

IN THE
Supreme Court of the United States

LEXMARK INTERNATIONAL, INC.,

Petitioner,

v.

STATIC CONTROL COMPONENTS, INC.,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Section 43(a) of the Lanham Act gives a right of action “to any person who believes that he or she is or is likely to be damaged” by another’s “false or misleading representation of fact” in “commercial advertising or promotion” 15 U.S.C. § 1125(a)(1)(B).

The question presented is: Does a plaintiff have prudential standing, at the pleading stage, under Section 43(a) of the Lanham Act where the plaintiff alleges that the defendant directly targeted the plaintiff with false advertising statements about plaintiff’s products that had the effects of diverting sales from plaintiff to defendant and tarnishing plaintiff’s goodwill?

CORPORATE DISCLOSURE STATEMENT

Under Supreme Court Rule 29.6, Static Control Components, Inc. states it has no parent corporation, and no publicly held company owns 10% or more of its stock.

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STATEMENT OF THE CASE

1. Section 43(a) of the Lanham Act states in relevant part:

Any person who . . . uses in commerce any . . . false or misleading representation of fact, which . . . in commercial advertising or promotion, misrepresents the nature, characteristics, qualities, or geographic origin of his or her or another person's goods, services, or commercial activities, shall be liable in a civil action by any person who believes that he or she is or is likely to be damaged by such act.

15 U.S.C. § 1125(a)(1)(B).

The text of Section 43(a), on its face, allows “any person” injured to recover damages for statutory violations. Federal courts of appeals, however, have limited the class of plaintiffs who may seek redress—beyond the requirements of Article III standing—through the doctrine of “prudential standing.” The Court’s “prudential standing” doctrine “encompasses . . . the requirement that a plaintiff’s complaint fall within the zone of interests protected by the law invoked.” *Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1, 12 (2004) (citations and internal quotation marks omitted).

2. Lexmark makes and sells laser printers. (Docket Entry (“DE”) 226, Second Am. Answer & Countercl. ¶¶ 22-24, at 14.) Lexmark also makes and sells consumable supplies for these laser printers—most importantly, replacement toner cartridges. (*Id.*) Owners of Lexmark

printers must purchase Lexmark-compatible toner cartridges to continue using the product throughout the life of the printer. (*Id.*)

Entities known as “remanufacturers” recycle used Lexmark toner cartridges (most of which would otherwise end up in landfills) by replacing any worn internal parts and by replenishing toner. (DE226, Second Am. Answer & Countercl. ¶¶ 27-29, at 15.) Remanufacturers sell these refurbished cartridges to owners of Lexmark printers, competing with Lexmark in the toner-cartridge market. (*Id.*)

Static Control is the world’s leading maker and seller of replacement parts for printer cartridges, including parts specifically designed for Lexmark-compatible toner cartridges. (DE226, Second Am. Answer & Countercl. ¶¶ 30-31, at 16.) Static Control makes and sells these parts (including sophisticated microchips and specialized mechanical parts) to remanufacturers, enabling them to compete with Lexmark in the market for toner cartridges. (*Id.*)

Lexmark initiated this litigation by suing Static Control in 2002.¹ Static Control counterclaimed, alleging that Lexmark’s conduct violated state and federal antitrust statutes and, separately, that Lexmark engaged in false

1. None of Lexmark’s affirmative claims is at issue here. The ten-year litigation between the parties has produced two reported opinions by the Sixth Circuit that provide a history of the parties’ claims. See *Static Control Components, Inc. v. Lexmark Int’l, Inc.*, 697 F.3d 387 (6th Cir. 2012) (Pet. App. 1-64); *Lexmark Int’l, Inc. v. Static Control Components, Inc.*, 387 F.3d 522, 528-32 (6th Cir. 2004).

advertising about both Lexmark's and Static Control's products. First, Static Control alleged that Lexmark falsely advertised that it sold its toner cartridges subject to a single-use patent license (which Lexmark referred to as its "Prebate" program²) and that remanufacturing Lexmark cartridges therefore infringed Lexmark patents. (DE226, Second Am. Answer & Countercl. ¶¶ 2, 39-41, at 10, 18-19.) Second, Lexmark falsely advertised that the use of Static Control's products would cause remanufacturers to infringe Lexmark's patent-based restrictions on Prebate cartridges. (DE226, Second Am. Answer & Countercl. ¶ 35, at 17; *id.* ¶¶ 2, 84-90, at 10, 28-29.) These advertisements were false because Lexmark lacked patent rights to impose on the cartridges' post-sale use. *See* Pet. App. 9-10, 46-64. Lexmark's false advertising

2. The court of appeals described Lexmark's "Prebate" program as follows:

In the 1990s, Lexmark started a "Prebate" program with certain large customers whereby Lexmark would sell new toner cartridges at an upfront discount of around 20% if the end user agreed to (1) a single-use license and (2) a restriction that the cartridge be returned to Lexmark for remanufacturing or recycling and not to a third-party remanufacturer. These terms were printed on several notices on the outside of the toner-cartridge box, which instructed the user that opening the box would indicate acceptance of the terms.

Pet. App. 5 (citation omitted). Lexmark placed a microchip in each cartridge that prevented Prebate cartridges from being remanufactured or reused. *Id.* at 6. After Static Control developed and marketed replacement microchips for the Lexmark cartridges, Lexmark initiated this lawsuit. *Id.* at 7; *see Lexmark Int'l v. Static Control*, 387 F.3d at 530-31.

harmed Static Control's business by (among other things) "caus[ing] consumers and others in the trade to believe that [Static Control's] products are illegal and unlawful," "diverting sales from [Static Control] to Lexmark," and causing substantial injury to Static Control's business reputation. (DE226, Second Am. Answer & Countercl. ¶¶ 2, 86, at 10, 29.)

Static Control alleged that these false representations violated Section 43(a) of the Lanham Act and a state law analogue, the North Carolina Unfair and Deceptive Trade Practices Act, N.C. Gen. Stat. §§ 75-1, *et seq.* The trial of Lexmark's claims established that Lexmark's representations were false. *See* Pet. App. 44-64.

3. Lexmark moved to dismiss Static Control's state and federal antitrust and false advertising counterclaims for lack of prudential standing. In deciding Lexmark's motion, the district court first concluded that Static Control lacked antitrust standing (under both state and federal law) after applying this Court's five-factor test articulated in *Associated General Contractors of California, Inc. v. California State Council of Carpenters*, 459 U.S. 519, 537-45 (1983) ("AGC"). Pet. App. 73-82 (federal law); Pet. App. 82, 86 (state law).

The district court also found that Static Control lacked standing under the Lanham Act and the North Carolina Unfair and Deceptive Trade Practices Act, "[f]or the same reasons that [Static Control] lacks standing to pursue its antitrust claims." Pet. App. 83 (citing its *AGC* analysis); Pet. App. 86. The district court conducted no analysis of the distinct factual allegations supporting Static Control's Lanham Act counterclaim, *e.g.*, Pet. App. 38 n.10; Pet. App.

82-83,³ which included allegations that Lexmark’s false advertising directly targeted Static Control’s products. (DE226, Am. Answer & Countercl. ¶ 35, at 17; *id.* ¶¶ 2, 84-90, at 10, 28-29.)

4. On appeal, the Sixth Circuit reversed the district court’s dismissal of Static Control’s Lanham Act, North Carolina Unfair and Deceptive Trade Practices Act, and state law antitrust claims.⁴ Pet. App. 4, 34-42. The court of appeals reached three significant conclusions regarding Static Control’s Lanham Act claim:

a. The court of appeals reiterated that Lanham Act standing in the Sixth Circuit is governed by the “reasonable-interest” test set forth in *Frisch’s Restaurants, Inc. v. Elby’s Big Boy*, 670 F.2d 642, 649-50 (6th Cir.), *cert. denied*, 459 U.S. 916 (1982). Pet. App. 37.⁵ This is the standard that the courts of appeals in the First, Second, and arguably Fourth Circuits also apply.⁶

3. Pet. App. 82-83 (“The claim is presumably based on the ‘Prebate agreement’ that Lexmark prints on each of its ‘Prebate cartridges’. . . . The factual predicate for SCC’s Lanham Act claim is the same as for SCC’s antitrust claims.”).

4. The court of appeals affirmed the district court’s dismissal of Static Control’s federal antitrust claims. *E.g.*, Pet. App. 42.

5. Inasmuch as the Sixth Circuit has applied the reasonable-interest test for more than 30 years, Lexmark’s claims that the Sixth Circuit in this case “adopted” the reasonable-interest test, or was “following” a 2010 opinion of the Second Circuit, Pet. 9, are incorrect.

6. *Camel Hair & Cashmere Inst. of Am., Inc. v. Associated Dry Goods Corp.*, 799 F.2d 6, 11 (1st Cir. 1986); *Johnson & Johnson v. Carter-Wallace, Inc.*, 631 F.2d 186, 190 (2d Cir. 1980); *Made in*

Under this standard, a claimant has Lanham Act standing if it pleads facts showing “a reasonable basis for the belief that [it] is likely to be damaged as a result of the false advertising.” *Frisch’s*, 670 F.2d at 649-50 (quoting *Johnson & Johnson*, 631 F.2d at 190). Although the Sixth Circuit noted that the Third, Fifth, Eighth, and Eleventh Circuits either reference antitrust principles or use the *AGC* five-factor test to determine Lanham Act standing,⁷ the court observed that the Third Circuit (the first to apply *AGC* in this way) characterized *AGC* as a framework for applying the reasonable-interest test.⁸

b. The court of appeals held that Static Control pleaded sufficient facts to establish standing under the reasonable-interest test: “Static Control alleged a cognizable interest in its business reputation and sales

the USA Found. v. Phillips Foods, Inc., 365 F.3d 278, 281 (4th Cir. 2004) (“Our [approach to Lanham Act standing] is consistent with the basic approach of other circuits that requires the Lanham Act plaintiff to be engaged in commercial activity.”).

7. Pet. App. 37 (citing *Conte Bros. Auto., Inc. v. Quaker State–Slick 50, Inc.*, 165 F.3d 221, 233-34 (3d Cir. 1998) (Alito, J., authoring); *Procter & Gamble Co. v. Amway Corp.*, 242 F.3d 539, 562-63 (5th Cir.), *cert. denied*, 534 U.S. 945 (2001); *Gilbert/Robinson, Inc. v. Carrie Beverage–Mo., Inc.*, 989 F.2d 985, 990-91 (8th Cir.), *cert. denied*, 510 U.S. 928 (1993); *Phoenix of Broward, Inc. v. McDonald’s Corp.*, 489 F.3d 1156, 1162-64 (11th Cir. 2007), *cert. denied*, 552 U.S. 1275 (2008)). Contrary to Lexmark’s assertions, Pet. 12, the Eighth Circuit neither applied the *AGC* test nor followed *Conte Bros.*, but analogized the requirement of causation for Lanham Act liability to the concept of antitrust standing. *Gilbert/Robinson*, 989 F.2d at 991.

8. Pet. App. 37 (“The Third Circuit nominally uses a ‘reasonable interest’ approach, but applies it by looking to the five *AGC* factors.”) (citing *Conte Bros.*, 165 F.3d at 233-34).

to remanufacturers and sufficiently alleged that these interests were harmed by Lexmark's statements to the remanufacturers that Static Control was engaging in illegal conduct. This is sufficient to state a claim under the Lanham Act." Pet. App. 38.

c. The court of appeals also explained that "Static Control's claim would not necessarily fail" under the *AGC* approach, and that the district court had applied the *AGC* test to the wrong facts: "the district court at a minimum should have applied the *AGC* factors to Static Control's allegations of false advertising directly targeting Static Control (not just the Prebate program) and its injuries in conducting the five-factor analysis." Pet. App. 38 n.10.

5. The court of appeals thereafter denied rehearing en banc.

REASONS TO DENY THE PETITION

The Court should deny the petition for three reasons. First, any alleged circuit split is neither significant nor consequential. Second, the case is a poor vehicle because the decision is interlocutory, and review by the Court will not be outcome determinative. Finally, the decision below is correct and thoroughly consistent with the policies underlying the Lanham Act—no justification exists for certiorari.

I. Lexmark Overstates the Scope and Significance of Any Circuit Split.

Lexmark invents a "widening," Pet. 14, three-way split among the courts of appeals for determining Lanham Act standing, *e.g.*, Pet. 8-9, and contends that this

Court’s intervention is necessary to “resolve wide-spread confusion” about the proper test. Pet. 7. Not so.

A. There is no three-way split. The conflict in the circuits at bottom pits a moribund categorical approach (requiring direct competition for Lanham Act standing) against the trend toward a multi-factor analysis of the claimant’s reasonable commercial interests. This limited conflict is receding in importance and is not worthy of the Court’s attention.

The clear majority of the courts of appeals holds that direct competition between the claimant and the defendant is not necessary to establish Lanham Act standing.⁹ The categorical test requiring such direct competition represents the disfavored minority position of the courts of appeals, with only three circuits adhering to this view.¹⁰

9. See, e.g., *Camel Hair*, 799 F.2d at 11 (“[T]here appears to be a general consensus that the plaintiff does not have to be a competitor in order to have standing to sue.”); *Famous Horse, Inc. v. 5th Ave. Photo Inc.*, 624 F.3d 106, 113 (2d Cir. 2010) (“We have not *required* that litigants be in competition”); *Conte Bros.*, 165 F.3d at 234 (“[T]here may be circumstances in which a non-competitor may have standing to sue. . . .”); *Logan v. Burgers Ozark Country Cured Hams Inc.*, 263 F.3d 447, 460-61 (5th Cir. 2001) (rejecting defendant’s argument that claimant, as non-competitor, lacked standing); *Phoenix of Broward*, 489 F.3d at 1164-66 (refusing to adopt “categorical” test).

10. See, e.g., *L.S. Heath & Son, Inc. v. AT&T Info. Sys., Inc.*, 9 F.3d 561, 575 (7th Cir. 1993); *Waits v. Frito-Lay, Inc.*, 978 F.2d 1093, 1109 (9th Cir. 1992); *Stanfield v. Osborne Indus., Inc.*, 52 F.3d 867, 873 (10th Cir. 1995). The Seventh and Ninth Circuits used in prior cases the reasonable-interest test for Lanham Act standing. See, e.g., *Dovenmuehle v. Gildorn Mortg. Midwest Corp.*, 871 F.2d 697, 700 (7th Cir. 1989) (affirming summary judgment

The most recent case adopting the categorical test within a judicial circuit (the Tenth Circuit) was decided eighteen years ago. No other court of appeals has adopted it since, while all other circuits have reaffirmed the reasonable-interest test or adopted the Third Circuit’s elaboration of that test by analogy to *AGC*.

All recent cases from other circuits reject the categorical test. The Third Circuit, in a case written by then-Judge Alito, concluded that the plain language of the Lanham Act could not support the Ninth Circuit’s categorical test. *Conte Bros.*, 165 F.3d at 232. This is consistent with the observations of the leading treatise on the Lanham Act, which calls the categorical test “an aberration in the history of court interpretation of § 43(a).”¹¹

Given the criticism leveled at the categorical test for Lanham Act standing, and the fact that the test has gained no new adherents in nearly two decades, the asserted split is of questionable importance and unquestionably is receding. The dearth of appellate cases decided under the “categorical” test suggests this issue rarely proves dispositive. And none of the cases adopting the “categorical” test involved circumstances where the false advertising specifically targeted a claimant’s commercial goods. To the contrary, in each of the cases cited by

that plaintiffs “failed to establish ‘a reasonable interest to be protected’”); *New West Corp. v. NYM Co. of Cal., Inc.*, 595 F.2d 1194, 1198 (9th Cir. 1979) (“[t]he dispositive question is whether the party has a reasonable interest to be protected against false advertising”).

11. 5 J. Thomas McCarthy, *McCarthy on Trademarks and Unfair Competition* § 27:32, at 27-74 – 27-75 (4th ed. 2013).

Lexmark either the alleged false advertising did not pertain to goods produced by the claimant, or the claimant produced no commercial goods at all. For these reasons, this Court should deny the petition and allow the courts of appeals for the Seventh, Ninth, and Tenth Circuits the opportunity to reconsider their Lanham Act standing jurisprudence and join the majority of their sister circuits in adopting some form of the reasonable-interest test.

B. No reason exists for the Court to articulate a non-categorical approach to Lanham Act standing. The reasonable interest test and the *AGC* factors are consistent with one another, and no meaningful confusion in the court of appeals exists. As the Third Circuit noted, the *AGC* factors simply provide “an appropriate method for adding content to [the] ‘reasonable interest’ test” for Lanham Act standing. *Conte Bros.*, 165 F.3d at 233.¹² Even Lexmark argued below that the reasonable-interest test and *AGC* were conceptually the same. Pet. App. 37. Although Lexmark tries to amplify the claimed differences between the circuits, the courts of appeals generally recognize only two Lanham Act standing tests—categorical and non-categorical.¹³

12. The *Conte Bros.* panel applied and elaborated upon the Third Circuit’s earlier jurisprudence, which concluded that Lanham Act Section 43(a) standing turns on whether the claimant has a reasonable interest to be protected against false advertising, and that a non-competitor properly can assert standing. *Id.*, 165 F.3d at 230-33 (citing *Serbin v. Ziebart Int’l Corp.*, 11 F.3d 1163, 1175-77 (3d Cir. 1993) and *Thorn v. Reliance Van Co.*, 736 F.2d 929, 933 (3d Cir. 1984)).

13. See, e.g., *Phoenix of Broward*, 489 F.3d at 1166 n.5 (characterizing the difference between the categorical test and multi-factor approach as “tension” rather than a circuit split). The

What Lexmark calls “confusion” among the circuits largely reflects that determinations of standing are necessarily fact-bound, and that “it is simply not possible to fashion an across-the-board and easily applied standing rule which can serve as a tool of decision for every case.” *AGC*, 459 U.S. at 536 n.33 (quoting Randolph S. Sherman, *Antitrust Standing: From Loeb to Malamud*, 51 N.Y.U. L. Rev. 374, 407 (1976)). This Court should not intervene merely because “there might be some marginal differences in the circuits about what qualifies as commercial or competitive interest for standing purposes.” *Phillips Foods*, 365 F.3d at 281. Such nuances exist in the circuits on every test involving multiple, non-exclusive factors.¹⁴ Whatever differences might exist among the reasonable-interest approaches to Lanham Act standing, Static Control would have standing regardless of the test applied.

Sixth Circuit, like the Second Circuit, suggested the formal *AGC* construction of the reasonable-interest test was unnecessary. Pet. App. 37 (citing *Famous Horse*, 624 F.3d at 115 n.3).

14. Lexmark asserts that the Sixth Circuit’s decision applied the reasonable-interest test “in a way that is materially different and more expansive than the Second Circuit” because the latter applies a “heightened standard” for non-competitors. Pet. 10 (citing *Ortho Pharm. Corp. v. Cosprophar, Inc.*, 32 F.3d 690, 694 (2d Cir. 1994)). The Second Circuit cases, however, do not apply a “heightened standard” to determine standing at the pleading stage. The court in *Cosprophar* dismissed the case for lack of standing following plaintiff’s case-in-chief, after the claimant failed to produce sufficient proof of injury or causation. 32 F.3d at 694. *Cosprophar*, therefore, stands at most for the proposition that Static Control would lack standing if it were to fail to present sufficient evidence of its “reasonable interest” to be free from Lexmark’s false advertising. 32 F.3d at 692. *See also Famous Horse*, 624 F.3d at 113.

II. This Case Is a Poor Vehicle Because the Decision Is Interlocutory, and Any Action by This Court Is Unlikely to Change the Outcome.

A. The Sixth Circuit’s decision is not final because it remanded for further proceedings, including a trial on the merits. The question presented is therefore not ripe for review because intervening events could moot the necessity for this Court’s review. *Cf. Bhd. of Locomotive Firemen & Enginemen v. Bangor & Aroostook R.R.*, 389 U.S. 327, 328 (1967) (per curiam) (denying certiorari “because the Court of Appeals remanded the case,” making it “not yet ripe for review by this Court”). As this Court recognized long ago, “many orders made in the progress of a suit become quite unimportant by reason of the final result, or of intervening matters.” *Am. Constr. Co. v. Jacksonville, T. & K.W. Ry.*, 148 U.S. 372, 384 (1893).

A judgment adverse to Static Control’s Lanham Act claim—either at summary judgment or by jury verdict—could moot the question presented. And a judgment favorable to Static Control’s state-law claims for the same damages could provide an adequate and independent state ground for a verdict, precluding review of the question presented. The Court, moreover, would benefit from having a developed record and jury findings on which to judge the question presented. The Court should allow those claims to go forward. If, at the end of those proceedings, the case presents a suitable question for review, the Court can decide whether the case merits certiorari based on a full factual record.

B. Lexmark incorrectly insists that, if this Court were to adopt *AGC* as the test for Lanham Act standing, “then the District Court’s dismissal of . . . Static Control’s Lanham Act claims using that analysis should be affirmed.” Pet. 11-12. The Sixth Circuit had a different opinion. Even if this Court were to grant review and thereafter conclude that *AGC* is the proper Lanham Act standing test, the court of appeals in this case has already stated that Static Control’s counterclaim allegations may establish Lanham Act standing under *AGC*. Pet. App. 38 n.10.

Lexmark’s speculative contention that the district court opinion would be “affirmed” under *AGC* ignores the court of appeals’ criticism of the district court’s reasoning on this precise point. Pet. 11-12. As the Sixth Circuit found, the district court erred even under *AGC* by failing to assess Static Control’s specific allegations supporting its Lanham Act claim, which were different from Static Control’s antitrust allegations. Pet. App. 38 n.10.

In analogous circumstances, claimants engaged in commercial activity have established Lanham Act standing even when they have not been the defendant’s direct competitors.¹⁵ In those cases applying *AGC* and concluding that the claimant *lacked* standing, none involved allegations (as Static Control’s do) that the

15. See, e.g., *Camel Hair*, 799 F.2d at 6-8 (trade group of cashmere garment producers had standing to remedy false advertising by coat manufacturer concerning cashmere content of its products); *PPX Enters., Inc. v. Audiofidelity, Inc.*, 746 F.2d 120 (2d Cir. 1984) (holding that owner of royalty streams from music recording had standing to sue distributor of falsely labeled music recordings).

defendant's false advertising directly targeted the claimant's products.¹⁶

Further, regardless of how this Court resolves Lexmark's petition, Static Control's false advertising claim will proceed under the North Carolina Unfair and Deceptive Trade Practices Act—a state law analogue to the Lanham Act. Pet. App. 38-42. As a consequence, even if this Court were to reverse the Sixth Circuit and hold that Static Control lacks prudential standing under the Lanham Act, Lexmark will still face potential false advertising liability for the same conduct. A merits decision by this Court, therefore, will make little, if any, practical difference to the parties. The Court should allow Static Control's false advertising claims—first alleged more than nine years ago—to go forward without further delay.

III. Lexmark Provides No Reasoned Justification for Adopting Any Particular Prudential Standing Test.

Lexmark provides no argument or reasoned justification for reversing the Sixth Circuit's application

16. See, e.g., *Phoenix of Broward*, 489 F.3d at 1169 (affirming order dismissing Lanham Act claims for lack of standing) (“[T]he causal chain linking [defendant] McDonald's alleged misrepresentations about one aspect of its promotional games to a decrease in [class claimants-franchisees] *Burger King's* sales is tenuous, to say the least”); *Procter & Gamble*, 242 F.3d at 563 (finding no standing where “the injury is alleged to arise from a competitor's fraudulently inducing a workforce—not necessarily its competitor's—to work for it. . . .”); *Conte Bros.*, 165 F.3d at 234-35 (concluding retailers lacked Lanham Act standing concerning a manufacturer's misstatements about its own motor oil additive products).

of the reasonable interest test apart from its interest in changing the result. In any event, the Sixth Circuit's decision was correct.

Section 43(a) of the Lanham Act provides a right of action to any person who is or is likely to be damaged by false statements that misrepresent the nature, characteristics, or qualities of that person's goods, services, or commercial activities. 15 U.S.C. § 1125(a)(1)(B). Congress enacted the Lanham Act to give a cause of action for unfair competition to commercial interests that, like Static Control, are the target of false advertising. *See* 15 U.S.C. § 1127 ("The intent of this chapter is . . . to protect persons engaged in such commerce against unfair competition").

Static Control's Lanham Act counterclaim promotes the Lanham Act's statutory standing elements and objectives. As alleged, Lexmark specifically targeted Static Control with false commercial statements attacking the lawfulness of Static Control's products and its business, and its reputation for honesty and integrity. Pet. App. 34-35. Lexmark's intentional effort to harm Static Control's commercial sales and goodwill is precisely the type of unfair competition that Congress enacted Section 43(a) to remedy. *See Conte Bros.*, 165 F.3d at 236 (purpose of Section 43(a) is "to ferret out unfair competitive methods and protect businesses from the unjust erosion of their good will and reputation").

Lexmark, moreover, does not contend that Static Control's standing under the reasonable-interest test conflicts with the Lanham Act's text or purposes. Indeed, Lexmark fails to cite any authority concluding that the reasonable-interest test itself conflicts with the Lanham

Act's purposes. Lexmark thus provides no justification for a grant of certiorari in this case, other than its self-interest in reversing the conclusion of the court of appeals. Just as this Court previously denied certiorari in prior cases under alternative articulations of the reasonable-interest test,¹⁷ it should again deny certiorari here.

CONCLUSION

This Court should deny the petition for a writ of certiorari.

Respectfully submitted,

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17. See, e.g., *Phoenix of Broward*, *supra* at 6 note 7 (applying AGC factors); *Frisch's Restaurants*, *supra* at 5 (using multi-factor reasonable-interest analysis).

