
18 way for that question.

19           MS. HARRINGTON:           Yes. And I think  
20 Petitioner may have misspoken when he suggested that --  
21 Petitioner's counsel when he suggested that there's a  
22 circuit split on whether likelihood of confusion is a  
23 question for a jury or a question for a judge. I'm not  
24 aware of any circuit that has held it's a question for a  
25 judge only. There's a circuit split on whether it's a



1 question of law or a question of fact and that affects  
2 how you review it on appeal. But as far as I know,  
3 every circuit treats it as a question for the jury.

4 And one important element of the likelihood  
5 of confusion analysis in every circuit is a comparison  
6 of the similarity of two marks. Petitioner has conceded  
7 that a jury can make that comparison. That's a  
8 different -- again, you're comparing different marks  
9 there than you are in tacking and it's a different  
10 degree of similarity you're looking for, but it's not  
11 different in kind, that kind of analysis. And there's  
12 no reason that I can think of why a jury would be  
13 well-equipped to answer that question, but not equipped  
14 to answer the consumer impression comparison question in  
15 the tacking context.

16 JUSTICE KENNEDY: I'll check it out in my  
17 notes. I thought that there was a split on the  
18 likelihood of confusion issue on the point of whether it  
19 goes to the judge or the jury.

20 MS. HARRINGTON: Not as far as I can tell.  
21 There's a split on whether it's a question of law or a  
22 question of fact and, in fact, that's also the circuit  
23 split as to tacking.

24 But, you know, in the Second Circuit, for  
25 example, they have held that likelihood of confusion is

1 a question of law, but their review jury determinations  
2 on likelihood of confusion; they just review them  
3 without giving them much deference to the jury's  
4 ultimate determination. Those issues are decided by  
5 juries in most circuits that have held that it's a  
6 question of law, which I admit doesn't make a lot of  
7 sense and we think isn't necessarily the right way to do  
8 it.

9 But if I could just say a word  
10 about Petitioner's reliance on history --

11 JUSTICE KENNEDY: If I look confused by your  
12 answer, I am. I'll check it.

13 MS. HARRINGTON: Okay. So the circuit split  
14 is on law versus fact, not judge versus jury for  
15 likelihood of confusion.

16 JUSTICE SOTOMAYOR: Seeing as  
17 those courts that think it's an issue of law, they still  
18 give it to a jury but then ignore what the jury says?

19 MS. HARRINGTON: Some version of that. It's  
20 more complicated than that. I don't want to -- because  
21 that's not the issue here, I don't want to waste  
22 the Court's time, but it's some odd version of that.

23 If I could just say a word about  
24 Petitioner's reliance on history, Petitioner identifies  
25 a number of cases in which judges, you know, going way

1 back, in which judges have decided tacking questions.  
2 But none of those cases are cases where a jury was  
3 impaneled to decide the infringement issue. Those are  
4 all cases that were decided on summary judgment or  
5 motion to dismiss, that were tried as bench trials, or  
6 that were suits for injunctive relief. And so the  
7 treatment of tacking in those cases tells us nothing  
8 about what we should do when a jury is actually  
9 impaneled.

10 And as far as I know, Petitioner has not  
11 identified and I'm not aware of a single case from any  
12 period of time in which a jury was impaneled to decide  
13 an infringement issue and the judge took the issue away  
14 from the jury. There just isn't such an example. And  
15 that's because generally when you have civil trials and  
16 you have a jury impaneled, these questions of ultimate  
17 determinations of factual issues and even when they go  
18 to the ultimate legal determinations they're decided by  
19 juries who are properly instructed.

20 Now, I say that there's a lot of -- a lot of  
21 overtone in Petitioner's argument that we're worried  
22 about juries getting it wrong and there is an argument  
23 that the jury got it wrong in this case. But I think  
24 that shouldn't drive your decision about whether juries  
25 or judges should decide this issue, because juries, just

1 like judges, can get things wrong all the time and we  
2 have mechanisms in place to correct erroneous jury  
3 verdicts.

4 You can argue that the jury was improperly  
5 instructed. That wasn't an argument that's ever been  
6 made in this case. Or you can argue that there wasn't  
7 sufficient evidence to support the jury's verdict. That  
8 was the argument that Petitioner made on appeal to the  
9 Ninth Circuit. The argument was rejected and Petitioner  
10 has not asked this Court to review that determination.

11 So, however you feel about whether the jury  
12 got it right or wrong in this case, that shouldn't tell  
13 -- that doesn't tell you whether the jury should or  
14 shouldn't have had the right to answer the question. We  
15 think it's clearly a fact-based question and it should  
16 go to the jury.

17 Just one last point if I could. The  
18 Petitioner has basically asserted that you should only  
19 really look at the two marks themselves and that will  
20 almost always tell you what you need to do, and when you  
21 look at precedent you just look at those two marks. And  
22 as the Justices have suggested, it's -- you know, just  
23 looking at how other marks in the past have been treated  
24 doesn't always tell you the full story.

25 And even in the American Mobile Phone case,

1 one of the dispositive considerations in that case was  
2 not just looking at the marks and how they looked and  
3 what the words were, and it wasn't just the fact that  
4 there was an intervening mark that was similar, they  
5 looked -- the Court looked at, or the TTAB and then the  
6 Federal Circuit approved it, looked at how the two  
7 different marks had been used in the Yellow Pages and  
8 whether they had been used to advertise the same kind of  
9 products or different kind of products. And that just  
10 shows that tacking is a very context specific inquiry.  
11 You need to look at how the -- how the marks are used in  
12 advertising with respect to the products and, you know,  
13 how the consumers actually perceive those marks.

14 And, of course, if a company is in a  
15 position where it's contemplating amending its mark and  
16 it wants to have some sort of certainty about whether  
17 that will be allowed, it can go to its consumers and do  
18 consumer surveys and say, you know, do you think if we  
19 changed it this way would you still have the same  
20 consumer impression? It can, in other words, gather the  
21 evidence that it would have introduced at trial if  
22 tacking came up at trial.

23 Also, and this -- I guess this can be the  
24 last point if there are no questions, but a mark owner  
25 can seek to amend its mark with the PTO.

1 CHIEF JUSTICE ROBERTS: Thank you, counsel.

2 Mr. Hughes, you have 6 minutes left.

3 REBUTTAL ARGUMENT OF PAUL W. HUGHES

4 ON BEHALF OF THE PETITIONER

5 MR. HUGHES: Thank you, Your Honor.

6 Three brief points. Our fundamental  
7 submission is that there is more going on here than  
8 simply the consumer impression test. test. I think  
9 there's a reason that this is called the legal  
10 equivalents test and not simply just consumer impression  
11 and that's because what is happening here is a deeper  
12 legal judgment that corresponds to the legal fiction  
13 that -- that is tacking.

14 And I think what's deeper about this is just  
15 informing a jury that the question is, do these two  
16 marks have the same consumer impression is going to not  
17 just lead to a different result, but a very different  
18 kind of test than if a court looks at these past  
19 examples to truly understand how narrow tacking is.

20 I think if one just reads what the -- what  
21 the standard of continuing consumer impression and  
22 then you look to the past cases, there is some confusion  
23 as to how these cases have come out. But these cases  
24 show just how narrow the doctrine must be. Those cases  
25 are what give the vibrance and -- and -- and the bite to

1 the doctrine.

2 JUSTICE SOTOMAYOR: Well, let's assume that  
3 commercial impression is a jury question, that we were  
4 to hold that. What would be the legal standard that a  
5 judge should apply in coming to a legal conclusion?

6 MR. HUGHES: Yes, Your Honor.

7 JUSTICE SOTOMAYOR: What -- what is more --  
8 what is the legal conclusion?

9 MR. HUGHES: Your Honor, the judge is going  
10 to use the consumer impression, if that were factual, to  
11 understand what the preemptive scope of the first mark  
12 and the preemptive scope of the second mark. So as you  
13 suggested, that could be a factual determining what  
14 those are. But what the legal aspect of that is is  
15 asking how much of a change in the preemptive scope from  
16 the first mark to the second mark has there been, and  
17 then is that --

18 JUSTICE GINSBURG: Did you spell that out in  
19 your blue brief? I know that's your -- your yellow  
20 brief says this -- everything is wrong up until now  
21 because it's a legal question, preemptive scope of the  
22 old mark and of the new mark. That's spelled out very  
23 clearly in your reply brief, but I didn't see it in the  
24 blue brief.

25 MR. HUGHES: Well, Your Honor, I point to a

1 couple of places. In Page 19 of our blue brief, for  
2 example, we made the argument that if -- if, and I'm  
3 quoting here -- "if a new mark creates a different right  
4 of exclusion than the original, tacking is not allowed."

5 That was our controlling framework from the  
6 opening brief. And throughout our opening brief, we  
7 explained that the limitation that's essential on  
8 tacking is the competition or the rights of the third  
9 parties. Every court that has explained that there is  
10 an outer bound on when tacking can be allowed has  
11 explained that that outer bound derives from the  
12 anti-competitive effects that would result from  
13 retroactively, years later, expanding the -- the initial  
14 trademark rights. So that -- that was, I think, the  
15 theme of our -- our -- of our opening brief, and that  
16 continued through into the yellow brief.

17 The second point I would like to make is  
18 that this is, in fact, truly a judicially created  
19 doctrine and where this is a judicially created doctrine  
20 that is getting at a legal fiction, I think this is  
21 precisely the kind of circumstance where this legal test  
22 that we discussed must have a legal aspect or legal  
23 component that is put to the judge.

24 So back to the question what happens in that  
25 second stage in terms of what is the legal aspect of the



1 test, the court will assess how much of a change has  
2 been made in the mark, and then it has to compare that  
3 against the original mark to see was that reasonable,  
4 was that foreseeable, did people in the marketplace --  
5 could they have predicted that this kind of change was  
6 coming. That's the sort of legal determination that  
7 a court is going to be making that turns on its  
8 assessment of -- of the interaction and the effect of --  
9 of the two marks.

10 My final point is -- is just one that is  
11 related particularly to this case. Respondent made the  
12 contention that they had used Hana Bank in Korean in  
13 their initial advertising and suggested that that would  
14 be a basis for priority. As we explained in the yellow  
15 brief, though, no court of appeals has ever adopted the  
16 notion of foreign language equivalents into the concept  
17 of trademark tacking. And as we demonstrated, I think,  
18 the effects of that would be quite severe because it  
19 would create a circumstance where any current mark  
20 holder would be in jeopardy if there was, unknown to  
21 them, a similar -- confusingly similar usage of that  
22 kind of mark in a foreign language which they would not  
23 have the ability to access.

24 So while it's certainly true that foreign  
25 language equivalents can and should and is a doctrine

1 that permits an affirmative trademark infringement  
2 claim, that is not what we have here. It's not a  
3 doctrine that can be used to, years after the fact,  
4 expand the -- the scope of -- of a trademark.

5 Thank you.

6 With respect to the -- to the foreign  
7 language --

8 JUSTICE SOTOMAYOR: The foreign -- the use  
9 or reliance on the foreign use of Hana --

10 MR. HUGHES: Your Honor, we did object to  
11 the use of foreign language equivalents. The Ninth  
12 Circuit specifically did not reach that issue. It -- it  
13 stated in a footnote that because it was relying on the  
14 broader use of tacking, tacking between Hana Bank to  
15 Hana Overseas Korean Club, it didn't have to consider  
16 whether it could use foreign language equivalents. We  
17 certainly objected that that was an impermissible use.  
18 We think if the Court were to reach that, it should  
19 certainly hold that that is not a permissible use of  
20 foreign language equivalents because the effects of it  
21 would be really quite substantial.

22 CHIEF JUSTICE ROBERTS: Thank you, counsel.

23 The case is submitted.

24 (Whereupon, at 11:59 a.m., the case in the  
25 above-entitled matter was submitted.)

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