No. 12-873

In The Supreme Court of the United States

LEXMARK INTERNATIONAL, INC.,

Petitioner,

v.

STATIC CONTROL COMPONENTS, INC.,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

BRIEF OF THE AMERICAN ANTITRUST INSTITUTE AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENT

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Am. Professional Testing Svc., Inc. v. Harcourt Brace Jovanovich Legal & Professional Publications, Inc., 108 F.3d 1147 (9th Cir. 1997) 11

Am. Soc'y of Mech. Eng'rs v. Hydrolevel, 456 U.S. 556 (1982) 11

Associated General Contractors of Cal., Inc. v. Cal. State Council of Carpenters, 459 U.S. 519 (1983) ..... *passim*

Association of Data Processing Service Orgs., Inc. v. Camp, 397 U.S. 150 (1970) 12, 13

Audi AG v. D'Amato, 469 F.3d 534 (6th Cir. 2006) 19

Bennett v. Spear, 520 U.S. 154 (1997) 12, 13, 14

Blue Shield of Va. v. McCready, 457 U.S. 465 (1982) 15

Boston Stock Exch. v. State Tax Comm'n, 429 U.S. 318 (1977) 13

Brooke Group Ltd. v. Brown & Williamson Tobacco Corp., 509 U.S. 209 (1993) 31

Brown Shoe Co. v. United States, 370 U.S. 294 (1962) 30

California v. Am. Stores Co., 495 U.S. 271 (1990) 30

TABLE OF AUTHORITIES – Continued

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Camel Hair & Cashmere Institute of Am., Inc. v. Associated Dry Goods Corp., 799 F.2d 6 (1st Cir. 1986) 19

Century 21 Real Estate Corp. v. Sandlin, 846 F.2d 1175 (9th Cir. 1988) 19

Clarke v. Sec. Indus. Ass'n, 479 U.S. 388 (1987) 13, 15, 26

Continental Television, Inc. v. GTE Sylvania, Inc., 433 U.S. 36 (1977) 31

Dennis v. Higgins, 498 U.S. 439 (1991) 13

Eagles, Ltd. v. Am. Eagle Found., 356 F.3d 724 (6th Cir. 2004) 20

FEC v. Akins, 524 U.S. 11 (1998) 13

Gracie v. Gracie, 217 F.3d 1060 (9th Cir. 2000) 20

In re Flash Memory Antitrust Litig., 643 F. Supp. 2d 1133 (N.D. Cal. 2009) 27

In re Graphics Processing Units Antitrust Litig., 540 F. Supp. 2d 1085 (N.D. Cal. 2007) 27

ITC Ltd. v. Punchgini, Inc., 482 F.3d 135 (2d Cir. 2007) 18

Leegin Creative Leather Prods., Inc. v. PSKS, Inc., 551 U.S. 877 (2007) 30

Lucas v. Bechtel Corp., 800 F.2d 839 (9th Cir. 1986) 28

Mandeville Island Farms, Inc. v. Am. Crystal Sugar Co., 334 U.S. 219 (1948) 29

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Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians v. Patchak, 132 S. Ct. 2199 (2012) 3, 13

National Credit Union Admin. v. First Nat. Bank & Trust Co., 522 U.S. 479 (1998) 12, 13

Ortho Pharm. Corp. v. Cosprophar, Inc., 32 F.3d 690 (2d Cir. 1994) 18

Rambus, Inc. v. FTC, 522 F.3d 456 (D.C. Cir. 2008) 11

Sandoz Pharms. Corp. v. Richardson-Vicks, Inc., 902 F.2d 222 (3d Cir. 1990) 9

SAS of Puerto Rico, Inc. v. Puerto Rico Tel. Co., 48 F.3d 39 (1st Cir. 1995) 28

Schachar v. Am. Academy of Opthalmology, 870 F.2d 397 (7th Cir. 1989) 11

Static Control Components, Inc. v. Lexmark International, Inc., 697 F.3d 387 (6th Cir. 2012) 17

Thompson v. N. Am. Stainless, LP, 131 S. Ct. 863 (2011) 12, 13, 14

U.S. Healthcare, Inc. v. Healthsource, Inc., 986 F.2d 589 (1st Cir. 1993) 25

United States v. Grinnell Corp., 384 U.S. 563 (1966) 11

Walker Process Equipment, Inc. v. Food Machinery & Chemical Corp., 382 U.S. 172 (1965) 11

TABLE OF AUTHORITIES – Continued

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William H. Morris Co. v. Group W, Inc., 66 F.3d 255 (9th Cir. 1995) 20

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2 U.S.C. § 437g(8)(B) 13

5 U.S.C. § 702 13

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15 U.S.C. § 298(b) 14

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15 U.S.C. § 1120 5

15 U.S.C. § 1125(a) 2, 5, 13, 14

15 U.S.C. § 1125(b) 5

15 U.S.C. § 1127 .....*passim*

42 U.S.C. § 1983 13

42 U.S.C. § 2000e-5(b) 13

42 U.S.C. § 2000e-5(f)(1) 13

OTHER AUTHORITIES

133 Cong. Rec. S 16546 (daily ed. Nov. 19, 1987) 6

134 Cong. Rec. H 10411-02 (daily ed. Oct. 19, 1988) 6

TABLE OF AUTHORITIES – Continued

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Philip A. Areeda, *The Changing Contours of the Per Se Rule*, 54 Antitrust L.J. 27 (1985) 25

Joseph P. Bauer, *A Federal Law of Unfair Competition: What Should Be the Reach of Section 43(a) of the Lanham Act*, 31 UCLA L. Rev. 671 (1983) 7

Joseph P. Bauer, *The Stealth Assault on Antitrust Enforcement: Raising the Barriers for Antitrust Injury and Standing*, 62 U. Pitt. L. Rev. 437 (2001) 29

Arthur Best, *Controlling False Advertising: A Comparative Study of Public Regulation, Industry Self-Policing, and Private Litigation*, 20 Ga. L. Rev. 1 (1985).....20, 23, 24

Jean Wegman Burns, *Confused Jurisprudence: False Advertising under the Lanham Act*, 79 B.U. L. Rev. 807 (1999) 20

Jean Wegman Burns, *The Paradox of Antitrust and Lanham Act Standing*, 42 UCLA L. Rev. 47 (1994).....*passim*

Carolyn L. Carter, National Consumer Law Center, Consumer Protection in the States: A 50-State Report on Unfair and Deceptive Acts and Practices Statutes (Feb. 2009), *available at* http://www.nclc.org/images/pdf/udap/report_50_states.pdf.....10

Susan A. Creighton et al., *Cheap Exclusion*, 72 Antitrust L.J. 975 (2005) 8

TABLE OF AUTHORITIES – Continued

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Joshua P. Davis & Robert H. Lande, *Toward an Empirical and Theoretical Assessment of Private Antitrust Enforcement*, 36 Seattle U. L. Rev. 1269 (2013).....30

Federal Trade Commission, FTC Policy Statement on Deception (Oct. 14, 1983), *available at* http://www.ftc.gov/bcp/policystmt/ad-decept.htm 10

C. Douglas Floyd, *Antitrust Victims Without Antitrust Remedies: The Narrowing of Standing in Private Antitrust Actions*, 82 Minn. L. Rev. 1 (1997).....28, 29

John J. Flynn, *Which Past Is Prolog? The Future of Private Antitrust Enforcement*, 35 Antitrust Bull. 879 (1990) 27

Harry S. Gerla, *Federal Antitrust Law and the Flow of Consumer Information*, 42 Syracuse L. Rev. 1029 (1991).....8, 9

Lee Goldman, *The World's Best Article on Competitor Suits for False Advertising*, 45 Fla. L. Rev. 487 (1993) 21

Jonathan M. Jacobson & Tracy Greer, *Twenty-One Years of Antitrust Injury: Down the Alley with* Brunswick v. Pueblo Bowl-O-Mat, 66 Antitrust L.J. 273 (1998) 27

Louis Kaplow, *Why (Ever) Define Markets?*, 124 Harv. L. Rev. 438 (2010).....25

TABLE OF AUTHORITIES – Continued

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Robert H. Lande & Joshua P. Davis, *Benefits from Private Antitrust Enforcement: An Analysis of Forty Cases*, 42 U.S.F. L. Rev. 879 (2008).....30

Gerald P. Meyer, *Standing Out: A Commonsense Approach to Standing for False Advertising Suits Under Lanham Act Section 43(a)*, 2009 U. Ill. L. Rev. 309 (2009).....21, 24

Mark R. Patterson, *Coercion, Deception, and Other Demand-Increasing Practices in Antitrust Law*, 66 Antitrust L.J. 1 (1997) 7

Arthur C. Pigou, The Economics of Welfare (4th ed. 1932).....8

Robert Pitofsky, *New Definitions of Relevant Market and the Assault on Antitrust*, 90 Colum. L. Rev. 1805 (1990) 25

A. Mitchell Polinsky & Steven Shavell, *The Theory of Public Enforcement of Law*, *in* I Handbook of Law & Economics (A. Mitchell Polinsky & Steven Shavell eds. 2007).....10

Robert Prentice, *Vaporware: Imaginary High-Tech Products and Real Antitrust Liability in a Post-Chicago World*, 57 Ohio St. L.J. 1163 (1996).....9

S. Rep. No. 100-515 (1988).....6

Roger E. Schechter, *Additional Pieces of the Deception Puzzle: Some Reactions to Professor BeVier*, 78 Va. L. Rev. 57 (1992).....21

TABLE OF AUTHORITIES – Continued

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Maurice E. Stucke, *How Do (and Should) Competition Authorities Treat a Dominant Firm's Deception?*, 63 SMU L. Rev. 1069 (2010) 23

Maurice E. Stucke, *When a Monopolist Deceives*, 76 Antitrust L.J. 823 (2010) 7, 8

Stephen D. Susman, *Standing in Private Antitrust Cases: Where Is the Supreme Court Going?*, 52 Antitrust L.J. 465 (1983) 29

Diane Taing, *Competition for Standing: Defining the Commercial Plaintiff Under Section 43(a) of the Lanham Act*, 16 Geo. Mason L. Rev. 493 (2009) 18

Robert P. Taylor, *Antitrust Standing: Its Growing – Or More Accurately Its Shrinking – Dimensions*, 55 Antitrust L.J. 515 (1986) 27

Rebecca Tushnet, *Fighting Freestyle: The First Amendment, Fairness, and Corporate Reputation*, 50 B.C. L. Rev. 1457 (2009) 10

Rebecca Tushnet, *Running the Gamut from A to B: Federal Trademark and False Advertising Law*, 159 U. Pa. L. Rev. 1305 (2011) 22, 23, 26

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Restatement (Second) of Torts § 552 (1977) 8

INTEREST OF *AMICUS CURIAE*

The American Antitrust Institute ("AAI") is an independent and non-profit education, research, and advocacy organization devoted to advancing the role of competition in the economy, protecting consumers, and sustaining the vitality of the antitrust laws.[1] These goals of U.S. competition policy could be seriously undermined if the Court adopts an unduly restrictive prudential standing test for claims under Section 43(a) of the Lanham Act, which plays a central role in ensuring the dissemination of accurate information in the market and thereby protecting consumers, competitors, and the competitive process.

SUMMARY OF ARGUMENT

The prudential standing test for claims under Section 43(a) of the Lanham Act must ensure adequate

[1] The parties have lodged blanket consents to the filing of *amicus* briefs with the clerk. No person other than *amicus curiae* or its counsel authored this brief in whole or in part or made a monetary contribution intended to fund its preparation or submission. The AAI is managed by its Board of Directors, with the guidance of an Advisory Board that consists of approximately 125 prominent antitrust lawyers, law professors, economists, and business leaders. The AAI's Board of Directors has approved this filing for the AAI; individual views of members of the Board of Directors or Advisory Board may differ from the AAI's positions. Certain members of the Advisory Board are attorneys at Constantine Cannon LLP, which is counsel for respondent. They played no role in the Directors' deliberations or the preparation or submission of the brief.

deterrence of deception. False and misleading statements can inflict serious harm on the marketplace and distort the competitive process in myriad ways, without having any offsetting salutary effects. At the same time, neither public enforcement of state and federal consumer protection statutes nor public and private enforcement of the antitrust laws alone can adequately police deception. The Federal Trade Commission and state attorneys general can remedy some deceptive conduct under their consumer protection authority, but they face legal obstacles and resource constraints. Likewise, public and private plaintiffs can challenge deception under the antitrust laws, but they face high standards of proof and can realistically reach only a subset of deceptive conduct. Because of these practical limitations, the Lanham Act plays an essential role in policing deceptive behavior by market participants.

The Court should adopt the zone-of-interests test to govern prudential standing under Section 43(a) of the Lanham Act, which provides a cause of action to "any person who believes that he or she is or is likely to be damaged" by false advertising. 15 U.S.C. § 1125(a). The various circuit courts currently apply a categorical test, a multi-factor *Associated General Contractors* (AGC) test, or a reasonable interest test to claims under Section 43(a). The Court, however, has held that the zone-of-interests test is the ordinary test for statutory standing and that departures from it must be rooted in statutory policy. The core statutory policy of the Lanham Act is to broadly

deter anticompetitive deception in the marketplace. Consistent with this policy and the plain meaning of the statutory text, the zone-of-interests test would bar only those false advertising claims that are marginally related to or inconsistent with the Lanham Act's purpose. *See Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians v. Patchak*, 132 S. Ct. 2199, 2210 (2012).

If the Court should depart from the zone-of-interests test and choose from among the tests described in the Question Presented, it should adopt the reasonable interest test. Of the three tests, the reasonable interest test best effectuates Lanham Act statutory policy. Like the zone-of-interests test, it promotes the policing of false and misleading statements and reduces the risk that deceptive conduct – harmful to consumers, competitors, and competition – will go unchallenged. Fears that the reasonable interest test will lead to a flood of litigation or deter truthful advertising are, at the very least, overstated, and they have not been borne out in jurisdictions that apply the reasonable interest test. The Lanham Act prohibits false or misleading statements, not advertising generally, and distinguishing between truthful and false statements is not particularly complex. Moreover, remedies under the Lanham Act are limited; successful plaintiffs ordinarily obtain injunctions prohibiting only *future* deception by the defendant. The fear of chilling effects is also undercut by the sophistication of the modern advertising enterprise.

The Court should reject the categorical and AGC tests. The categorical test, which limits standing to direct competitors of the defendant, would likely result in underdeterrence of anticompetitive behavior. Competitors sometimes may not have the incentive to challenge the deception of rivals, either because they benefit from the deception or because the economically rational response is to emulate the deception. As a result, if this test were adopted, some of the most pernicious forms of deception would likely go unchallenged. Insofar as the categorical test requires courts to define relevant markets, it would not be simple to apply; market definition has proven to be a costly, time-consuming, and uncertain process in antitrust litigation. The AGC test, applicable to claims for damages under the Clayton Act, has been problematic in the antitrust context and should not be applied to a distinct statutory scheme with facially more limited injury requirements and narrower remedies. The test features duplicative criteria that tend to weigh against standing and often requires the resolution of complex issues of fact at the pleading stage. It has weakened the enforcement of the antitrust laws in the name of identifying the "optimal" plaintiff, and it is particularly inappropriate for Lanham Act claims.

ARGUMENT

I. THE LANHAM ACT PLAYS A CENTRAL ROLE IN BROADLY DETERRING ANTI-COMPETITIVE DECEPTION

A proper prudential standing test for Section 43(a) claims must effectuate the Lanham Act's core policy goal, which is to deter anticompetitive deception. By its plain text, "the intent" of the Lanham Act is to "mak[e] actionable the deceptive and misleading use of marks in [interstate] commerce" and "to prevent fraud and deception in such commerce." 15 U.S.C. § 1127.[2] Section 43(a), the unfair competition provision, prohibits any "false designation of origin," "false or misleading description of fact," or "false or misleading representation of fact" that is "likely . . . to deceive" or that "misrepresents" in connection with goods or services in commercial advertising or promotion. 15 U.S.C. § 1125(a). The text gives a cause of action to "any person who believes that he or she is or is likely to be damaged" by such conduct. *Id*.

Consistent with the text, the legislative history of Section 43(a), including the Trademark Law Revision

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[2] In addition to the broad statement of intent in 15 U.S.C. § 1127, the Act's individual provisions reflect a strong emphasis on deception. *See, e.g*., *id*. §§ 1114(a), 1127 ("colorable imitations" "likely . . . to deceive"); *id*. § 1114(a) (reproductions, counterfeits and copies "likely . . . to deceive"); *id*. § 1125(b) (bad faith provision of "misleading false contact information"); *id*. § 1120 (procurement of a registered mark "by a false or fraudulent declaration or representation" or "by any false means").

Act of 1988 (TLRA), suggests a clear congressional preference for broad prohibitions on anticompetitive deception in the false advertising context. *See, e.g.,* S. Rep. No. 100-515, at 1 (1988) (describing purpose as improving "the law's protection of the public from . . . deception"). The TLRA intentionally expanded the remedial provisions in Section 43(a) that punish deception. *See id*. at 38 (expanded remedies will serve the "public policy of deterring acts of unfair competition").[3]

A. Deception Can Have Significant Anticompetitive Effects

Congressional concern about anticompetitive deception is warranted because deceptive practices can have significant anticompetitive effects. Deception in commercial advertising or promotion can harm competition, consumers, and competitors by raising prices, reducing output, deterring entry, and

[3] Apart from the Senate report, individual sponsors of the TLRA expressed a preference for strong protections and expansive applications to protect against false advertising. *See* 133 Cong. Rec. S 16546 (daily ed. Nov. 19, 1987) (statement of Sen. DeConcini) (Trademark Law Revision Act of 1987 would "strengthen[ ]" 43(a) by broadening remedies and scope of actionable conduct); *id*. (1987 bill would conform to "expanded scope of protection"); *id*. (intent was for courts to continue giving 43(a) same "innovative interpretation"); 134 Cong. Rec. H 10411-02 (daily ed. Oct. 19, 1988) (statement of Rep. Kastenmeier) (applauding Act's authorization of expanded remedies not previously available in Section 43(a) cases).

decreasing product quality and consumer choice. Compounding the problem, deception is a low-cost and financially rational tactic that creates no salutary competitive benefits to offset its anticompetitive harm. Moreover, deceptive harm can be particularly injurious to consumer welfare, because it often inhibits both dynamic and allocative efficiency.

When a firm successfully deceives, it is unjustly enriched at the expense of other market participants. Deception injures consumers by inducing mistaken demand for inferior or unneeded products, raising search costs, and sometimes creating "lemon" markets where lower-quality goods or services drive out higher-quality goods. Deception also injures competitors by raising their costs (whether to differentiate their products from the deceiver's or to respond to the deceptive statements), raising entry barriers, or by driving them out of the market. Moreover, deception injures competition itself, because it distorts markets and misallocates resources. *See* Maurice E. Stucke, *When a Monopolist Deceives*, 76 Antitrust L.J. 823, 824-25 (2010); Mark R. Patterson, *Coercion, Deception, and Other Demand-Increasing Practices in Antitrust Law*, 66 Antitrust L.J. 1, 12-16 (1997); Joseph P. Bauer, *A Federal Law of Unfair Competition: What Should Be the Reach of Section 43(a) of the Lanham Act*, 31 UCLA L. Rev. 671, 672-73 (1983).

For paying this price, society receives nothing in return. Deception is a form of "cheap exclusion." It is not merely a low-cost exclusionary strategy but "a particular kind of low-cost exclusionary strategy,

namely, one that does not raise any cognizable efficiency claims; that is, 'cheap' in that it has little positive value." Susan A. Creighton et al., *Cheap Exclusion*, 72 Antitrust L.J. 975, 977 (2005). *See also* Stucke, *supra*, at 825 ("Deception lacks any redeeming economic qualities or cognizable efficiency justifications"); Harry S. Gerla, *Federal Antitrust Law and the Flow of Consumer Information*, 42 Syracuse L. Rev. 1029, 1030 (1991) ("False or misleading information is deadweight economic loss, causing injury without any offsetting economic benefit. Supplying such information to consumers also offends basic societal moral values."); Restatement (Second) of Torts § 552 cmt. a (1977) ("[N]o interest of society is served by promoting the flow of information not genuinely believed by its maker to be true."); Arthur C. Pigou, The Economics of Welfare pt. II ch. IX § 17 (4th ed. 1932) ("As a rule . . . the social net product of any dose of resources invested in a deceptive activity is negative. Consequently, . . . absolute prohibition of the activity is required.").

Worse yet, deception can be an effective predatory strategy to thwart new and innovative products, which can cause comparatively greater harm to consumer welfare by impeding dynamic efficiency. Disseminating false information about innovative, new and complex products "is particularly effective" because "disparaging claims about the innovation will be much more credible than claims about products which the consumer has used in the past." Gerla, *supra*, at 1068. Moreover, "[t]echnical, scientific, or

other professional fields are precisely the areas in which false information (particularly derogatory information) is most likely to be believed by consumers." *Id*. at 1089. *See also* Robert Prentice, *Vaporware: Imaginary High-Tech Products and Real Antitrust Liability in a Post-Chicago World*, 57 Ohio St. L.J. 1163 (1996) (describing market-freezing effects and harm to innovation caused by fraudulent announcements of new software programs not in fact forthcoming, which discourage consumers from trying new products).

B. Other Competition Laws Alone Cannot Adequately Police Deceptive Conduct in the Marketplace

A prudential standing test for Section 43(a) claims should recognize not only that deception is unambiguously harmful, but that private actions under the Lanham Act play a central role in deterring that harm. First, public enforcement can play only a limited role. Although the Federal Trade Commission ("FTC") polices deceptive acts and practices pursuant to Sections 5 and 12 of the Federal Trade Commission Act, and every state has an unfair and deceptive acts and practices ("UDAP") statute, the FTC and the states do not have sufficient resources to police commercial deception comprehensively. "The FTC is not required to prosecute every potential false advertising claim it identifies," *Sandoz Pharms. Corp. v. Richardson-Vicks, Inc.*, 902 F.2d 222, 229 n.8 (3d Cir. 1990), and it "will essentially never get involved if there is a

specific target of negative speech that can take care of itself (sometimes with a Lanham Act lawsuit)." Rebecca Tushnet, *Fighting Freestyle: The First Amendment, Fairness, and Corporate Reputation*, 50 B.C. L. Rev. 1457, 1472 (2009); *see also* Federal Trade Commission, FTC Policy Statement on Deception (Oct. 14, 1983), *available at* http://www.ftc.gov/bcp/policystmt/ad-decept.htm (distinguishing among potentially deceptive practices the agency is more and less likely to pursue).

Likewise, "in almost all states significant gaps or weaknesses undermine the promise of UDAP protections for consumers." Carolyn L. Carter, National Consumer Law Center, Consumer Protection in the States: A 50-State Report on Unfair and Deceptive Acts and Practices Statutes 3 (Feb. 2009), *available at* http://www.nclc.org/images/pdf/udap/report_50_states.pdf.[4] Private enforcement under the Lanham Act is, therefore, a necessary complement to public enforcement. *See also* A. Mitchell Polinsky & Steven Shavell, *The Theory of Public Enforcement of Law*, *in* I Handbook of Law & Economics 403, 406 (A. Mitchell Polinsky & Steven Shavell eds. 2007) (noting that "allowing private suits for harm will motivate victims

[4] The National Consumer Law Center's report on state enforcement concluded that "[t]he holes are glaring. Legislation or court decisions in dozens of states have narrowed the scope of UDAP laws or granted sweeping exemptions to entire industries. Other states have placed substantial legal obstacles in the path of officials charged with UDAP enforcement, or imposed ceilings as low as $1,000 on civil penalties." Carolyn L. Carter, 50-State Report, *supra* at 3.

to initiate legal action and thus will harness the information they have for purposes of law enforcement").

Second, the antitrust laws can reach only a relatively small subset of deceptive behavior. Causes of action under the Sherman Act, for example, arise only for unreasonable restraints of trade, which requires the element of agreement, *Am. Needle, Inc. v. Nat'l Football League*, 130 S. Ct. 2201, 2208 (2010), and for monopolization, which requires the element of monopoly power, *United States v. Grinnell Corp.*, 384 U.S. 563, 570-71 (1966). These and other limitations on Sherman Act claims often lead courts to dismiss antitrust claims involving deception, if they are brought at all. *See, e.g., Rambus, Inc. v. FTC*, 522 F.3d 456 (D.C. Cir. 2008); *Am. Professional Testing Svc., Inc. v. Harcourt Brace Jovanovich Legal & Professional Publications, Inc.*, 108 F.3d 114 (9th Cir. 1997); *Schachar v. Am. Academy of Opthalmology*, 870 F.2d 397 (7th Cir. 1989). *But see Am. Soc'y of Mech. Eng'rs v. Hydrolevel*, 456 U.S. 556 (1982); *Walker Process Equipment, Inc. v. Food Machinery & Chemical Corp.*, 382 U.S. 172 (1965). Conversely, the Lanham Act "mak[es] actionable the deceptive and misleading use of marks in [interstate] commerce," 15 U.S.C. § 1127, without regard to concepts like antitrust injury, agreement, or market power.

II. THE COURT SHOULD ADOPT THE ZONE-OF-INTERESTS TEST TO GOVERN PRUDENTIAL STANDING UNDER SECTION 43(A) OF THE LANHAM ACT

The purpose and plain language of the Lanham Act, as well as the Court's prudential standing precedent, support adoption of the zone-of-interests test. The Court has generally formulated "the applicable prudential standing requirement" as "whether the interest sought to be protected by the complainant is arguably within the zone of interests to be protected or regulated by the statute." *Bennett v. Spear*, 520 U.S. 154, 163 (1997) (quoting *Association of Data Processing Service Orgs., Inc. v. Camp*, 397 U.S. 150, 153 (1970)) (zone-of-interests test is a "prudential standing requirement[ ] of general application"). The zone-of-interests test enables suits "by any plaintiff with an interest 'arguably [sought] to be protected by the statute[ ],' *National Credit Union Admin. v. First Nat. Bank & Trust Co.*, 522 U.S. 479, 495 (1998) (internal quotation marks omitted), while excluding plaintiffs who might technically be injured in an Article III sense but whose interests are unrelated to the statutory prohibitions." *Thompson v. N. Am. Stainless, LP*, 131 S. Ct. 863, 870 (2011).

Ordinarily, the zone-of-interests test applies to statutory standing inquiries without limitation, but the "zone" varies according to the provisions of the law at issue. *Bennett*, 520 U.S. at 163. Although the test is more liberally applied in suits under the Administrative Procedure Act (APA), which has

"generous review provisions," *Clarke v. Sec. Indus. Ass'n*, 479 U.S. 388, 400, n.16 (1987), the test is expressly not limited to APA suits. *Bennett*, 520 U.S. at 163 (citing *Dennis v. Higgins*, 498 U.S. 439, 449 (1991)). Thus, the Court has held that the zone-of-interests test applies to "a person claiming to be aggrieved" by an unlawful employment practice under Title VII, 42 U.S.C. § 2000e-5(b), (f)(1); *Thompson,* 131 S. Ct. 863, as well as to "any citizen . . . depriv[ed] of any rights, privileges, or immunities" under the Commerce Clause, 42 U.S.C. § 1983; *Dennis*, 498 U.S. 439 (citing *Boston Stock Exch. v. State Tax Comm'n*, 429 U.S. 318 (1977)), in addition to "a person . . . adversely affected or aggrieved" by agency action under the APA, 5 U.S.C. § 702; *Association of Data Processing Service Organizations, Inc. v. Camp*, 397 U.S. 150 (1970).[5] Similarly, the zone-of-interests test should apply to "any person who believes that he or she is or is likely to be damaged" by false advertising under the Lanham Act. 15 U.S.C. § 1125(a).

When a statute provides relief to a broad class of victims, the Court has held that the zone-of-interests

[5] *See also Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians v. Patchak*, 132 S. Ct. 2199 (2012) (applying zone-of-interests test to Indian Reorganization Act suit under the APA); *FEC v. Akins*, 524 U.S. 11 (1998) (applying test to suit under 2 U.S.C. §§ 437g(8)(A), (C), of the Federal Election Campaign Act); *National Credit Union Admin. v. First Nat. Bank & Trust Co.*, 522 U.S. 479 (1998) (applying test to Federal Credit Union Act suit under the APA).

test avoids the "absurd consequences" of affording standing to any person injured in the Article III sense, but it also avoids "the other extreme" in which "artificially narrow meaning" is ascribed with "no basis in text or prior practice." *Thompson,* 131 S. Ct. 863, 869-70. A restrictive prudential standing test, like the AGC or categorical test, would not only ascribe "artificially narrow meaning" to the words used in Section 43(a), it would have "no basis in . . . prior practice." *Thompson,* 131 S. Ct. at 870. As the Court noted in *Bennett*, Congress has an established practice of using specific, narrow language when it wants to limit standing under unfair competition statutes. *Bennett*, 520 U.S. at 165 ("Congress has often been . . . more restrictive . . . [i]n statutes concerning unfair trade practices and other commercial matters," such as by authorizing suit only by "any person injured in his business or property," 7 U.S.C. § 2305(c) (Agricultural Fair Practices Act), 15 U.S.C. § 72 (Antidumping Act), or by "competitors, customers, or subsequent purchasers," *id*. § 298(b) (National Gold and Silver Stamping Act)). It would be inconsistent with prior practice – and "artificial" – to conclude that Congress intended comparable limitations on prudential standing for a statute "concerning unfair trade practices and other commercial matters," *id*., but which defines the class of victims using broader language than the acts cited in *Bennett, see* 15 U.S.C. § 1125(a), 1127.

To be sure, the Court has sometimes departed from the zone-of-interests test, including to determine

when "any person injured in his business or property" has standing to bring a treble damages action under the antitrust laws. *Associated General Contractors of Cal., Inc. v. Cal. State Council of Carpenters*, 459 U.S. 519 (1983). The Court has maintained, however, that "at bottom the reviewability question turns on congressional intent." *Clarke v. Sec. Indus. Ass'n*, 479 U.S. 388, 400 (1987); *accord Associated General Contractors*, 459 U.S. at 534 (grounding holding in congressional intent that the Sherman Act be construed in light of its common law background).

Congressional intent is gleaned from "articulable consideration[s] of statutory policy." *Blue Shield of Va. v. McCready,* 457 U.S. 465, 473 (1982). Even in antitrust, where the Court has departed from the zone-of-interests test, it has proceeded from the unexceptional principle that statutory policy is the touchstone of prudential standing. *See Associated General Contractors*, 459 U.S. at 538 (favorably citing *McCready* and affirming "the relevance of [the Sherman Act's] central [statutory] policy to a determination of the plaintiffs' right to maintain an action under § 4."); *McCready,* 457 U.S. at 473 (the Court enforces the "broad remedial and deterrent objectives" of the antitrust laws absent "some articulable consideration of statutory policy suggesting a contrary conclusion in a particular factual setting"); *cf. Associated General Contractors*, 459 U.S. at 546 (Marshall, J., dissenting) (agreeing that articulable considerations of statutory policy should determine who has prudential standing but disagreeing with majority's interpretation).

The Petitioner's argument for restricting standing fails to address the role of statutory policy. Although Petitioner correctly recognizes that the Lanham Act may be conceived as a competition statute, it draws the mistaken inference that the antitrust standing test is appropriate for the Lanham Act because it allegedly "maps nicely" onto the Lanham Act. Pet'r's Br. at 3. Alternatively, Petitioner suggests that the Court should choose a categorical test, limiting standing to competitors, because it affords a "bright line." Pet'r's Br. at 12, 29-30. These arguments gloss over key distinctions between the Lanham Act and the antitrust laws, *see supra* Sec. I.B., or altogether ignore congressional intent and Lanham Act policy, *see supra* Sec. I.A. The zone-of-interests test would adhere to congressional intent and statutory policy.

III. IF THE COURT CHOOSES FROM AMONG THE THREE TESTS DESCRIBED IN THE QUESTION PRESENTED, IT SHOULD ADOPT THE REASONABLE INTEREST TEST

A. The Reasonable Interest Test Better Effectuates Congressional Intent

If the Court should depart from the zone-of-interests test and choose from among the three tests described in the Question Presented, it should adopt the reasonable interest test. The reasonable interest test requires a plaintiff to show that it has a "reasonable interest to be protected against the false

advertising" and "a reasonable basis for believing that the interest is likely to be damaged by the alleged false advertising." *Static Control Components, Inc. v. Lexmark International, Inc.*, 697 F.3d 387, 410 (6th Cir. 2012). Although the zone-of-interests test has stronger moorings to this Court's precedent, *see supra* Sec. I.C., and to congressional intent, *see infra* note 6, the reasonable interest protects the public interest in accurate information in the marketplace better than the categorical and AGC tests.

Like the zone-of-interests test, the reasonable interest test allows commercial market participants injured by the dissemination of false or misleading information to seek redress. Some plaintiffs with standing, including competitors of the business that disseminated false or misleading information, may not vindicate their statutory rights. They may benefit from the deception or believe that their injury does not justify the significant costs of litigation. *See infra* Sec. III.B. Like the zone-of-interests test, the reasonable interest test increases the likelihood that a plaintiff will actually emerge to remedy a particular instance of deceptive behavior. Judicial experience in applying the AGC test to antitrust claims reveals the folly of hoping and waiting for the "ideal" plaintiff, however defined, to appear. *See infra* Sec. III.C. When false or misleading information is circulated in the market, even an "imperfect" plaintiff is preferable to no plaintiff at all.

Although some cite a flood of litigation and overdeterrence in opposition to less restrictive standing

rules, Diane Taing, *Competition for Standing: Defining the Commercial Plaintiff Under Section 43(a) of the Lanham Act*, 16 Geo. Mason L. Rev. 493, 513, 516 (2009), both concerns are, at the very least, overstated. There is no indication that jurisdictions already applying the reasonable interest test have been burdened by a flood of Lanham Act claims or a decline in truthful advertising; adoption of the test nationwide is unlikely to yield a different outcome. The two factors in the reasonable interest test place real limits on standing. Even as the courts have defined "reasonable interest" broadly, *see, e.g., ITC Ltd. v. Punchgini, Inc.*, 482 F.3d 135, 169 (2d Cir. 2007), they have limited it to "commercial interests." *Ortho Pharm. Corp. v. Cosprophar, Inc.*, 32 F.3d 690, 694 (2d Cir. 1994). At the same time, courts have interpreted the "reasonable basis" prong to require a causal nexus between the plaintiff's injury and the alleged falsehood, which limits suits by parties whose injury is only tenuously or remotely related to the falsehood.[6] *Id.* at 694. And, of course, plaintiffs that satisfy

[6] An inquiry into remoteness is implicit in both the zone-of-interests test and the reasonable interest test. Whereas the zone-of-interests test tethers the remoteness inquiry to congressional intent, the reasonable interest test requires that a causal nexus "be demonstrated in some manner." *See Ortho Pharm. Corp.*, 32 F.3d at 694. Under either test, for example, a person injured by a product that is falsely advertised to be safe presumably would lack standing to recover for physical injuries, and her insurer presumably would lack standing to recover its insurance payments. But the claims would fail for different reasons. They fail under the reasonable interest test for the

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the reasonable interest test, like plaintiffs under any prudential standing test, would still have to establish the substantive requirements of a false advertising claim. *See, e.g.*, *Camel Hair & Cashmere Institute of Am., Inc. v. Associated Dry Goods Corp.*, 799 F.2d 6, 10-12 (1st Cir. 1986) (separate analyses of plaintiff's standing and request for preliminary injunction).

Importantly, the remedies under the Lanham Act are limited. Unlike antitrust claims, in which victorious plaintiffs are entitled to treble damages and attorneys' fees, winning Lanham Act plaintiffs are entitled primarily to injunctions. *See, e.g., Audi AG v. D'Amato*, 469 F.3d 534, 550-51 (6th Cir. 2006) ("Injunctive relief is the remedy of choice for trademark and unfair competition cases, since there is no adequate remedy at law for the injury caused by a defendant's continuing infringement.") (citing *Century 21 Real Estate Corp. v. Sandlin*, 846 F.2d 1175, 1180 (9th Cir. 1988)); *see also* Jean Wegman Burns, *The Paradox of Antitrust and Lanham Act Standing*, 42 UCLA L. Rev. 47, 72 (1994) (hereinafter, "Burns, *Paradox of Standing*"). Although *compensatory* damages are available, plaintiffs face a high burden of

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absence of commercial harm and lack of a causal nexus between the alleged injuries and the alleged falsehoods, whereas they fail under the zone-of-interests test because neither injury would be within the zone of interests that Congress intended to protect under the Lanham Act. The zone-of-interests test is superior because it tethers the inquiry more closely to congressional intent and statutory policy, which this Court has recognized as the touchstone of prudential standing. *See supra* Sec. II.

proof and must prove the additional element of commercial injury to obtain damages. *See, e.g.*, *William H. Morris Co. v. Group W, Inc.*, 66 F.3d 255, 258 (9th Cir. 1995) (denying damages for lost profits); *see also* Burns, *Paradox of Standing* at 72 n.106; Jean Wegman Burns, *Confused Jurisprudence: False Advertising under the Lanham Act*, 79 B.U. L. Rev. 807, 886 (1999).[7] Also, the "prevailing party" can receive attorneys' fees only in "exceptional" cases. 15 U.S.C. § 1117(a). This typically requires that the non-prevailing party's case is "groundless, unreasonable, vexatious or pursued in bad faith." *Gracie v. Gracie*, 217 F.3d 1060, 1071 (9th Cir. 2000); *see also Eagles, Ltd. v. Am. Eagle Found.*, 356 F.3d 724, 728-29 (6th Cir. 2004).

Litigation is a costly and risky venture. Plaintiffs are likely to file a complaint only when they have an *economic incentive* to sue, not merely when they have a *legal right* to sue. Arthur Best, *Controlling False Advertising: A Comparative Study of Public Regulation, Industry Self-Policing, and Private Litigation*, 20 Ga. L. Rev. 1, 55 (1985). When this intrinsic feature of litigation is combined with the limited remedies afforded by the Lanham Act, a less restrictive standing rule is unlikely to produce a surge in false advertising suits. Moreover, the belief that a less restrictive standing test will lead to a flood of false advertising

[7] Although the Lanham Act confers authority for a court to treble a plaintiff's damage recovery, it may do so only if the profit recovery is otherwise inadequate. 15 U.S.C. § 1117(a). Any trebling of damages award must "constitute compensation and not a penalty." *Id*.

suits has not been borne out by the evidence. Gerald P. Meyer, *Standing Out: A Commonsense Approach to Standing for False Advertising Suits Under Lanham Act Section 43(a)*, 2009 U. Ill. L. Rev. 309, 318 (2009).

A less restrictive prudential standing test also poses little threat of chilling socially beneficial speech. The claims presented in advertisements can often "be objectively measured allowing the prospective defendant to know the truthfulness of its claims." Lee Goldman, *The World's Best Article on Competitor Suits for False Advertising*, 45 Fla. L. Rev. 487, 511 (1993). Word choice in marketing campaigns is generally the product of careful deliberation. The probable effect of particular words and phrases on consumers is studied at length. *Id.* at 510. "[A]mbiguities or misleading messages" in advertising are typically the product of deliberate decisions, *id.*, and not the result of innocent mistakes. As an empirical matter, it would be farfetched to claim that "section 43(a) has created any seeming dearth of advertising." Roger E. Schechter, *Additional Pieces of the Deception Puzzle: Some Reactions to Professor BeVier*, 78 Va. L. Rev. 57, 81 (1992).

B. The Categorical Test Would Fail to Deter Anticompetitive Deception Adequately

Of the three tests described in the Question Presented, the categorical test, which limits standing

to direct competitors of the defendant, fails most obviously to account for Lanham Act policy. In addition to contradicting the text of the Lanham Act, which expressly protects "commercial" interests rather than strictly "competitor" interests, 15 U.S.C. § 1127, the categorical test risks allowing the most harmful instances of anticompetitive deception to go unpunished, and it may not be a bright-line test in practice. Moreover, it is hardly obvious why an "indirect" competitor – such as an input supplier of an important component used by direct downstream competitors of the defendant – should be denied standing, particularly where, as alleged here, the input supplier was directly targeted by false statements. *See Amicus Curiae* Br. of Am. Intellectual Prop. Law Ass'n in Support of Neither Party at 22-23.

A competitor injured by a rival's misrepresentation may not have the incentive to seek legal redress and remedy deception. For example, a rival's false statements about its own products may allow it to capture a substantial volume of sales. Although the overall effect of the deception is large, the harm suffered by an individual competitor in a market with many firms may be small. Burns, *The Paradox of Standing*, *supra* at 85-86. Under these circumstances, the deception may go unremedied because an individual competitor's injury may be too insignificant to justify the costs of litigation. And, most of the benefits of successful litigation may accrue to other participants in the market. Rebecca Tushnet, *Running the Gamut from A to B: Federal Trademark and False*

Advertising Law, 159 U. Pa. L. Rev. 1305, 1381 (2011) (hereinafter "Tushnet, *Running the Gamut from A to B*"). A business is unlikely to expend time and money on a lawsuit unless it is expected to be privately profitable.

Competitors may sometimes find that the rational response to the false statements of a rival is not litigation, but emulation of the deception. As a rival's campaign of false advertising continues unabated, a competitor may steadily lose market share and experience a decline in revenues and profits. Maurice E. Stucke, *How Do (and Should) Competition Authorities Treat a Dominant Firm's Deception?*, 63 SMU L. Rev. 1069, 1096-97 (2010). Instead of staking its market position on uncertain legal remedies, a competitor may respond to a rival's deception with deception of its own. *Id.* at 1097. This emulation of deception may be the most practical way to maintain market share in the midst of pervasive misinformation. In this situation, the original deception is not remedied; it is amplified.

At other times, a competitor may benefit from the deception of a rival and opt not to challenge the misrepresentation in court or the market. If the deception pertains to an entire product category instead of a specific brand or company, every firm in the industry may benefit from the false information. If, for instance, a supplier makes unsubstantiated positive claims about general product attributes, sales in the entire category are likely to increase. Best, *supra*, at 69-70. Although producers may not

benefit equally, all firms in the particular product segment are likely to experience an increase in sales from the single supplier's deception. Competitors are not hurt by these types of representations; they profit from them. Empirical evidence confirms that competitors are unlikely to challenge general misrepresentations. Studies have shown that false advertising claims by competitors overwhelmingly involve comparative advertisements involving specific brands. *Id.* at 26-28; Burns, *Paradox of Standing*, *supra*, at 85-86.

While the categorical test superficially offers a bright-line rule for standing, applying the test is likely far from straightforward in practice. Before a court can decide whether a plaintiff is a competitor of the defendant, it may have to decide whether the two parties are in the same economic market. Meyer, *supra*, at 317. For instance, are McDonald's and Taco Bell competitors in a broad fast food market? Or do they participate in separate hamburger and Tex-Mex markets, respectively? The answer is not intuitively obvious and requires an in-depth factual inquiry. Since standing is a threshold question, market definition would generally need to be decided at the pleading stage prior to the development of the factual record.[8]

[8] The concern is not merely theoretical, as lower courts applying the categorical test have denied plaintiffs standing in false advertising cases on the basis of market definition. *See,*

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The recent history of antitrust litigation shows the challenges of market definition. *See* Philip A. Areeda, *The Changing Contours of the Per Se Rule*, 54 Antitrust L.J. 27, 28 (1985) ("We have certainly learned from merger, monopoly, and rule of reason cases that proving markets and power is difficult, complex, expensive and time-consuming."); Robert Pitofsky, *New Definitions of Relevant Market and the Assault on Antitrust*, 90 Colum. L. Rev. 1805, 1807 (1990) ("Unfortunately, no aspect of antitrust enforcement has been handled nearly as badly as market definition. . . . [T]he critical issues in market definition . . . are all matters of degree that are extremely difficult to measure."); *U.S. Healthcare, Inc. v. Healthsource, Inc.*, 986 F.2d 589, 598 (1st Cir. 1993) (Boudin, J.) ("There is no subject in antitrust law more confusing than market definition."); *see also* Louis Kaplow, *Why (Ever) Define Markets?*, 124 Harv. L. Rev. 438 (2010) (arguing that market definition in antitrust should be abandoned because it is incoherent). If courts insist on rigorous market definition to decide whether a plaintiff "competes" with a defendant, even some apparent competitors may be denied standing and generally deterred from pursuing meritorious false advertising claims.

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e.g., *New.Net, Inc. v. Lavasoft*, 356 F. Supp. 2d 1090, 1116 (C.D. Cal. 2004).

C. The AGC Test Has Weakened Private Enforcement of the Antitrust Laws and Would Fail to Deter Anticompetitive Deception Adequately

While perhaps facially less problematic than the categorical test, the AGC test,[9] established by the Court to decide antitrust standing, also has serious deficiencies and should not be applied to false advertising claims.[10] This Court has stated that a standing test developed for one statutory scheme may not necessarily be appropriate for another. *Clarke*, 479 U.S. at 400 n.16. When applied to private antitrust claims, the AGC test has resulted in weakened enforcement of the antitrust laws. Furthermore, the two primary theoretical grounds for limiting standing in the antitrust arena – the potential for antitrust suits to be used to protect competitors instead

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[9] The AGC factors are: (1) the nature of the plaintiff's injury and the specific relationship between that injury and the alleged violation; (2) the directness with which the injury resulted from the market restraint; (3) the speculativeness of the injury; (4) the risk of duplicative recoveries and the complexity of apportioning damages; and (5) whether the injury was of a type that the antitrust laws seek to redress. *See Associated General Contractors*, 459 U.S. at 519.

[10] In adapting the AGC test for Lanham Act claims, the Third Circuit modified the test. *Conte Bros. Automotive, Inc. v. Quaker State-Slick 50, Inc.*, 165 F.3d 221, 233 (3d Cir. 1998). This revision is perhaps an implicit acknowledgement that the test is not the appropriate screen for false advertising suits. Tushnet, *Running the Gamut from A to B*, *supra*, at 1376.

of competition and antitrust law's potent remedies – are *not* applicable to the Lanham Act.

In antitrust, the AGC test has been criticized for giving "a license to the lower courts to engage in imprecise, outcome-oriented decision making." Jonathan M. Jacobson & Tracy Greer, *Twenty-One Years of Antitrust Injury: Down the Alley with* Brunswick v. Pueblo Bowl-O-Mat, 66 Antitrust L.J. 273, 293 (1998). The test implicates complex questions of fact that often have to be resolved before any discovery has been taken. John J. Flynn, *Which Past Is Prolog? The Future of Private Antitrust Enforcement*, 35 Antitrust Bull. 879, 905-06 (1990). Deciding standing requires "a paper minitrial on both the facts and law *via* motion practice without any of the constraints of a normal trial or a full record on which the court can make an informed judgment." *Id.* at 903 (emphasis in original). And, it is unclear whether plaintiffs have to satisfy all factors, a majority of factors, or just multiple factors. Robert P. Taylor, *Antitrust Standing: Its Growing – Or More Accurately Its Shrinking – Dimensions*, 55 Antitrust L.J. 515, 521 (1986).[11]

[11] The AGC test has fallen into such disfavor with state courts that many choose not to apply it, creating discord when state and federal antitrust claims are tried together. One judge has described the task of deciphering the overall state of antitrust standing as "back-breaking labor." *In re Flash Memory Antitrust Litig.*, 643 F. Supp. 2d 1133, 1153 (N.D. Cal. 2009) (quoting *In re Graphics Processing Units Antitrust Litig.*, 540 F. Supp. 2d 1085, 1097 (N.D. Cal. 2007)).

The AGC test duplicates factors and tilts the balance against granting standing. It gives independent weighting to the directness of a plaintiff's alleged injury and the speculativeness of its damages. Yet, these two factors largely restate each other: "[i]f damages are indirect, they are more likely to be speculative." C. Douglas Floyd, *Antitrust Victims Without Antitrust Remedies: The Narrowing of Standing in Private Antitrust Actions*, 82 Minn. L. Rev. 1, 44 (1997). Similarly, the distinction between the prohibition on duplicative recoveries and the complex allocation of damages encourages courts to treat them as separate grounds for denying standing. The two sub-factors express the same basic principle in different terms: if duplicative recovery is unlikely to occur, complex damage allocation does not arise. *Id.* at 43.

The AGC test has been applied at times in a fashion that carries an "air of unreality." Floyd, *supra*, at 48. Despite suffering direct harms, parties that were instruments (and victims) of the defendant's anticompetitive conduct have been denied standing under the AGC test on the basis that injured consumers or competitors would be superior plaintiffs. *See, e.g.*, *SAS of Puerto Rico, Inc. v. Puerto Rico Tel. Co.*, 48 F.3d 39, 44 (1st Cir. 1995); *Lucas v. Bechtel Corp.*, 800 F.2d 839, 844-45 (9th Cir. 1986). Yet if alternative plaintiffs existed in these cases, they chose not to sue, perhaps because the potential recovery was too small or because important business relationships with the defendant would be harmed. Floyd, *supra*, at 47-48. The courts, in dismissing the

claims of direct targets of antitrust conspiracies, sacrificed the party that "*actually* elected to sue in favor of the *hypothetical* preferred consumer or competitor plaintiff who ha[d] not chosen to vindicate the public interest in antitrust enforcement." *Id.* at 48 (emphasis added).

Fundamentally, the AGC test places undue emphasis on the potential existence of an "optimal" plaintiff. Burns, *Paradox of Standing*, *supra*, at 90. It limits actions "by a 'good' plaintiff, i.e., one who did suffer identifiable harm, merely because the defendant has been able to identify 'better,' i.e., more directly harmed plaintiffs." Joseph P. Bauer, *The Stealth Assault on Antitrust Enforcement: Raising the Barriers for Antitrust Injury and Standing*, 62 U. Pitt. L. Rev. 437, 451 (2001). In many instances, defendants can point to a hypothetically superior phantom plaintiff that could vindicate its rights at some point in the future. Stephen D. Susman, *Standing in Private Antitrust Cases: Where Is the Supreme Court Going?*, 52 Antitrust L.J. 465, 473 (1983). While courts "wait[ ] for the Godot" of the ideal plaintiff, Burns, *Paradox of Standing*, *supra*, at 103, no plaintiff may emerge at all to challenge anticompetitive conduct.

The AGC test in its quest for the "ideal" plaintiff has likely produced serious underenforcement of the antitrust laws. The Court has noted that private antitrust enforcement serves two vital functions: compensating victims and deterring future anticompetitive behavior. *See Mandeville Island Farms, Inc.*

v. Am. Crystal Sugar Co., 334 U.S. 219, 236 (1948); *California v. Am. Stores Co.*, 495 U.S. 271, 284 (1990). Empirical research has found that private actions yield sizable social benefits. *See* Joshua P. Davis & Robert H. Lande, *Toward an Empirical and Theoretical Assessment of Private Antitrust Enforcement*, 36 Seattle U. L. Rev. 1269, 1316 (2013); Robert H. Lande & Joshua P. Davis, *Benefits from Private Antitrust Enforcement: An Analysis of Forty Cases*, 42 U.S.F. L. Rev. 879, 880 (2008). When anticompetitive behavior has occurred or is about to occur, "society is better served by a knowledgeable second-best plaintiff than by hopes for an ideal person to detect and prosecute the case." Burns, *Paradox of Standing*, at 90.

The considerations that ostensibly support limiting standing for private antitrust claims are not germane to false advertising suits. The AGC test for antitrust standing has been theoretically justified on the basis of antitrust law's potential for anticompetitive misuse and powerful remedies. *Id*. at 69-70. However, while it is frequently said that the antitrust laws protect competition, not competitors, *Brown Shoe Co. v. United States*, 370 U.S. 294, 320 (1962), the Lanham Act protects competition *and* competitors, 15 U.S.C. § 1127. Moreover, the Lanham Act poses qualitatively less theoretical risk of overdeterrence than the antitrust laws. The Court has assumed the possibility of procompetitive justifications for most antitrust violations and described the rule of reason as the "usual" and "prevailing" rule in antitrust. *Leegin Creative Leather Prods., Inc. v.*

PSKS, Inc., 551 U.S. 877, 882 (2007); *Continental Television, Inc. v. GTE Sylvania, Inc.*, 433 U.S. 36, 49 (1977). Unlike in certain antitrust rule-of-reason cases, there is no theoretical downside to punishing deception even when it is unsuccessful. *Cf., e.g., Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209, 224 (1993) (positing that unsuccessful attempts at predatory pricing enhance consumer welfare).

Finally, the remedies for successful false advertising suits are much more limited and the stakes for defendants are much lower, which limits concerns as to overdeterrence and duplication of damages. Whereas money damages are common in antitrust and trebling is mandatory, Lanham Act plaintiffs are limited to compensatory damages if they recover any damages at all. Usually, successful Lanham Act plaintiffs are awarded only injunctive relief. *See supra* Sec. III.A.

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CONCLUSION

For all of these reasons, the Court should adopt the zone-of-interests test to govern prudential standing for claims under Section 43(a) of the Lanham Act. If the Court chooses from among the tests described in the Question Presented, it should adopt the reasonable interest test and reject the categorical test and the AGC test.

Respectfully submitted,

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