

No. 13-1211

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In the Supreme Court of the United States

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HANA FINANCIAL, INC., PETITIONER

*v.*

HANA BANK, ET AL.

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ON WRIT OF CERTIORARI  
TO THE UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT

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BRIEF FOR THE UNITED STATES  
AS AMICUS CURIAE IN SUPPORT OF RESPONDENTS

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SARAH T. HARRIS  
*General Counsel*  
NATHAN K. KELLEY  
*Solicitor*  
THOMAS W. KRAUSE  
*Deputy Solicitor*  
JAMIE L. SIMPSON  
CHRISTINA J. HIEBER  
AMY J. NELSON  
*Associate Solicitors*  
*U.S. Patent and Trademark*  
*Office*  
*Alexandria, Va. 22314*

DONALD B. VERRILLI, JR.  
*Solicitor General*  
*Counsel of Record*  
JOYCE R. BRANDA  
*Acting Assistant Attorney*  
*General*  
MALCOLM L. STEWART  
*Deputy Solicitor General*  
SARAH E. HARRINGTON  
*Assistant to the Solicitor*  
*General*  
MARK R. FREEMAN  
MEGAN BARBERO  
*Attorneys*  
*Department of Justice*  
*Washington, D.C. 20530-0001*  
*SupremeCtBriefs@usdoj.gov*  
*(202) 514-2217*

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### QUESTION PRESENTED

Two related trademarks may be “tacked” for purposes of determining priority of use if the marks create the same, continuing commercial impression such that consumers would consider them the same mark. This case is a trademark-infringement suit in which a jury was empaneled and was instructed on the legal standard for tacking. The question presented is as follows:

Whether, in a trademark-infringement suit where a jury has been empaneled, the jury or the court determines whether use of an older mark may be tacked to a newer one.

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**BRIEF FOR THE UNITED STATES  
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## **INTEREST OF THE UNITED STATES**

In some circumstances, a trademark owner can establish the priority of a mark based on “tacking,” *i.e.*, by linking use of the mark to the first-use date of an earlier, technically distinct mark. The question presented here is whether, in a trademark-infringement suit in which a jury has been empaneled, the appropriateness of tacking should be determined by the jury or by the court. The Court’s resolution of that question is likely to turn at least in part on the extent to which tacking determinations are factual in character.

The United States Patent and Trademark Office (PTO) is “responsible for \* \* \* the registration of trademarks.” 35 U.S.C. 2(a)(1). The PTO regularly adjudicates trademark priority and related issues,

including questions of tacking. See, e.g., 15 U.S.C. 1052(d). Decisions of the PTO's Trademark Trial and Appeal Board (TTAB or Board) can be reviewed by the Federal Circuit, 15 U.S.C. 1071(a), which reviews the Board's factual findings under the deferential substantial-evidence standard. E.g., *DuoproSS Meditech Corp. v. Inviro Med. Devices, Ltd.*, 695 F.3d 1247, 1252 (2012); *In re Nett Designs, Inc.*, 236 F.3d 1339, 1341 (2001). The United States therefore has a substantial interest in the Court's resolution of the question presented.

#### STATEMENT

1. a. Under the common law of unfair competition, a person acquires rights in a trademark—generally, a word or symbol used to indicate the source of goods or services—through the use of the mark in commerce. 1 Anne Gilson LaLonde, *Gilson on Trademarks* § 3.02[2][a], at 3-26 (Sept. 2014) (*Gilson*). Once established, those common-law rights enable the trademark owner to exclude others from using certain similar marks on goods or services. See *ibid.*

The Trademark Act of 1946 (Lanham Act), 15 U.S.C. 1051 *et seq.*, confers additional benefits on trademark owners who federally register their marks. See *Wal-Mart Stores, Inc. v. Samara Bros.*, 529 U.S. 205, 209 (2000). The “owner of a trademark used in commerce” may apply to the PTO to register the mark on the PTO's “principal register.” 15 U.S.C. 1051(a)(1). Federal registration of a mark serves as constructive nationwide notice of the mark's use and as prima facie evidence of the mark's ownership, the mark's validity, and the owner's exclusive right to use the mark. *Gilson* § 3.02[2][a], at 3-27; 15 U.S.C. 1057(b), 1115.

The owner of a registered or common-law trademark may bring a civil action against anyone using a mark in commerce when such use “is likely to cause confusion, or to cause mistake, or to deceive.” 15 U.S.C. 1114(1)(a) (registered marks), 1125(a)(1)(A) (common-law marks); see *KP Permanent Make-Up, Inc. v. Lasting Impression I, Inc.*, 543 U.S. 111, 117 (2004); *Two Pesos, Inc. v. Taco Cabana, Inc.*, 505 U.S. 763, 767-768 (1992). Rights in a trademark—and the accompanying ability to seek remedies for infringement—is determined not by the date of registration, but by the date of the mark’s first use in commerce. See, e.g., *United Drug Co. v. Theodore Rectanus Co.*, 248 U.S. 90, 100 (1918); 2 J. Thomas McCarthy, *McCarthy on Trademarks and Unfair Competition* § 16:18, at 16-50 (4th ed. Sept. 2014) (*McCarthy*).

b. From time to time, a trademark owner may wish to modify its mark in order, for example, to respond to “changing consumer preferences, evolving aesthetic developments, or new advertising and marketing styles.” *Brookfield Commc’ns, Inc. v. West Coast Entm’t Corp.*, 174 F.3d 1036, 1048 (9th Cir. 1999). In limited circumstances, the owner of the mark may trace priority of the revised mark to the first use of the earlier mark. See generally 3 *McCarthy* § 17:25, at 17-63 to 17-64. This is called “tacking.” Courts have long allowed trademark owners to modernize or “polish \* \* \* up” a mark without abandoning it or forfeiting priority in the original mark. *Beech-Nut Packing Co. v. P. Lorillard Co.*, 299 F. 834, 850 (D.N.J. 1924), *aff’d*, 7 F.2d 967 (3d Cir. 1925), *aff’d*, 273 U.S. 629 (1927).

The TTAB and the Court of Customs and Patent Appeals (a precursor to the Federal Circuit) have also long endorsed the “tacking” concept. See *Ilco Corp. v. Ideal Sec. Hardware Corp.*, 527 F.2d 1221, 1224 (C.C.P.A. 1976) (“The law permits a user who changes the *form* of its mark to retain the benefit of its use of the earlier form, without abandonment, if the new and old forms create the same, continuing commercial impression.”); *Laura Scudder’s v. Pacific Gamble Robinson Co.*, 136 U.S.P.Q. 418, 419 (T.T.A.B. 1962) (finding that two technically distinct marks “create substantially the same general impression, namely, that of a blue-colored bird, and hence are believed to symbolize a single and continuing trademark right in applicant”). All of the courts of appeals that have addressed tacking agree on the applicable standard. Tacking is available when the original and revised marks are “legal equivalent[s]” such that the two marks “create the same, continuing commercial impression” and consumers “consider both as the same mark.” *Van Dyne-Crotty, Inc. v. Wear-Guard Corp.*, 926 F.2d 1156, 1159 (Fed. Cir. 1991) (internal quotation marks and citation omitted); see, e.g., Pet. App. 11a; *George & Co. LLC v. Imagination Entm’t Ltd.*, 575 F.3d 383, 402 (4th Cir. 2009); *Data Concepts, Inc. v. Digital Consulting, Inc.*, 150 F.3d 620, 623 (6th Cir. 1998).

Allowing trademark owners to treat two marks that create the same, continuing commercial impression as one mark for purposes of determining priority serves several basic objectives of trademark law. Those objectives include “protect[ing] source-identifying trademarks from appropriation by competitors” and “reducing the costs that customers incur in shopping

and making purchasing decisions.” *Brookfield Commc’ns, Inc.*, 174 F.3d at 1048; see *Qualitex Co. v. Jacobson Prods. Co.*, 514 U.S. 159, 163-164 (1995) (“[T]rademark law, by preventing others from copying a source-identifying mark, reduce[s] the customer’s costs of shopping and making purchasing decisions, for it quickly and easily assures a potential customer that *this* item—the item with this mark—is made by the same producer as other similarly marked items that he or she liked (or disliked) in the past.”) (second set of brackets in original) (internal quotation marks and citations omitted).

2. a. Petitioner and respondent both provide financial services to individuals in the United States, and both use the word “Hana” in their names. Pet. App. 4a. The Korean word pronounced like the English word “Hana” means “number one,” “first,” “top,” or “unity.” *Ibid.*

Respondent Hana Bank is a Korean entity established in 1971 as Korea Investment Finance Corporation. Pet. App. 4a, 23a. In 1991, respondent changed its name to Hana Bank. *Ibid.* In May 1994, respondent established a service called Hana Overseas Korean Club to provide financial services to Korean expatriates. *Id.* at 23a. In July 1994, respondent made those services available to customers living in the United States, and it launched an advertising campaign for Hana Overseas Korean Club in Washington, D.C. and California. *Id.* at 23a-24a. The print advertisements displayed the name “Hana Overseas Korean Club” in English and Korean, the name “Hana Bank” in Korean, and respondent’s “dancing man” logo. *Id.* at 5a, 24a. In 2000, respondent changed the name of Hana Overseas Korean Club to Hana World Center.

*Id.* at 7a, 25a. In 2002, respondent began operating an agency in the United States under the name Hana Bank. *Ibid.*

Petitioner is a California corporation that began using the name Hana Financial and an associated trademark in commerce in April 1995. Pet. App. 6a, 26a. In July 1996, petitioner obtained a federal trademark registration for a pyramid logo with the name “Hana Financial,” which was to be used in connection with particular types of financial services. *Ibid.* Petitioner was aware of respondent before it used the “Hana Financial” mark. *Id.* at 5a, 27a.

b. In March 2007, petitioner filed this action against respondent, alleging, *inter alia*, that respondent’s use of the name “Hana” in its “Hana Bank” mark infringed petitioner’s “Hana Financial” mark. Pet. App. 7a; J.A. 11-21.<sup>1</sup> Respondent denied infringement and filed a counterclaim seeking cancellation of petitioner’s registration for its mark, based on respondent’s assertion that the registration was fraudulently procured because petitioner was aware of respondent’s superior rights in the “Hana” mark in connection with the provision of financial services. Pet. App. 7a, 21a; J.A. 46-50.

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<sup>1</sup> This suit was also filed against respondent Hana Financial Group, a Korean entity incorporated in 2005 as Hana Bank’s holding company. Pet. App. 4a n.1; J.A. 119. Hana Financial Group does not provide services in the United States or direct Hana Bank’s activities in the United States. Pet. App. 4a n.1. Although Hana Financial Group is listed as a respondent in this action, the district court dismissed that entity as a defendant, and that decision was not appealed. *Ibid.* This brief refers to Hana Bank as “respondent” in the singular because Hana Bank appears to be the sole remaining defendant.

The district court granted summary judgment for respondent on the trademark-infringement claim, finding that respondent had established priority of use for the “Hana” mark. See J.A. 118, 122-126, 132. The district court also granted summary judgment for petitioner on respondent’s cancellation counterclaim, concluding that there was no fraudulent procurement. J.A. 126-132. The Ninth Circuit reversed the grant of summary judgment on petitioner’s infringement claim, finding genuine issues of material fact as to priority, and affirmed the grant of summary judgment on the cancellation counterclaim. J.A. 135-138.

c. On remand, the trademark-infringement claim was tried to a jury. Pet. App. 8a, 22a. Respondent argued that it was not liable for infringement because respondent, not petitioner, was the senior user of the “Hana” mark. See J.A. 161-163, 167-169. Respondent sought to demonstrate its seniority by, *inter alia*, emphasizing its earlier commercial use of marks similar to its Hana Bank mark and arguing that its advertisements consistently offered services of Hana Bank. See *ibid*.

Before the case was submitted to the jury, petitioner filed a motion for judgment as a matter of law, which the district court denied. Pet. App. 8a. Without objection from petitioner, the district court subsequently gave a jury instruction on tacking that was nearly identical to one proposed by petitioner:

A party may claim priority in a mark based on the first use date of a similar but technically distinct mark where the previously used mark is the legal equivalent of the mark in question or indistinguishable therefrom such that consumers consider both as the same mark. This is called “tacking.” The

marks must create the same, continuing commercial impression, and the later mark should not materially differ from or alter the character of the mark attempted to be tacked.

*Id.* at 9a; J.A. 173.

The jury returned a verdict for respondent. Pet. App. 9a; J.A. 174-175. On the verdict form, the jury answered “yes” to the question whether respondent had “used its mark in commerce in the United States beginning prior to April 1, 1995, and continuously since that date.” J.A. 174. Because petitioner had first used its mark in April 1995, the jury’s verdict established that respondent is the senior user of the mark and therefore is not liable for trademark infringement. Pet. App. 22a-23a. The district court denied petitioner’s renewed post-verdict motion for judgment as a matter of law. *Id.* at 9a-10a. The court explained, *inter alia*, that “there was sufficient evidence to support the jury’s verdict on priority,” and that “the court had given a tacking instruction similar to the one [petitioner] had requested.” *Ibid.*<sup>2</sup>

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<sup>2</sup> Although the jury was instructed on tacking, it is not apparent from the verdict form whether the jury actually relied on a tacking theory in concluding that respondent is the senior user. As noted, respondent had argued to the jury (and indicated in its counterclaim) that the relevant mark was simply “Hana.” In post-trial briefing in the district court, respondent argued that the jury’s verdict should be understood as endorsing that theory. See D. Ct. Doc. 335, at 8 (Aug. 8, 2011) (asserting that “tacking has always been irrelevant to the issues in this case”). As explained below, however, the court of appeals assumed that tacking was the basis of the jury’s priority determination, *i.e.*, its finding that respondent had “used its mark in commerce in the United States beginning prior to April 1, 1995.” J.A. 174.

d. The court of appeals affirmed. Pet. App. 1a-20a. The court noted that “the standard test of ownership” in the trademark context “is priority of use.” *Id.* at 10a (quoting *Brookfield Commc’ns, Inc.*, 174 F.3d at 1047). In this case, the court stated, “the priority issue turns on whether it was permissible for the jury to find that [respondent] could ‘tack’ its use of its present ‘Hana Bank’ mark to its use of the [Hana Overseas Korean] Club mark beginning in 1994.” *Ibid.*

The court of appeals explained that tacking is a narrow doctrine that applies when two technically distinct marks “are so similar that consumers generally would regard them as essentially the same.” Pet. App. 10a (quoting *Brookfield Commc’ns, Inc.*, 174 F.3d at 1048); see *id.* at 12a-13a. Tacking is permitted, the court noted, only when each mark, considered in its entirety, “conveys the same commercial impression” as “determined from the perspective of the ordinary purchaser of these kinds of goods or services.” *Id.* at 11a (citations omitted). The court explained that “the visual or aural appearance” of the relevant marks “may be instructive” in determining whether they convey the same commercial impression, but it emphasized that the marks’ commercial impressions “should be resolved by considering a range of evidence, ideally including consumer survey evidence.” *Id.* at 11a-12a.

The court of appeals noted a division among the circuits as to whether the availability of tacking is a question of law or a question of fact. Pet. App. 12a & n.5. Relying on Ninth Circuit decisions that had characterized the tacking question as one of fact, the court of appeals found sufficient evidence for a reasonable

jury to conclude that, “throughout the time period at issue, the ordinary purchasers of these services had the continuous impression that the advertised services were being offered by [respondent] and that there were no material differences between the marks” respondent used. *Id.* at 18a; see *id.* at 17a (“The jury could have reasonably concluded that the ordinary purchasers of the financial services at issue likely had a consistent, continuous commercial impression of the services [respondent] offered and their origin.”).

Stating that the jury had “receiv[ed] an instruction that correctly conveyed the narrowness of the [tacking] doctrine,” the court of appeals reviewed the evidence presented to the jury. Pet. App. 16a-18a. The court explained that the “ordinary purchasers” of respondent’s services “were Korean-speaking consumers (consisting of Korean expatriates and Korean Americans) that likely had a preexisting awareness of [respondent] due to its ongoing business presence in Korea.” *Id.* at 17a. The court held that “[t]he jury could have reasonably concluded that these purchasers associated ‘Hana Bank’ with the ‘Hana Overseas Korean Club’ when ‘Hana Overseas Korean Club’ appeared, in English, next to ‘Hana Bank,’ in Korean, and the dancing man logo in the advertisements.” *Ibid.* In particular, the court noted that, “[i]n that context, ‘Hana’ was arguably the most significant portion of the trade name, as the ordinary purchasers would have then made the association between the English word ‘Hana’ and the Bank’s Korean name.” *Ibid.* The court stated, however, that “other courts, which consider tacking a question of law, might reach a different conclusion on these facts.” *Id.* at 20a.

**SUMMARY OF ARGUMENT**

A. In limited circumstances, a trademark owner may trace the priority of a mark currently in use to the first-use date of a related, but technically distinct, mark. To determine whether tacking is appropriate in a particular case, the decision-maker must know both the legal standard for tacking and the relevant facts. Here, the legal standard is not in dispute: tacking is available when the two marks create the “same, continuing commercial impression,” such that an ordinary consumer of the involved goods or services would view the marks as the same. Although two marks that may be tacked together are sometimes referred to as “legal equivalents,” that shorthand terminology does not suggest that the tacking inquiry is purely one of law or that it cannot be submitted to a jury.

B. The tacking inquiry is conducted from the point of view of an ordinary consumer, and it will sometimes depend on the uses of the two marks in advertising and marketing campaigns. That sort of context-dependent inquiry is predominantly factual in nature. The visual and aural similarity (or dissimilarity) of two marks is relevant to a tacking determination, and an obvious dissimilarity will often be a sufficient ground for concluding that tacking is inappropriate. The ultimate inquiry, however, is whether two distinct marks are so similar, as used in their actual commercial contexts, that they create the same, continuing commercial impression in the minds of ordinary consumers. And while judicial precedents may assist in clarifying the limits of permissible tacking, the potential relevance of precedent does not negate the inquiry’s predominantly factual character.

Tacking issues may also arise in non-jury settings, such as in bench trials or TTAB proceedings. In those contexts, resolution of the tacking question will still involve legal and factual components. If a court or the TTAB applies the correct legal standard, its determination that the older and newer marks do or do not create the same, continuing commercial impression is a finding of fact that should be reviewed deferentially on appeal.

C. When a trademark-infringement suit is tried to a jury and material questions exist about whether two related marks create the same, continuing commercial impression, that question should be submitted to the jury. In order to resolve a tacking question, a jury must understand the legal standard, must weigh and interpret the relevant facts, and must apply the correct legal standard to its understanding of those facts. If the judge properly instructs the jury on the legal standard, the second and third steps in the process are properly assigned to the jury, whose verdict may be set aside only if no reasonable jury could have concluded that tacking is available. Juries are routinely called upon to apply legal rules to their understanding of the facts to reach an ultimate verdict.

Petitioner's reliance on *Markman v. Westview Instruments, Inc.*, 517 U.S. 370 (1996), is misplaced. In *Markman*, the Court held that questions of patent claim construction should be decided by a judge even when they require subsidiary findings of fact. That holding was based primarily on the Court's view that judges are better equipped than juries to determine the meaning of written instruments. The tacking inquiry, by contrast, does not involve construction of any written document, but rather depends on consum-

er impressions of older and newer marks in their commercial contexts. Juries are well-suited to conduct that inquiry because they are made up of consumers who bring community standards to bear on the facts of a particular case.

Trademark disputes involving tacking questions sometimes have been resolved without juries. But the election of some litigants to proceed with a bench trial or to seek an injunction sheds no light on which actor should determine the availability of tacking in a damages suit where a jury has been empaneled. Although the doctrine of tacking promotes fairness in the trademark system, decision-makers faced with a tacking question are not called upon to determine whether it would be “fair” or “equitable” to treat the newer and older marks as the same. They are called on to apply a legal rule to assess evidence of how two marks are used and what message consumers understand them to convey.

D. Submitting tacking questions to juries will not undermine the predictability or efficiency of the trademark system. Tacking determinations are context-specific regardless of whether they are made by a judge or a jury. And while judicial resolution of a tacking issue might expedite the ultimate disposition of an infringement suit, that prospect has never been viewed as a sufficient reason to reallocate traditional functions between judge and jury.

E. The court of appeals applied the correct standard of review. Petitioner did not challenge the jury instruction on tacking or any other tacking-related legal ruling made by the district court. Under those circumstances, the court of appeals properly limited its inquiry to whether any reasonable jury could have

found tacking to be appropriate given the evidence in this case.

#### ARGUMENT

#### IN A TRADEMARK-INFRINGEMENT SUIT THAT IS TRIED TO A JURY, THE JURY MAY PROPERLY BE ASKED TO DETERMINE WHETHER THE UNDERLYING STANDARD FOR TRADEMARK TACKING HAS BEEN SATISFIED

##### A. A Trademark-Tacking Determination Involves Both Factual And Legal Components

The parties agree that, in certain limited circumstances, a trademark owner is entitled to trace the priority of a mark currently in use to the first-use date of a related, but technically distinct, mark. In order to determine whether such “tacking” is permitted in a particular case, the decision-maker must know *both* the legal standard for tacking *and* the relevant facts.

The applicable legal standard for tacking is not in dispute here. As the district court correctly instructed the jury in this case, tacking is appropriate when two marks “create the same, continuing commercial impression, and the later mark [does] not materially differ from or alter the character of the [earlier] mark.” Pet. App. 9a; J.A. 173. See, e.g., *George & Co. LLC v. Imagination Entm’t Ltd.*, 575 F.3d 383, 402 (4th Cir. 2009); *Brookfield Commc’ns, Inc. v. West Coast Entm’t Corp.*, 174 F.3d 1036, 1047-1048 (9th Cir. 1999); *Data Concepts, Inc. v. Digital Consulting, Inc.*, 150 F.3d 620, 623 (6th Cir. 1998); *Van Dyne-Crotty, Inc. v. Wear-Guard Corp.*, 926 F.2d 1156, 1159 (Fed. Cir. 1991); see also *Humble Oil & Ref. Co. v. Sekisui Chem. Co.*, 165 U.S.P.Q. (BNA) 597, 603 (T.T.A.B. 1970) (“The only requirement in these instances is

that the mark be modified in such a fashion as to retain its trademark impact and symbolize a single and continuing commercial impression. That is, a change which does not alter its distinctive characteristics represents a continuity of trademark rights.”). When that standard is satisfied, the two marks are considered to be legal equivalents with the same (earlier) priority date.

Petitioner contends (Br. 20-25) that tacking is a purely legal issue because the ultimate question is whether two marks are “legal equivalents.” In petitioner’s view (Br. 20), the tacking inquiry does not depend on factual determinations but “looks, instead, at whether the marks are close enough to be regarded as *legally* ‘the same.’” Petitioner is correct that the overall tacking determination has a legal *component*, in the sense that the decision-maker must know the governing legal standard in order to determine whether tacking is appropriate in a particular case. If the jury in this case had been asked to determine whether respondent’s older and newer marks should be “tacked,” but had been given no guidance on the legal standard for making that decision, it could not cogently have determined whether tacking was appropriate. It does not follow, however, that the tacking question is *purely* one of law or that it cannot appropriately be submitted to a jury.

The tacking standard requires not that two marks be identical, but that they create the same, continuing commercial impression. As petitioner acknowledges (Br. 19), that inquiry requires a determination of how consumers would view each mark. Although a comparison of the marks themselves may often be sufficient to make this determination, the inquiry may also

involve consideration of other relevant evidence, such as the uses of the two marks and the likely reaction of consumers to them. See pp. 18-20, *infra*. Those subsidiary questions, as well as the ultimate question whether the two marks create the “same, continuing commercial impression,” are factual in character. The fact that the term “legal equivalents” is sometimes used as shorthand for the tacking standard does not obviate the need for those factual inquiries. Indeed, petitioner’s own proposed tacking instruction (D. Ct. Doc. 296, at 6 (May 23, 2011)) did not mention the term “legal equivalents,” but correctly recited the continuing-commercial-impression standard.

**B. The Determination Whether Two Marks Create The Same, Continuing Commercial Impression From The Perspective Of An Ordinary Consumer Is A Factual Determination**

This Court has long recognized “the vexing nature of the distinction between questions of fact and questions of law.” *Pullman-Standard v. Swint*, 456 U.S. 273, 288 (1982); see, e.g., *Thompson v. Keohane*, 516 U.S. 99, 110-111 (1995) (“[T]he proper characterization of a question as one of fact or law is sometimes slippery.”). To determine how an ordinary consumer would view a trademark, however, the decision-maker clearly must resolve questions of fact.

1. The crux of the tacking inquiry is whether two marks create the same, continuing commercial impression or are materially different. That question must be answered from the perspective of an ordinary consumer of the goods or services with which the mark is used—not an ordinary judge, lawyer, or even the owner of a mark—because consumers are the ones who encounter the marks in the marketplace. The

primary purpose of trademark law is to protect consumers from being deceived or confused by competing sellers. See *Qualitex Co. v. Jacobson Prods Co.*, 514 U.S. 159, 163-164 (1995). Thus, the perspective of the ordinary consumer is essential to determining most trademark-law issues, including a mark's "commercial impression." See 3 *McCarthy* § 17:26, at 17-71 ("'Commercial impression,' like most issues in trademark law, should be determined from the perspective of the ordinary purchaser of these kinds of goods or services."); see also *DuoProSS Meditech Corp. v. Inviro Med. Devices, Ltd.*, 695 F.3d 1247, 1253 (Fed. Cir. 2012) ("The commercial impression that a mark conveys must be viewed through the eyes of a consumer.").

Petitioner therefore is wrong in asserting that a tacking inquiry "does not invoke a familiarity of what the Court called in *Railroad Co. v. Stout*[, 84 U.S. (17 Wall.) 657, 664 (1873),] 'the common affairs of life.'" Pet. Br. 21 (brackets in original) (quoting Dorsey D. Ellis, Jr., *Punitive Damages, Due Process, and the Jury*, 40 Ala. L. Rev. 975, 1006 & n.183 (1989)). The tacking determination requires exactly such familiarity. The jury in this case was asked to review advertisements, marketing materials, and testimony, and to determine how ordinary consumers of the services at issue would view the marks in context. That sort of context-dependent inquiry into consumer perception is predominantly factual in character, even though the ultimate tacking determination requires application of a legal standard.

Petitioner is also wrong in asserting (Br. 28) that pure "historical facts" are rarely at issue in tacking determinations. A proper tacking inquiry requires

resolving when a particular mark was first used and how a consumer would have viewed it. Those inquiries frequently involve historical facts. Even when they do not, the absence of disputes about historical facts in a particular inquiry does not render the inquiry legal in nature. Juries are often called upon to apply community and reasonable-person standards to a defined set of circumstances. See, *e.g.*, *Miller v. California*, 413 U.S. 15, 30 (1973) (concluding that determining under “contemporary community standards” whether material “appeals to the ‘prurient interest’ or is ‘patently offensive’” “are essentially questions of fact”). Similarly, in a trademark case where tacking is at issue, the determination whether two marks would create the same, continuing commercial impression for a typical consumer is factual in character and fits comfortably within traditional understandings of the jury’s role.

2. Petitioner argues that the question whether tacking is appropriate in a particular case is a pure question of law because “a virtually identical ‘visual or aural appearance of the marks themselves’ is essential to tacking.” Pet. Br. 19 (quoting *Data Concepts*, 150 F.3d at 623). It is true that, where two marks are so visually or aurally different that an ordinary consumer would not receive the same commercial impression from each, those differences will be dispositive. See *Van Dyne-Crotty, Inc.*, 926 F.2d at 1159; see also Pet. App. 11a (“In determining whether the marks have the same commercial impression, visual or aural appearance *may be instructive.*”) (emphasis added). The existence of easy cases does not, however, convert the continuing-commercial-impression inquiry into one of law. Tacking is available when two marks are so *simi-*

*lar* that they function in an identical way in a commercial setting, *i.e.*, they convey the same impression to consumers. That determination may require a decision-maker to do more than simply look at or sound out the marks in question. And even when looking at or sounding out two marks is enough to determine that an ordinary consumer would not view them as the same, that determination remains one of fact.

The availability of tacking depends on the specific facts of each case, including a close review of the marks themselves and, in cases (like this one) where the marks alone may not resolve the inquiry, additional evidence that illuminates how ordinary consumers would view the marks in light of consumers' experiences and associations. In this case, for example, the ordinary purchasers of respondent's services were "Korean-speaking consumers (consisting of Korean expatriates and Korean Americans) that likely had a preexisting awareness of [respondent] Bank due to its ongoing presence in Korea." Pet. App. 17a. The jury was asked to determine whether those ordinary consumers of respondent's services would have received the same commercial impression from the older and newer marks in question. Evidence relevant to that determination included advertisements that respondent had placed in Korean-language newspapers and evidence from which a jury could have inferred that a typical consumer of respondent's services would have "associated 'Hana Bank' with the 'Hana Overseas Korean Club'" and might have viewed "Hana" as "the most significant portion of the trade name." *Ibid.*<sup>3</sup>

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<sup>3</sup> In support of its view that "[t]he sole inquiry" in this case "was the legal relevance of [respondent's] different marks," petitioner notes that "respondent[] did not present survey or expert evidence

Petitioner points (Br. 20) to the TTAB's decision in *American Paging, Inc. v. American Mobilphone, Inc.*, 13 U.S.P.Q. 2d (BNA) 2036 (1989), aff'd, 923 F.2d 869 (Fed. Cir. 1990) (Table), which found tacking unavailable between AMERICAN MOBILPHONE and AMERICAN MOBILPHONE PAGING. The Board in that case did note that, although the two marks were visually "quite similar," they were "distinguishable when spoken." *Id.* at 2039. But that was not the only basis of the Board's no-tacking determination. The Board also considered evidence of how the marks were used in advertisements and the range of services provided by the trademark owners. *Id.* at 2037-2038. The Board explained, for example, that the mark owner used AMERICAN MOBILPHONE PAGING when advertising in the Yellow Pages under "Paging & Signaling Equipment & Systems," but used AMERICAN MOBILPHONE when advertising in the same volume under "Cellular Telephones" and "Mobile Telephone Equipment & Supplies." *Id.* at 2038. Considering that evidence, as well as the visual and aural (dis)similarity of the marks, the Board concluded that customers who saw the two marks would view each as offering a different type of service. *Id.* at 2038-2039. The Board's analysis correctly considered not only the marks themselves but also the way the marks were used in the marketplace and consumers' likely impres-

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as to how consumers would view the differences among the marks." Br. 28. The court of appeals explained, however, that respondent was not able to gather survey evidence because petitioner "did not suggest that the Bank's marks were materially different and that the Bank could not rely on tacking until the 'eleventh hour.'" Pet. App. 16a n.9.

sions of each. That is quintessentially a factual inquiry.

3. Contrary to petitioner’s contention (Br. 22-24), the fact that courts frequently “consult[] precedent” to resolve questions of trademark tacking does not mean that the tacking determination is a purely legal one. Trademark tacking is a narrow doctrine that “in general should be condoned only in rare instances.” *Van Dyne-Crotty, Inc.*, 926 F.2d at 1160 (internal quotation marks and citation omitted); see also Pet. App. 12a (“Like our sister circuits, we have indicated that tacking applies only in ‘exceptionally narrow’ circumstances.”) (quoting *Brookfield Comm’cns, Inc.*, 174 F.3d at 1047). In many cases, an owner’s claim to priority based on tacking will fail as a matter of law, even construing all of the facts and related inferences in its favor. In such cases, a court may properly grant summary judgment or judgment as a matter of law on tacking. See *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250-252 (1986). Judicial precedents are obviously relevant to the determination whether a reasonable jury could find that tacking is appropriate in a particular case. Thus, while petitioner relies (Br. 23) on the Ninth Circuit’s decision in *One Industries, LLC v. Jim O’Neal Distributing, Inc.*, 578 F.3d 1154 (2009), cert. denied, 559 U.S. 992 (2010), the court of appeals in that case framed the relevant question as “whether the [marks] differ to such a degree that no reasonable jury could conclude that they create the ‘same, continuing commercial impression.’” *Id.* at 1161.<sup>4</sup>

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<sup>4</sup> Petitioner’s reliance on other cases that “consult[] precedent,” Br. 22, is similarly unavailing. In *Specht v. Google, Inc.*, 758 F. Supp. 2d 570 (N.D. Ill. 2010), aff’d, 747 F.3d 929 (7th Cir. 2014),

As the TTAB has long understood, factual context may play an important role in determining whether tacking should be permitted. In *Hess's of Allentown, Inc. v. National Bellas Hess, Inc.*, 169 U.S.P.Q. (BNA) 673 (1971), for example, the Board allowed an entity to trace the priority of its use of “Hess’s” to its prior use of “Hess Brothers” and “Hess.” The Board reviewed testimony and documentary evidence of Hess’s marketing strategy, including advertisements, sponsorships, and promotional materials. *Id.* at 675. The Board concluded that the trademark owner had “adopted the term ‘HESS’S’ to reflect the manner in which the purchasing public had come to refer to and identify its store and operations.” *Id.* at 677. Based on that evidence, the Board concluded that “HESS” and “HESS’S” “are and would be recognized as one and the same designation.” *Ibid.* In other cases, the Board has relied on advertising decisions, context, and design even when determining that two marks create different commercial impressions. *E.g., American*

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petition for cert. pending, No. 14-27 (filed Oct. 6, 2014), for example, the district court relied on precedent only to recite the proper legal standard and to reject a party’s reliance on a particular precedent. *Id.* at 583-584. That court also stated that tacking is a question of fact. *Id.* at 583; see *Children’s Legal Servs. PLLC v. Kresch*, No. 07-10255, 2008 WL 1901245, at \*1-\*2 (E.D. Mich. Apr. 25, 2008) (cited at Pet. Br. 22) (citing precedent to recite the legal standard), *aff’d sub nom. Children’s Legal Servs. P.L.L.C. v. Saiontz Kirk & Miles, P.A.*, No. 08-1677, 2009 WL 1868809 (6th Cir. June 18, 2009) (per curiam). In addition, many counterexamples exist in which a court denied a motion for summary judgment because of factual disputes relating to commercial impression. See *Adventis, Inc. v. Consolidated Prop. Holdings, Inc.*, No. 7:02-CV-00611, 2006 WL 1134129, at \*5-\*6 (W.D. Va. Apr. 24, 2006); *Navistar Int’l Transp. Corp. v. Freightliner Corp.*, No. 96C6922, 1998 WL 911776, \*3-\*6 & n.9 (N.D. Ill. Dec. 28, 1998).

*Paging, Inc.*, 13 U.S.P.Q. 2d (BNA) at 2038-2039 (discussed at p. 20, *supra*).

4. Tacking issues can arise not only in jury trials, but in TTAB proceedings and in bench trials as well.<sup>5</sup> Those cases do not involve juries and therefore do not implicate the specific question presented here, which involves the proper allocation of decision-making authority in a trademark-infringement suit where a jury has been empaneled. This Court's resolution of the judge-jury question is, however, likely to have implications for the proper standard of appellate review of tacking determinations made by the TTAB or by district courts after bench trials.

If the appellant from a TTAB or bench-trial decision contends that the initial decision-maker applied an incorrect legal standard, that challenge (assuming that the TTAB's understanding of applicable trademark law is not entitled to deference) should be reviewed *de novo* on appeal. But if (as is typically the case) the applicable legal standard is undisputed, and the appellant simply contests the initial decision-maker's determination that the older and newer marks do or do not create the "same, continuing commercial impression," a deferential standard of appellate review should apply. In that context, both the ultimate continuing-commercial-impression conclu-

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<sup>5</sup> In fact, trademark actions are frequently resolved in district courts without a jury. According to statistics available on the official United States Courts website, in 2013, approximately 37% of trademark cases that went to trial (15 out of 41) were "nonjury" trials. *Statistical Tables for the Federal Judiciary: Civil Cases Terminated, by Nature of Suit and Action Taken*, <http://www.uscourts.gov/uscourts/Statistics/StatisticalTablesForTheFederalJudiciary/2013/december/C04Dec13.pdf>.

sion, and any subsidiary determinations the decision-maker may have made about the respective appearances of the marks and their uses in commerce, are properly regarded as factual.

**C. When A Trademark-Infringement Suit Is Tried To A Jury, And An Issue Of Trademark Tacking Is Disputed By The Parties, That Issue Should Be Submitted To The Jury Unless The Evidence Compels A Particular Conclusion**

1. In order to decide whether tacking is warranted in a particular case, the decision-maker must understand the legal standard for tacking (*i.e.*, whether two non-identical marks create the same, continuing commercial impression), must weigh and interpret any submitted evidence (*e.g.*, evaluate the appearance and sound of the marks, how each mark was used commercially, and what consumers of the products or services understood the marks to convey), and must apply the legal standard to the facts in evidence (*i.e.*, determine whether consumers of the products or services would have understood the marks to convey the same commercial impression). In a trademark-infringement suit where a jury has been empaneled, the court must resolve any dispute about the applicable legal standard and must articulate that standard in its jury instructions. The court may also decline to submit the tacking issue to the jury if the evidence is such that no reasonable jury could find that tacking is appropriate. See Fed. R. Civ. P. 50(a), 56(a) and (g). But if the issue of tacking is not resolved at summary judgment or on a pre-verdict motion for judgment as a matter of law, the second and third steps of the analysis (assessment of the relevant facts and application of the

governing legal standard to the evidence) are for the jury.

The fact that the third step involves application of a legal standard does not mean that the step must be performed by the court. In cases where a jury is empaneled, its role extends well beyond that of “mere factfinder.” *United States v. Gaudin*, 515 U.S. 506, 514 (1995). When the jury in a criminal case decides whether the defendant committed first degree murder, the jury is not asked “to come forth with ‘findings of fact’ pertaining to each of the essential elements, leaving it to the judge to apply the law to those facts and render the ultimate verdict of ‘guilty’ or ‘not guilty.’” *Id.* at 512-513. On the contrary, “[j]uries at the time of the framing could not be forced to produce mere ‘factual findings,’ but were entitled to deliver a general verdict pronouncing the defendant’s guilt or innocence.” *Id.* at 513. The same approach is followed when a civil jury is asked to decide a question of, *e.g.*, common-law negligence. Thus, “the application-of-legal-standard-to-fact sort of question” called for in determining whether tacking is appropriate in a particular case “has typically been resolved by juries.” *Id.* at 512 (citing James Bradley Thayer, *A Preliminary Treatise on Evidence at the Common Law* 194, 249-250 (1898)).

In many jury trials, there is no meaningful dispute between the parties about the applicable legal rules. If (as in this case) both parties agree that “same, continuing commercial impression” is the legal standard for tacking, the jury’s factual determination whether two marks create the same, continuing commercial impression will effectively resolve the tacking issue. This Court has explained, however, that “an

issue does not lose its factual character merely because its resolution is dispositive of the ultimate \* \* \* question.” *Miller v. Fenton*, 474 U.S. 104, 113 (1985); see *Baumgartner v. United States*, 322 U.S. 665, 670 (1944) (“[A] ‘finding of fact’ may be the ultimate judgment on a mass of details.”). And even in cases where the relevant legal rules are undisputed by the parties, the trial court’s performance of its role as explicator of the law is essential to the jury’s discharge of its duties. The jurors in this case, for example, knew that two marks may be tacked if they create the “same, continuing commercial impression” only because the district court had so instructed them. Once it is accurately instructed on the relevant law, however, the jury’s job “is not merely to determine the facts, but to apply the law to those facts and draw the ultimate conclusion.” *Gaudin*, 515 U.S. at 514.

2. Petitioner’s reliance (Br. 21-22, 29-30) on *Markman v. Westview Instruments, Inc.*, 517 U.S. 370 (1996), is misplaced. The Court in *Markman* held that, in a patent-infringement suit, the trial court rather than the jury should resolve disputes concerning the proper construction of patent claims. The Court characterized claim construction as a “mongrel practice,” *id.* at 378, and it recognized that claim construction may sometimes turn on “testimony requiring credibility determinations,” *id.* at 389. The Court found it decisive, however, that “[t]he construction of written instruments is one of those things that judges often do and are likely to do better than jurors unburdened by training in exegesis.” *Id.* at 388.

The tacking inquiry is altogether different. The determination whether two marks create the “same, continuing commercial impression” does not involve

the interpretation of any written document. Rather, the determination turns on the likely perception of an average consumer given the appearance and prior use of the marks in question. Juries are made up of consumers who together bring community standards to bear on the facts of a particular case. The functional considerations that were dispositive in *Markman* therefore point in the opposite direction here.

3. Petitioner argues (Br. 30-35) that the determination whether tacking is appropriate in a particular case has historically been entrusted to trial judges rather than to juries. Petitioner relies most heavily (Br. 30-33) on the decisions in *Beech-Nut Packing Co. v. P. Lorillard Co.*, 299 F. 834 (D.N.J. 1924), *aff'd*, 7 F.2d 967 (3d Cir. 1925), *aff'd*, 273 U.S. 629 (1927). Petitioner points out that *Beech-Nut Packing* was decided without “the assistance of a jury,” Br. 33, and views that as evidence that tacking questions should still be decided by trial judges even in infringement suits where juries have been empaneled.

The decisions in *Beech-Nut Packing*, however, predated the merger of law and equity in federal courts and involved equitable claims for an injunction and an accounting. 299 F. at 835. At that time, and stretching back to the chancery courts of England, trademark owners could pursue damages actions in courts of law or injunctive and accounting actions in courts of equity. *Trade-mark Cases*, 100 U.S. 82, 92 (1879). The fact that no jury was empaneled in *Beech-Nut Packing* sheds no meaningful light on the division of responsibility between judge and jury in a case like this one, where a jury *was* empaneled and respondent clearly had a right to a jury determination on the ultimate question of trademark infringement. See

*Dairy Queen v. Wood*, 369 U.S. 469, 477 (1962) (recognizing a right to a jury trial in trademark-infringement suit for damages); cf. *Markman*, 517 U.S. at 377 (explaining that “there is no dispute that [patent-]infringement cases today must be tried to a jury” upon request; rather, the contested point was “whether a particular issue occurring within a jury trial (here the construction of a patent claim) is itself necessarily a jury issue”).<sup>6</sup>

4. There is likewise no merit to petitioner’s argument (Br. 35-38) that the tacking issue should be decided by a court because tacking is an equitable doctrine. To be sure, the doctrine of tacking might reasonably be described as reflecting a conclusion that the trademark system will be “fairer” if senior trademark users can make minor refinements to their marks without losing their priority. But a multitude of legal rules, whether specifically mandated by Con-

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<sup>6</sup> Many of the other decisions on which petitioner relies likewise do not support its position. Several cited decisions reviewed a district court’s grant of summary judgment or dismissal of a complaint. See, e.g., *Perfectform Corp. v. Perfect Brassiere Co.*, 256 F.2d 736, 738 (3d Cir.), cert. denied, 358 U.S. 919 (1958). In *Drexel Enterprises, Inc. v. Richardson*, 312 F.2d 525 (10th Cir. 1962), the court of appeals reviewed the result of a bench trial and affirmed the judge’s finding of “fact[.]” that no evidence in the record established that a business intended to abandon a mark when it altered the mark’s form. *Id.* at 527. The decision in *Miami Credit Bureau, Inc. v. Credit Bureau, Inc.*, 276 F.2d 565, 568 (5th Cir. 1960), reviewed a non-jury proceeding in which the district court had granted a request for an injunction. It also relied on extrinsic evidence and did not appear to involve a question of tacking. Although the plaintiff in that case updated its mark, it did so before the accused infringer first used its infringing mark. *Id.* at 566-567. Tacking is not an issue when a revised mark has priority without reference to its earlier form.

gress or adopted as judicial or administrative glosses on more general statutory language, are intended to promote fairness. Resolution of factual issues bearing on the application of such rules is routinely entrusted to juries.

In this case, the jury was not instructed to determine whether it would be “fair” or “equitable” to treat respondent’s older and newer marks as the same mark. Rather, the jury was instructed on various legal rules used to determine the relative priority of competing trademarks, including the rule that tacking is appropriate (*i.e.*, that the newer mark should take on the older mark’s priority date) if one entity’s older and newer marks create the “same, continuing commercial impression.” In applying those rules to the circumstances of this case, the jurors could rely on evidence concerning the manner in which the marks had been used in the past, and on the jurors’ own experiences and understanding as consumers in the marketplace. The fact that the priority rules themselves were devised at least in part to promote fairness does not mean that the application of those rules was beyond the jury’s purview.

**D. Treating The Issue Of Trademark Tacking As A Question For The Jury Would Not Undermine The Administration Of The Trademark System**

Petitioner argues (Br. 25-27) that, if the determination whether tacking is appropriate in a particular case is entrusted to the jury rather than made by the court, the predictable and efficient operation of the trademark system will be compromised. That is incorrect.

1. Petitioner argues (Br. 26) that, “[w]hen trademark owners consider making alterations to their

valuable marks, they require predictability,” and that such predictability is impossible if tacking issues are submitted to juries. Even if the tacking determination is treated as a jury question, however, the district court can grant summary judgment or judgment as a matter of law if it determines that the evidence compels a particular conclusion. In ruling on such motions, judges can issue opinions that clarify at least the outer boundaries of permissible tacking.

Thus, even under the approach taken by the court below, the question of tacking must actually be presented to the jury only in those cases where the district court concludes that a jury could reasonably decide the issue in favor of either party. There is no reason to suppose that judicial decisions in that category of cases will markedly reduce whatever uncertainty trademark owners would otherwise face. That is particularly so because (a) tacking determinations are context-specific, depending on a visual or aural comparison between two marks, as well as on evidence of marketplace usage and likely consumer reactions; and (b) a judge’s tacking decision in a case that could reasonably be resolved in favor of either party would provide no guarantee that other judges would reach the same conclusion even in a case with identical facts.

2. Treating the “same, continuing commercial impression” inquiry as involving a question of fact would also be consistent with the standard governing judicial review of allowance of trademark amendments. Section 7(e) of the Lanham Act authorizes amendments to registered marks when “the amendment or disclaimer does not alter materially the character of the mark.” 15 U.S.C. 1057(e); see also 37 C.F.R. 2.72(a)(2). To satisfy that standard, “[t]he modified mark must con-

tain what is the essence of the original mark, and the new form must create the impression of being essentially the same mark.” *In re Hacot-Colombier*, 105 F.3d 616, 620 (Fed. Cir. 1997) (citation omitted). Echoing the tacking standard, the TTAB looks to whether “the new and old forms of the mark” “create essentially the same commercial impression.” *In re Who? Vision Sys., Inc.*, 57 U.S.P.Q. 2d (BNA) 1211, 1218 (2000) (citation omitted). The Federal Circuit has held that the TTAB’s determination whether a material alteration has occurred is a determination of fact entitled to deferential review. *In re Thrifty, Inc.*, 274 F.3d 1349, 1352-1353 (Fed. Cir. 2001); *Hacot-Colombier*, 105 F.3d at 618. For substantially the same reasons, the determination whether older and newer marks create the “same, continuing commercial impression” is appropriately entrusted to civil juries.

3. Petitioner argues (Br. 27) that, because “[t]rademark tacking is often dispositive of an infringement claim,” allowing a judge to decide tacking as a matter of law at the outset of a case would promote efficiency. In many contexts, however, judicial resolution of a particular subsidiary issue would expedite the ultimate disposition of a suit. That prospect has never been viewed as a sufficient ground for judicial resolution of factual issues that are otherwise within the jury’s purview.

**E. The Court Of Appeals Applied The Correct Standard Of Review With Respect To The Appropriateness Of Tacking Under The Circumstances Of This Case**

This Court granted certiorari on the following question: “Whether the jury or the court determines whether use of an older mark may be tacked to a newer one?” Pet. i. That question concerns the proper

allocation of authority between judge and jury in a civil case where a jury has been empaneled. Petitioner does not appear to assert, as an alternative ground for reversal, that the court of appeals should have reviewed the jury's priority determination *de novo* even if that issue was properly submitted to the jury.

In any event, the court of appeals applied the correct standard of review. If petitioner believed that the jury's verdict was premised on an incorrect understanding of the law, it could have argued on appeal (if it had preserved the challenge in the district court) that the jury instructions were erroneous. Petitioner did not raise such an argument on appeal, however, and the tacking instruction given at trial was not meaningfully different from the instruction that petitioner had proposed. Absent any challenge to the jury instruction, or to any other district court legal ruling (*e.g.*, the exclusion or introduction of evidence whose admissibility was contested) relevant to the tacking issue, petitioner's remaining recourse was to contend that the evidence was insufficient to support the jury's verdict. Cf. p. 23, *supra* (discussing analogous standard-of-review questions in trademark cases involving bench trials and TTAB proceedings).

Petitioner asserted such an argument, filing pre- and post-verdict motions for judgment as a matter of law, see Pet. App. 8a, 9a, and then appealing the district court's denial of those motions, see *id.* at 10a. In reviewing those denials, the court of appeals was required to apply the same standard that the district court applied initially, under which petitioner could obtain judgment as a matter of law only if "a reasonable jury would not have a legally sufficient evidentiary basis to find for [respondent] on [the tacking]

issue.” Fed. R. Civ. P. 50(a)(1); see Pet. App. 9a-10a (district court denied petitioner’s post-verdict motion for judgment as a matter of law because, *inter alia*, “there was sufficient evidence to support the jury’s verdict on priority”).<sup>7</sup> The court of appeals correctly recognized that, “[a]s the losing party in a jury trial, [petitioner] must show that its interpretation of the evidence is the *only* reasonable one” in order to prevail on a sufficiency challenge. *Id.* at 16a. Thus, if the issue of tacking was properly submitted to the jury in the first instance, the court of appeals correctly articulated the appropriate inquiry on appeal.

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<sup>7</sup> The court of appeals stated that “[t]acking requires a highly fact-sensitive inquiry, *and the jury decided the issue* after receiving an instruction that correctly conveyed the narrowness of the doctrine.” Pet. App. 16a (emphasis added). As we explain above (see note 2, *supra*), it is not clear whether the jury actually relied on a tacking theory in concluding that respondent had “used its mark in commerce in the United States beginning prior to April 1, 1995.” J.A. 174. But if this Court assumes that the jury found tacking to be appropriate, and in the absence of any challenge to the jury instructions or to any other pertinent legal ruling, the question for a reviewing court is whether a reasonable jury could have so concluded.

**CONCLUSION**

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

SARAH T. HARRIS  
*General Counsel*  
NATHAN K. KELLEY  
*Solicitor*  
THOMAS W. KRAUSE  
*Deputy Solicitor*  
JAMIE L. SIMPSON  
CHRISTINA J. HIEBER  
AMY J. NELSON  
*Associate Solicitors*  
*U.S. Patent and Trademark*  
*Office*

DONALD B. VERRILLI, JR.  
*Solicitor General*  
JOYCE R. BRANDA  
*Acting Assistant Attorney*  
*General*  
MALCOLM L. STEWART  
*Deputy Solicitor General*  
SARAH E. HARRINGTON  
*Assistant to the Solicitor*  
*General*  
MARK R. FREEMAN  
MEGAN BARBERO  
*Attorneys*

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