

1           IN THE SUPREME COURT OF THE UNITED STATES

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3   LEXMARK INTERNATIONAL, INC.,           :

4           Petitioner                               :   No. 12-873

5           v.   :

6   STATIC CONTROL COMPONENTS, INC.       :

7   - - - - - x

8                               Washington, D.C.

9                               Tuesday, December 3, 2013

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11           The above-entitled matter came on for oral  
12 argument before the Supreme Court of the United States  
13 at 11:14 a.m.

14 APPEARANCES:

15 STEVEN B. LOY, ESQ., Lexington, Kentucky; on behalf of  
16 Petitioner.

17 JAMESON R. JONES, ESQ., Denver, Colorado; on behalf of  
18 Respondent.

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

2 (11:14 a.m.)

3 CHIEF JUSTICE ROBERTS: We will hear  
4 argument next this morning in Case 12-873, Lexmark  
5 International v. Static Control Components.

6 Mr. Loy.

7 ORAL ARGUMENT OF STEVEN B. LOY

8 ON BEHALF OF THE PETITIONER

9 MR. LOY: Mr. Chief Justice, and may it  
10 please the Court:

11 The standing trust for antitrust adopted by  
12 this Court 30 years ago in AGC is the appropriate test  
13 to give effect to Congress's intent under the Lanham  
14 Act, and this is for three reasons.

15 First, the plain text of the Lanham Act at  
16 Section 45 states that the intent of that Act is to  
17 protect commercial actors against unfair competition.  
18 Competition generally is the focus of both antitrust  
19 statutes and the Lanham Act, and any test that this  
20 Court adopts should be tied to that statutory intent  
21 section.

22 Second, the history in the common law of  
23 both antitrust statutes and the Lanham Act are similar.  
24 In fact, in the Lanham Act context, the common law was  
25 more specific and more direct than it was under the

1 antitrust statutes.

2 And, finally, each of the five --

3 JUSTICE SCALIA: The Lanham Act goes well  
4 beyond the common law, doesn't it?

5 MR. LOY: The -- the Lanham Act provides  
6 some causes of action that are beyond the common law.  
7 We think the prudential standing considerations that  
8 were in place at common law or at least should guide the  
9 Court in determining what Congress intended to do by  
10 it --

11 JUSTICE SCALIA: Okay. But that would be a  
12 lot stronger if -- if you said the Lanham Act merely, as  
13 the Sherman Act was supposed to have done, merely  
14 adopted the common law. The Lanham Act doesn't merely  
15 adopt the common law. It goes well beyond it.

16 MR. LOY: I think there are two components  
17 to the common law and -- and we'll -- and I'll talk now  
18 about the most general component, and that are  
19 considerations of proximate cause and foreseeability  
20 that were in place when the Sherman and Tate Acts were  
21 enacted.

22 Those are general propositions that apply  
23 to -- to any, at least, Federal statutory cause of  
24 action and would also apply then to the Lanham Act. And  
25 the AGC factors address those prudential standing

1 requirements about specifically asking about proximate  
2 cause factors.

3 The very first question that AGC asks is:  
4 Is this the type of injury Congress intended to address?  
5 It's a logical question and should be asked  
6 appropriately in any Federal statutory cause of action.

7 The second factor --

8 JUSTICE SOTOMAYOR: Tell me why the answer  
9 to that question doesn't end this case here? You're  
10 disparaging the goods of a person. You're saying that  
11 it's illegal to use that person's products. It seems to  
12 me that's the essence of the Lanham Act, as it's now  
13 written.

14 MR. LOY: Two points. First, we can talk  
15 about the -- the alleged false advertisements in this  
16 case. The first alleged false advertisement by Lexmark  
17 was to Lexmark's customers, saying that you're bound by  
18 this or use restriction on our cartridges. That  
19 advertisement does not mention Static Control at all.

20 The second alleged false --

21 JUSTICE SCALIA: It doesn't mention what at  
22 all? It doesn't --

23 MR. LOY: It does not mention Static Control  
24 at all, the Respondent.

25 The second alleged misrepresentation were

1 letters written to remanufacturers, saying to the  
2 remanufacturers, if you remanufacture -- remanufacture  
3 our cartridges, you will violate our rights, including  
4 if you use Static Control's products to do it.

5 Beyond that, though, the question of target  
6 is not a test. It's a conclusion. And, in AGC, this  
7 Court, in the antitrust context, rejected a test for  
8 antitrust standing called the target area test. In  
9 Conte Brothers, the Third Circuit decision that first  
10 adopted the AGC test in the Lanham Act also did not  
11 adopt a target area test.

12 And so, for that reason, we think the  
13 factors that AGC lays out are the appropriate factors to  
14 determine antitrust standing in any given case.

15 JUSTICE ALITO: I -- I assume you would  
16 agree that the manufacturer of the cartridges that  
17 compete with Lexmark would have standing here.

18 MR. LOY: And, in fact, in this case, they  
19 did have standing. And one of the remanufacturers  
20 asserted a false advertising claim against Lexmark  
21 related to the Prebate program.

22 JUSTICE ALITO: But it's not a very big step  
23 from the manufacturer of the cartridge that competes to  
24 the manufacturer of the chip, which is really the  
25 essential component of -- or an essential component of

1 the cartridge that competes.

2 MR. LOY: Well, we -- we think it is. And  
3 wherever the Court draws the line on standing, whoever  
4 is just on the other side of the line is always going to  
5 think that it's too narrow.

6 Our cartridges, for instance, they do have  
7 microchips on them. We do not sell the microchips.  
8 Static Control does not sell cartridges. Those  
9 cartridges also have resin, they have labels, they have  
10 toner, they come in boxes.

11 If we allow one of many parts suppliers,  
12 like Static, in the remanufacturing industry, to have  
13 standing --

14 JUSTICE GINSBURG: Well, then you could --  
15 you could sue them for infringing on your patent or  
16 whatever intellectual property protection you have. But  
17 here is an entrepreneur that says, we make a product,  
18 and Lexmark is disparaging our product. It is  
19 essentially trying to get us out of this line of  
20 business.

21 Certainly, if you just read the words of the  
22 Lanham Act, this is allegedly false advertising, and the  
23 false advertiser shall be liable to any person who  
24 believes he or she is likely to be damaged by such an  
25 act.

1           That -- that legislation seems to envision a  
2 very broad standing, certainly enough to encompass the  
3 person who is -- whose product is being disparaged.

4           MR. LOY:           Certainly, the Lanham Act uses the  
5 any person language and that language is no different,  
6 though, than the any person language appears in the  
7 antitrust statutes and in RICO, both instances in which  
8 this Court adopted AGC tests to determine standing.

9           The one difference -- the one difference is  
10 the Lanham Act, unlike the antitrust statutes, at  
11 Section 45, specifically states its intent as to protect  
12 commercial actors against unfair competition.

13           JUSTICE BREYER:           Suppose you have the --  
14 shouldn't a supplier have standing to sue the competitor  
15 of the firm to which he supplies, where the alleged  
16 liable or slander or whatever it is, is directly about  
17 what the supplier supplies?

18           The example, make it clearer.           Suppose that  
19 Bailey's sells ice cream sundaes, and the defendant has  
20 said the chocolate sauce in Bailey's ice cream sundaes  
21 is poisonous. Now, the chocolate sauce does not compete  
22 with the defendant because he's an ice cream parlor,  
23 but, nonetheless, he is directly affected by the  
24 statement that he is suing about.

25           He is, therefore, different from the other



1 suppliers who might have supplied Bailey's with  
2 cushions, heat, electricity. But shouldn't at least  
3 that supplier of chocolate sauce have the standing to  
4 bring a claim against the ice cream parlor that  
5 competes with Bailey?

6 MR. LOY: That supplier may very well have  
7 standing to bring a State law claim for defamation.

8 JUSTICE BREYER: Why not -- why not in this  
9 Lanham Act suit, why shouldn't the chocolate sauce  
10 supplier have standing? He is directly victimized by --  
11 he has not just lost sales, but the comment is about  
12 him.

13 MR. LOY: We believe to give intent to  
14 Section 45, which states that the purpose is unfair  
15 competition, standing under the Lanham Act is going to  
16 be a narrow, focused inquiry.

17 And if you -- using the cartridge example as an  
18 example, if a supplier of microchips, who is one of many  
19 suppliers in the market for microchips, has standing,  
20 then couldn't the person who prints the label that sells  
21 to remanufacturers by saying, well, if Lexmark hadn't  
22 made these statements to you, you would have refilled  
23 more cartridges, and we could have sold more labels.

24 JUSTICE BREYER: Well, the answer to your  
25 question, if you're asking, is no, because the person

1 who supplies labels is totally -- the statement that is  
2 sued about has nothing to do with labels. So the people  
3 who have nothing to do with the statement wouldn't have  
4 standing.

5 But my -- do you remember my question?

6 MR. LOY: I do.

7 JUSTICE BREYER: All right. Well, why  
8 shouldn't that person who is talked about in the  
9 statement have standing? A clear distinction. Not  
10 every supplier could sue.

11 MR. LOY: We think Lanham Act does and  
12 should have a narrow standing requirement. And in the  
13 false advertising context, it would be unusual -- Conte  
14 Brothers pointed out that there might be situations  
15 where a noncompetitor has standing, but that it's going  
16 to be an unusual situation.

17 JUSTICE KAGAN: Mr. Loy, can I ask you what  
18 you think this standing doctrine is all about in a  
19 context like this? You said before -- you said to  
20 give -- to effect Congress' intent in passing Section  
21 43. Is that what we're trying to do here?

22 MR. LOY: I think so. I think under --  
23 under any standing analysis or test, one of the  
24 questions ought to be, what was Congress' intent?

25 JUSTICE KAGAN: Well, one of the questions.

1 Why isn't that the only question that we ought to be  
2 concerned with in a case like this? Congress creates a  
3 right of action, and it seems to me that the normal  
4 thing that we ought to do and do do in most contexts is  
5 just say, you know, what's the scope of that right of  
6 action?

7 And -- and certainly we could take into  
8 account Congress' purposes in interpreting the scope of  
9 that right of action. But that would be the question.

10 MR. LOY: That should always be a question.  
11 I would point out there are only two tests that have  
12 been identified that even ask that question in the  
13 Lanham Act, and that is the AGC test that we propose and  
14 the categorical test that we propose in the alternative,  
15 because it categorically requires direct competition.

16 None of the other tests that have been  
17 identified ask that question, and it should be  
18 asked in every inquiry.

19 JUSTICE KAGAN: I guess, if that's the  
20 question, the AGC test strikes me as not the answer to  
21 that question. I mean, we don't usually say what was  
22 Congress' intent, how broad did Congress mean for this  
23 cause of action to go, and then sort of devise a  
24 five-part test with a lot of things that aren't  
25 mentioned in the statute.

1           MR. LOY:           I think that the -- this Court's  
2           decision in Holmes, and I believe it was the concurrence  
3           by Justice Scalia, identified the proximate cause  
4           factors as part of any standing analysis. And I think  
5           that's what AGC was getting at when it adopted factors 2  
6           through 5, is these are proximate cause type injuries,  
7           plus, as AGC noted, we want to make it judicially  
8           manageable, which is a legitimate prudential standing  
9           concern because one of the prudential background  
10          considerations is whether -- the prohibition on  
11          litigating generalized grievances.

12                 So a test that looks at those proximate  
13          cause factors, which are part of, we think, a standing  
14          analysis in any statutory scheme, is appropriate, and it  
15          ensures that the plaintiff and the defendant are in  
16          close proximity to one another.

17           JUSTICE SOTOMAYOR:           Except there are two  
18          remedies under this statute, injunctive relief and  
19          damages. And to the extent that proximate cause always  
20          limits the recovery on damages, it doesn't limit  
21          injunctive relief issues.

22                 And so the question is, why should we be  
23          reading into a statute a limitation against bringing any  
24          action based on your proximate cause point when there  
25          are other remedies in this statute?

1           MR. LOY:           And just as there are injunctive  
2 remedies available in the antitrust statute and in this  
3 Court's decision in Cargill, I think, in a footnote, the  
4 Court noted that, if all you have is an injunctive  
5 request under antitrust statutes, some of those factors  
6 may not be relevant.

7           For instance, duplicative damages, risk of  
8 apportionment issues would not -- Your Honor is  
9 correct - be relevant.

10          JUSTICE SCALIA:           But proximate cause? What  
11 about proximate cause? Do you agree that -- that  
12 there's no proximate cause analysis when what is at  
13 issue is an injunction?

14          MR. LOY:           No. What we were saying is some  
15 of the factors that AGC identifies, such as --

16          JUSTICE SCALIA:           Answer my question. Yes or  
17 no? Do you agree with what Justice Sotomayor said --

18          MR. LOY:           No --

19          JUSTICE SCALIA:           Because --

20          MR. LOY:           I think it is likely still  
21 appropriate in an injunctive analysis to look at the  
22 proximity of the plaintiff and the defendant. I think  
23 that is a legitimate inquiry. I think some of the  
24 damage factors for AGC are not going to be applicable in  
25 the injunctive analysis, and that's what we do in

1 antitrust --

2 JUSTICE GINSBURG: Explain to me why -- we  
3 are talking in abstract terms. Here is a manufacturer  
4 that says, my product is being disparaged by the  
5 defendant -- my product, not someone else's -- the  
6 result is that I am losing business.

7 Why do we need anything more than that under  
8 the Lanham Act, which makes false advertising -- gives a  
9 claim for false advertising to somebody who's been hurt  
10 by it?

11 MR. LOY: Again, there -- there very well  
12 could be State law remedies available to plaintiffs who  
13 do not have standing under the Lanham Act.

14 JUSTICE GINSBURG: But I'm not asking about  
15 State law remedies. I'm looking at this statute, and  
16 your interpretation seems to stray very far from what  
17 the statute -- this section of the statute says.

18 MR. LOY: We --

19 JUSTICE GINSBURG: And if you just read this  
20 section, would you agree that -- what is the party --  
21 SCC is someone who has been injured, damaged, by the  
22 false advertising?

23 MR. LOY: We agree they make that  
24 Article III allegation. But in the Lanham Act, where we  
25 think it's -- the one thing that is clear under the

1 Lanham Act is there is prudential standing  
2 consideration, and Congress has not expressly negated  
3 those.

4 So the question is what test to apply. We  
5 think the Lanham Act is a limited, focused statutory  
6 remedy. It's not a Federal tort of misrepresentation.  
7 It's not a Federal tort of deceit. The purpose of  
8 this -- of the statute expressly is to protect  
9 commercial actors against unfair competition, not  
10 against unfair trade practices.

11 And so to -- to use the -- or take advantage  
12 of the Federal courts in the Lanham Act, which has  
13 potential for treble damages and attorneys fees, we  
14 think it's a narrow class of plaintiffs. Particularly,  
15 unlike the antitrust context, there's no intent  
16 requirement under the Lanham Act.

17 One could be liable for damages under the  
18 Lanham Act for an innocent misrepresentation, one that  
19 they thought, at the time, was truthful, which would  
20 argue, perhaps, for more limited standing than either --  
21 than even the antitrust statutes because there is an  
22 intent element under the antitrust statutes. And so the  
23 standing should be more limited in this situation.

24 Again, it's a -- it's a narrow, focused  
25 statutory remedy. And unlike RICO, unlike Sherman,

1 unlike Clayton, there's an intent section, which we  
2 think guides the courts or should guide the courts on  
3 which test to adopt.

4 And, again, the only two --

5 JUSTICE GINSBURG: Is there any question  
6 here that there was an intent on the part of Lexmark to  
7 stop the Static Control company from making these  
8 microchips?

9 MR. LOY: Well, again, on the alleged facts  
10 of this case --

11 JUSTICE GINSBURG: Yes. That's what we  
12 have -- and we have to deal with the complaint and  
13 have to assume that that's true. What the complaint  
14 alleges is that Static was making a product and Lexmark  
15 was disparaging it and not by happenstance, but quite  
16 deliberately.

17 MR. LOY: We would disagree with that  
18 characterization of -- of their counterclaim. Again,  
19 their -- the advertisements here were directed to the  
20 remanufacturers, who are indirect competitors of  
21 Lexmark, and was telling them --

22 JUSTICE GINSBURG: And the -- the  
23 directive -- the letter said don't buy Static Control's  
24 product because, if you do, you're in jeopardy of being  
25 a contributory infringer.



1           MR. LOY:           What it first says to the  
2 remanufacturers is that if you remanufacture our  
3 cartridge -- our Prebate cartridges, generally, you  
4 infringe our rights. But you will also infringe those  
5 rights, if you use Static Control's products to do it.

6           But merely because one is a target, we do  
7 not believe it necessarily translates into standing. It  
8 did not translate into standing in the AGC case; the  
9 union was the target, and this Court, nevertheless,  
10 denied standing.

11           The Fifth Circuit decision, the Procter &  
12 Gamble decision, which involved Procter & Gamble and  
13 Amway; there, the parties were actually competitors.  
14 And because of the nature of the statements that -- that  
15 Procter & Gamble allegedly made about compensation to  
16 Amway's distributors and how they get distributors,  
17 there, they were actually direct competitors, and  
18 standing was not provided, which, again, we think just  
19 reinforces that this is a narrow statutory remedy.

20           The -- the -- couple points about the zone  
21 of interest test, which was advocated by Static in -- in  
22 their brief. That is certainly a general prudential  
23 background consideration. We think it would apply along  
24 with prohibition on -- on generalized grievances and  
25 asserting rights of third parties.

1           But, here, it merely asked the question.           We  
2 think AGC provides the answer to that question. And the  
3 zone of interest has been largely used in the APA  
4 context, and it's -- it's appropriate in -- in that  
5 context. There's a two-step inquiry under the APA.

6           First, the APA itself is a procedural act,  
7 but, then, you have to go to the underlying substantive  
8 statute to determine who a party is -- what party is  
9 agreeing. The zone of interest, therefore, has to  
10 administer hundreds, if not thousands, of very different  
11 federal substantive statutes, and so some flexibility  
12 needs to be inherent in -- in that test.

13           If such a test were employed, we think, in  
14 the Lanham Act, we could lead to over-enforcement, which  
15 has its own set of harms. We don't think you want to  
16 deter companies from putting even truthful information  
17 into the marketplace, for fear of facing lawsuits by  
18 remote parts suppliers.

19           And -- and so, in this instance, we think  
20 the AGC test itself provides the answer to the question  
21 of what is in -- in the zone of interest.

22           JUSTICE SOTOMAYOR:           So what's wrong --  
23 what's wrong with the tests adopted by three circuits,  
24 the reasonable interest test?

25           MR. LOY:           We think it suffers from, in this

1 instance -- because, here, we have -- we have the Lanham  
2 Act. We can tailor a -- a standing test to the Lanham  
3 Act. Reasonable interest suffers, we think, from  
4 the same flaws in this context, as would the zone of  
5 interest test.

6 It's no more than Article III standing.  
7 Anybody that can plead a reasonable interest in the  
8 subject matter of the -- of the advertisement and a  
9 reasonable basis for believing that interest is harmed,  
10 then that's no more than Article III standing  
11 requirement.

12 And we do, in this case, believe that there  
13 is universal recognition that there should be prudential  
14 standing requirements in the Lanham Act and provides  
15 little guidance to courts below and, therefore, could  
16 lead to inconsistent results.

17 JUSTICE KAGAN: Mr. -- Mr. Loy, you said  
18 there's universal recognition that there should be  
19 prudential standing requirements in the Lanham Act.  
20 When should there be prudential standing requirements in  
21 a statutory right of action?

22 In other words, Congress passes lots of  
23 statutory rights of action. And let's say that almost  
24 never, never does Congress talk about prudential  
25 standing one way or the other.

1           Do you think that, every time Congress  
2 passes a right of action, the courts are supposed to  
3 engage in a kind of free-form inquiry about what kind of  
4 prudential standing rule should apply to that particular  
5 right of action?

6           MR. LOY:           We think, in any federal statutory  
7 cause of action, prudential standing requirements are  
8 presumed. Given Section 45 here, we believe that the  
9 Lanham Act clearly does have prudential standing  
10 requirements.

11           This Court in Bennett, in looking at the  
12 Endangered Species Act, at least the stand-alone  
13 citizenry portion of it, I believe determined that  
14 Congress eschewed prudential standing requirements there  
15 because the -- the subject matter of the Act was the  
16 environment, something that I think the Court noted  
17 everybody has an interest in and -- and want to  
18 encourage private attorney generals to pursue those  
19 causes of action.

20           And, in that situation, there was a right of  
21 first refusal for the government to first bring the  
22 lawsuit before a private suit could be brought. So  
23 there are times when prudential standing requirements  
24 have been done away with by Congress.

25           JUSTICE KAGAN:           And -- and you just sort of

1 know them when you see them, or it's a reaction to what  
2 are perceived to be very broad statutes or -- you know,  
3 when -- when do we know that we should be off on a  
4 prudential standing jag?

5 MR. LOY: I think -- I think that the -- the  
6 first place you look is at the text of the statute  
7 itself. To the extent that there are situations where  
8 legislative history might speak to intent -- and I think  
9 Clarke says, let's look at that.

10 In this situation, the 1946 Act and the  
11 Senate report that accompanied it said, this is the  
12 purpose to -- this is the end to which this statute was  
13 directed, and it identified fair competition and the  
14 prevention of diversion of goodwill from one to the  
15 other.

16 JUSTICE ALITO: Maybe the answer is  
17 when we just can't believe that Congress really meant  
18 the literal words of the statute to be interpreted  
19 without some limiting principle. So, here, Congress  
20 says, "any person," and any person surely includes  
21 people who purchase printer cartridges.

22 So if we don't think that -- that Congress  
23 really meant for every single person who purchases a  
24 printer cartridge to be able to file a claim in Federal  
25 court with no amount in controversy requirement, then

1 that would be a situation where some consideration of  
2 prudential standing would have to take place.

3 MR. LOY: That's correct. "Any person"  
4 language here would allow consumer standing, which is  
5 one thing that every circuit that's addressed this issue  
6 has agreed upon, that there is no consumer standing  
7 under the Lanham Act.

8 Again, that's tied to Section 45, which  
9 protects commercial actors --

10 JUSTICE KAGAN: But, there, couldn't that be  
11 done just by interpreting the -- the language of the  
12 statute, in accord with its purposes, because you have a  
13 specific purpose provision in the Lanham Act that says,  
14 we're -- we're trying to get at commercial competition  
15 here.

16 MR. LOY: I think standing is in many, if  
17 not most, instances, a separate analysis from the cause  
18 of action itself. And the text is always going to  
19 provide the cause of action.

20 JUSTICE SCALIA: What is prudential  
21 standing? I don't really understand. Is -- is it  
22 anything other than -- should it be renamed statutory  
23 standing? It can always be done away with by Congress,  
24 right?

25 MR. LOY: It can, and --

1 JUSTICE SCALIA: And -- and is it -- is it  
2 the kind of standing that we would have to raise on our  
3 own? Is it jurisdictional, so that if -- if a party  
4 hasn't raised it below, it, nonetheless, is still  
5 unavailable argument on appeal? Is prudential standing  
6 of that sort?

7 MR. LOY: It's -- at least I normally don't  
8 think of it in terms of jurisdictional. I think Article  
9 III injury, in fact, would be in the nature of a  
10 jurisdictional analysis. I think prudential standing is  
11 a little bit different.

12 That phrase only came into use, I think, in  
13 the '70s, but the -- the concepts underlying that have  
14 been --

15 JUSTICE SCALIA: I'm uncomfortable with the  
16 notion that -- you know, in my prudence I give standing  
17 here and I deny standing there, it's just up to me. I can  
18 understand Article III.

19 But unless prudential standing means  
20 statutory standing, so that I look to the statute to see  
21 whom it was intended to empower to bring lawsuits, I am  
22 very uncomfortable with the whole notion.

23 MR. LOY: And I think the phrase "statutory  
24 standing" would be fine with us. And, again, the very  
25 first AGC question that asked that question, what did

1 Congress intend to address here?

2 If there are no further questions, I would like  
3 to reserve my time.

4 CHIEF JUSTICE ROBERTS: Thank you, counsel.  
5 Mr. Jones.

6 ORAL ARGUMENT OF JAMESON R. JONES  
7 ON BEHALF OF THE RESPONDENT

8 MR. JONES: Mr. Chief Justice, and may it  
9 please the Court:

10 As some of this questioning indicated, if  
11 any party has standing under Section 43(a) of the Lanham  
12 Act, it's a party whose goods are misrepresented in  
13 false advertising. To remove any doubt about that  
14 question, Congress amended the statute in 1988 to ensure  
15 a cause of action when a false advertiser misrepresents  
16 the goods or commercial services of, quote, "another  
17 person," end quote.

18 This Court's zone of interest analysis shows  
19 that parties whose goods are disparaged, either  
20 expressly or by necessary implication, must have  
21 standing to sue.

22 Lexmark's simply wrong about the idea that  
23 the zone of interest analysis in the Lanham Act does not  
24 pose limits upon who may sue. As the hypothetical  
25 with respect to the Bailey's ice cream parlor shows, you



1 can look to the subject matter of the false  
2 advertisement to see whose goodwill and commercial  
3 activities are related to the falsity of the statement.

4 And those who come within the falsity and  
5 the subject matter of the advertisement at issue should  
6 have standing, while those who may have tangential  
7 injuries would not.

8 JUSTICE SCALIA: How do you -- how do you  
9 square that with the statutory provision that the  
10 purpose of the law is to prevent unfair competition?  
11 Unfair competition, not unfair trade practices. Unfair  
12 competition.

13 MR. JONES: Where Section 45 says that it is  
14 designed to protect those engaged in such commerce from  
15 unfair competition, it's referring to what is defined in  
16 the operative text as unfair trade practices. Unfair  
17 competition involves specific measures, use of  
18 falsities, that can injure parties who are not  
19 necessarily in competition with one another.

20 The courts, as a whole, all agree that a  
21 competition requirement cannot be inferred into the  
22 false association cause of action that is also unfair  
23 competition that's part of Section 43(a).

24 Section 43(a) goes to commercial activity.  
25 There is unfair competition in the sense that all of the

1 activity under it is commercial and competitive in that  
2 sense. But some narrow form of competition between a  
3 plaintiff and a defendant, for the purposes of standing,  
4 is inconsistent with the structure of Section 43(a) and  
5 the text of the authorizing paragraph.

6 JUSTICE ALITO: Suppose the comments in this  
7 case only disparaged the cartridges themselves and not  
8 the chips. Then would the chip manufacturer, would your  
9 client have standing?

10 MR. JONES: Yes, if the statements are about  
11 the legality of remanufacturing Lexmark's printer  
12 cartridges, all of those statements are about Static  
13 Control's products and the legality of using them, the  
14 places where those can be lawfully used.

15 Static Control here makes microchips and  
16 parts that are specifically designed for the very  
17 commercial activity that this false advertising says is  
18 illegal. In that sense, Static Control's goodwill and  
19 commercial relationships are all very closely and, by  
20 necessary implication, talked about in the  
21 advertisements.

22 JUSTICE ALITO: Well, that may be true, but  
23 I don't understand how you get from the zone of interest  
24 to the limiting principle that you are suggesting, which  
25 is that the zone of interest includes only those

1 businesses, other than the direct competitor, whose  
2 products are targeted by the false statements.

3 MR. JONES: As Mr. Loy recognized, in the --  
4 in the legislative history of the Act and in this  
5 Court's opinion in *Daystar*, the Court has said the core  
6 principle of the Lanham Act, as a whole, is to protect  
7 commercial actors' goodwill and reputation, and that can  
8 be seen in the trademark provisions. It can be seen in  
9 Section 43(a) itself.

10 And I think that basic principle means that  
11 there is a tie to the subject matter of the false  
12 statements, the false association, and that can apply to  
13 both prongs of Section 43(a), to where there is a nexus  
14 between the subject matter of what's talked about and  
15 the person who is injured.

16 JUSTICE SCALIA: Did you answer his  
17 question? I'm still left with a lack of understanding  
18 of how the disparagement of the -- of the composite  
19 product is automatically a disparagement of your chip.

20 MR. JONES: The disparagement -- the  
21 statements about the uses to which Static Control's  
22 products may be put are all implicit in all of the false  
23 advertisements that are at issue in this case.

24 When Lexmark says that remanufacturing our  
25 cartridges is illegal, even if it doesn't mention Static

1 Control in one particular advertisement, all of that  
2 goes to the subject matter and to whether or not Static  
3 Control's products have lawful uses.

4 These are specifically designed for this  
5 very commercial activity.

6 JUSTICE ALITO: All right. Well, to change  
7 it, suppose the statements don't implicitly -- even  
8 implicitly target Static Control, but the effect of the  
9 statements is to drive Static Control out of business.  
10 You would say there would be no standing there?

11 MR. JONES: It depends upon the context of  
12 the case. In many circumstances where the false  
13 advertising is not about a product, those products will  
14 have multiple different uses, such as commodity products  
15 that are supplied, gears and springs, for example, that  
16 may have many different uses, the false statements here  
17 would not be about those products.

18 And those manufacturers can sell their gears  
19 to many other different uses that require gears. Static  
20 Control's microchips here only work for remanufacturing  
21 Lexmark printer cartridges.

22 JUSTICE ALITO: All right. So, in Justice  
23 Breyer's hypothetical about the soda fountain that sells  
24 ice cream with chocolate sauce and there is a statement  
25 that the chocolate sauce is poisonous, if the effect of

1 that is to drive out of business a little company that  
2 manufactures ice cream that's used there, that company  
3 would not have standing?

4 MR. JONES: I think if it's not being talked  
5 about in that case, that company probably would not have  
6 standing. But the fact that the false advertisements in  
7 that case were about the chocolate sauce shows that --  
8 why the chocolate maker needs to have standing. That  
9 maker has different incentives vis-a-vis the person who  
10 is operating the Bailey's ice cream store.

11 Bailey's ice cream store could decide the  
12 game's not worth the candle, and we're going to stop  
13 buying this chocolate, even if all of those  
14 advertisements are false. And so the different  
15 incentives for the key supplier and the person who is  
16 actually within direct competition means that, to  
17 further the purposes of the Lanham Act, a party whose  
18 goods are misrepresented, either expressly or by  
19 necessary implication, needs to have standing.

20 JUSTICE ALITO: So if Bailey's was the only  
21 place that sold this chocolate sauce, Bailey -- Bailey's  
22 might have standing. That would be similar to this  
23 case. But, if other places also sold this chocolate  
24 sauce, then Bailey's is out.

25 MR. JONES: In the hypothetical that I heard

1 from Justice Breyer, the statement was, the chocolate  
2 sauce that Bailey's uses is -- is poisonous. In that  
3 circumstance, where both Bailey's is mentioned and the  
4 chocolate sauce, then I think Bailey's would have to  
5 have standing.

6 JUSTICE BREYER: How do we tie that in? I'm  
7 sort of sorry I used that hypothetical because it --

8 (Laughter.)

9 JUSTICE BREYER: But it nonetheless  
10 illustrates --

11 JUSTICE SCALIA: I am, too, because I'm sick  
12 of it.

13 JUSTICE BREYER: But it illustrates the  
14 point. I mean, in my own mind, the standing question is  
15 designed to answer, are you the kind of plaintiff that  
16 Congress intended, in this statute, to protect against  
17 the kind of injury that you say you suffered? Now, that  
18 goes back to Justice Brandeis, and it goes back to  
19 saying, did you suffer a common law injury, or do you  
20 fall within the scope as defined?

21 Normally, Congress doesn't think about that,  
22 and so courts decide, and we're right in the middle of  
23 that decision. So if I think that, basically, you have  
24 a point, that at least the supplier who is mentioned in  
25 the defamatory statement by the competitor who bought

1 the supplies, at least where he is mentioned explicitly,  
2 there should be standing, which means your side would  
3 win, I guess.

4 What do I write to tie that in to the three  
5 separate kinds of tests that the circuits have talked  
6 about? That's what I can't quite see because they talk  
7 about the reasonable interest test, they talk about the  
8 zone of interest test, they talk about some other kind  
9 of test.

10 How do I tie this into that?

11 MR. JONES: Justice Breyer, we think,  
12 respectfully, that the circuits' tests don't necessarily  
13 encompass this situation as well as they could, which is  
14 why we suggest that it's best for the Court to step back  
15 to first principles of prudential standing, which is the  
16 zone of interest analysis --

17 JUSTICE GINSBURG: Has that been applied  
18 outside the context of the APA, that is, when the suit  
19 is against an agency?

20 MR. JONES: Yes, Justice Ginsburg.

21 JUSTICE GINSBURG: Has it been applied to  
22 private party litigation?

23 MR. JONES: Yes, Justice Ginsburg. In 2011,  
24 this Court's opinion in *Thompson v. North American*  
25 *Stainless* applied the zone of interest test to a private

1 dispute under Title VII, as to whether or not a party in  
2 that suit had a private cause of action when he was the  
3 spouse of the person who was retaliated against.

4 JUSTICE BREYER: If that's so -- if you go  
5 back and you just lift the APA test -- because I think  
6 Justice Ginsburg is absolutely right, that this is not  
7 an APA suit -- the word "arguably" was inserted in the  
8 normal standing test by ADAPSO, which Justice Douglas  
9 wrote.

10 Now, if we take that and simply lift it, the  
11 first thing, the person who would get a new lawsuit, I  
12 guess, is a consumer, because the consumer could easily  
13 say, I didn't buy this product because of the false  
14 statement that the competitor of the person I would have  
15 bought from made.

16 And, indeed, you could have very big  
17 consumers, and they could allege all kinds of injuries.  
18 And so, if I simply lift the test, I'd rather worry that I  
19 am changing the law quite radically.

20 MR. JONES: I don't think so, Justice  
21 Breyer, because the zone of interest test requires the  
22 Court to determine what the purposes behind the statute  
23 are.

24 JUSTICE BREYER: But "arguably." Isn't it  
25 arguably, in part, to protect consumers?



1 MR. JONES: Well, in the -- in the Lanham  
2 Act, I think the purposes of the Act are to protect  
3 those engaged in such commerce from unfair competition,  
4 from false statements. And once that is defined -- and  
5 you look at the history of it, and it seems fairly clear  
6 from the history that it is designed to protect  
7 commercial actors. Once that is defined, those parties  
8 who are arguably within that zone, who arguably assert  
9 those interests, should have standing.

10 And that "arguably" term places the proper  
11 thumb on the scales with respect to what is otherwise  
12 clear statutory text that is being interpreted here,  
13 that, generally, it respects the role of the judiciary  
14 vis-a-vis the legislature, when Congress --

15 JUSTICE SOTOMAYOR: What do you see as the  
16 difference between reasonable interest and zone of  
17 interest? What do you -- I haven't quite understood  
18 what the difference is between the two.

19 MR. JONES: Justice Sotomayor, I believe the  
20 zone of interest test can have some more teeth,  
21 perhaps, than the reasonable interest test because it  
22 tailors what is the interest protected to the text and  
23 history of the particular statute.

24 The reasonable interest test, if properly  
25 applied, with all of that in mind, would, I think, be

1 applied in similar ways. But the zone of interest test  
2 has the directive to courts that, each time, rather than  
3 thinking what is reasonable in the abstract, to think  
4 about what Congress intended to protect as part of any  
5 given statute.

6 JUSTICE ALITO: Suppose that Lexmark had not  
7 made disparaging comments about Static Control, but had  
8 simply made false statements about its own product.  
9 Suppose it said that, if you use our products -- our  
10 cartridges, they will emit some sort of vapor in your  
11 house that will promote good health.

12 Who would be within the zone of interest  
13 there?

14 MR. JONES: So you would look at the subject  
15 matter of that -- of that false advertisement, and, as  
16 you've expressed it, I don't believe that Static  
17 Control's products would be within the subject matter  
18 about the vapor of Lexmark's printer cartridges.

19 But if, for example, Lexmark were to say,  
20 our printer cartridges produce A quality -- A quality  
21 print jobs, then -- and it's implicitly talking about  
22 its toner, Static Control, as a manufacturer of toner,  
23 may have standing in that circumstance because, by  
24 comparison, by necessary understanding about how the  
25 reputations of the parties' products are at play, Static

1 Control might have standing in that instance.

2 JUSTICE ALITO: Who would be within the zone  
3 of interest? Only -- would other printer cartridge  
4 manufacturers be within the zone of interest in that  
5 situation?

6 MR. JONES: In that situation, I think  
7 remanufacturers would and the supplier of toners that is  
8 necessarily by comparison talked about in that false  
9 advertisement.

10 And, when a party only talks about their own  
11 goods, they are necessarily going to be very difficult  
12 cases on the margins as to where the ripples of the  
13 subject matter of that false advertisement extend. That  
14 is certainly not this case, where Lexmark falsely  
15 advertised that the --

16 JUSTICE SCALIA: I understand. But why  
17 should it be "arguably"? "Arguably"? I mean, under the  
18 APA, you are dealing with suits against the government,  
19 and it's just funny money at issue. But, when you have  
20 private suits, you can drag somebody into court simply  
21 because you are arguably within the zone of interest  
22 protected? I'm not happy with that.

23 MR. JONES: If the Court wanted to get rid  
24 of the "arguably" language for the purpose of the Lanham  
25 Act, we don't feel we have a dog in that fight, but I do

1 believe --

2 JUSTICE KAGAN: Well, Mr. Jones, is the  
3 question that you are asking us to ask just did Congress  
4 want this kind of actor to be able to sue? Is that the  
5 question that you think we ought to be -- be asking?

6 MR. JONES: Yes. If there are going to be  
7 prudential limits on what a statute --

8 JUSTICE KAGAN: Well, let's not call the  
9 limits anything in particular. The question, in your  
10 view, is Congress passes this Act; did Congress -- in  
11 including this right of action, did Congress want this  
12 kind of actor to be able to use that right of action?  
13 Is that correct?

14 MR. JONES: Yes, yes. And, in the 1988  
15 amendments that expanded the cause of action to ensure a  
16 right of action when a false advertiser misstates  
17 another person's goods, that amendment should be  
18 dispositive in this case.

19 JUSTICE KAGAN: But, if that's correct, I  
20 mean, rather than talking about whether something is  
21 arguably within the zone of interests in the way we have  
22 to do, in the APA context, because we are dealing with a  
23 lot of statutes that don't provide rights of action  
24 there, why shouldn't we just ask, what kinds of actors  
25 did the Lanham Act provide a right of action to, as

1 sensibly construed?

2 We should sensibly construe the Lanham Act,  
3 in accordance with Congress' purposes.

4 MR. JONES: I think that would be a very  
5 straightforward way to deal with this case,  
6 Justice Kagan. I think the zone of interest --

7 JUSTICE KAGAN: And, then, what would be the  
8 test? What would we say the Lanham Act means?

9 MR. JONES: The Lanham Act means that those  
10 parties whose goodwill and commercial reputation is  
11 necessarily affected by the falsity of the statement  
12 have standing to sue, are protected by the Lanham Act  
13 and able to stop such false advertisements and able to  
14 seek recompense for the damages that are suffered.

15 And at the heart of that are those parties  
16 whose goodwill and whose commercial services are  
17 expressly misrepresented or implicitly misrepresented by  
18 a particular false advertisement because they have a  
19 unique interest in vindicating their reputations and  
20 making the false advertisements stop.

21 JUSTICE GINSBURG: So what makes this limit  
22 a prudential limit? You are supposed to put -- the  
23 notion of a prudential limit is there is Article III  
24 standing, but, even so, you can't sue because you don't  
25 meet the prudential.

1           MR. JONES:           Justice Ginsburg, this Court has  
2 talked about these types of inquiries as prudential  
3 limits on standing. I think it's perhaps better  
4 understood as interpreting what does "any person" really  
5 mean under this statute?

6           But whether it's thought of as prudential  
7 standing or whether Static Control falls within "any  
8 person" or has "injuries" as meant by the statute, the  
9 inquiry is ultimately the same. What is the intent of  
10 Congress? What was their core purpose in this Act? And  
11 who did they intend to sue?

12          And in the text with -- here, there is very, very  
13 broad authorizing language that gives a right of action  
14 to any party who believes that he or she is or is likely  
15 damaged by such false advertisement.

16          JUSTICE SOTOMAYOR:        Could you tell me how  
17 that would affect a situation that I read about in the  
18 papers, where a company like -- not to suggest that they  
19 have, but only using this as a hypothetical example --  
20 McDonald's says, in its advertising, we, in fact -- our  
21 calorie count is less than -- than 200, so buy from us.

22          Consumers, under your theory, can't sue  
23 under the Lanham Act. Assume that's absolutely true --  
24 false. Who would be -- who would have a permissible  
25 ground to sue in that situation?

1           MR. JONES:           I think, in that situation, you  
2 would look to Burger King would have a cause of action,  
3 probably even Subway, because they are a fast food  
4 company that advertises itself as based upon  
5 lower-calorie options, would have a standing to sue in  
6 that context.

7           JUSTICE SOTOMAYOR:           All right. So fit in  
8 that into your definition of what "standing" is --

9           MR. JONES:           So --

10          JUSTICE SOTOMAYOR: -- how do we not get it  
11 to be the local -- or maybe you say it's okay -- the --  
12 the local restaurant that has no franchises, that does  
13 healthy meals, which is actually true of many  
14 restaurants today, particularly in Washington.

15          MR. JONES:           Sure. So, in each of those  
16 contexts, Subway and Burger King can say that their  
17 goodwill -- their relative standing in the marketplace  
18 has been necessarily affected by McDonald's false  
19 advertisements on those subjects.

20          And, if you get to looking at pleadings,  
21 courts would look to whether or not the allegations that  
22 set that forth are plausible and meet that standard,  
23 but -- and how far out that's going to go is for another  
24 day. But I do believe it would be permissible for  
25 courts to say that you do need to allege that sort of

1 harm to goodwill or comparative standing in the  
2 marketplace for the standing to exist under the Act.

3 Lexmark's requests that the Court import  
4 into the Lanham Act rules from the antitrust context  
5 should not be countenanced. The antitrust laws  
6 incorporated the common law itself, as this Court said  
7 in *Leegin*, in -- in a way that, when Congress prescribed  
8 a very broad set of actions that could not mean what it  
9 said, Congress necessarily anticipated that there would  
10 be some judicial policymaking and common law rulemaking  
11 as to the scope of a cause of action and who can sue  
12 under it.

13 JUSTICE BREYER: But, now, does that -- just  
14 thinking of Justice Sotomayor's hypothetical, that  
15 suggests that maybe the reasonable interest test is okay  
16 because what that's trying to do is -- you have  
17 McDonald's that's allegedly made the false statement,  
18 and then there are a range of people in terms more or  
19 less distant in respect to being direct competitors.

20 There is -- what you said, Burger King,  
21 direct competitor, then there are the health  
22 restaurants. Then there are -- so you need something to  
23 cut off at some point the plaintiff, who claims to be a  
24 direct competitor, but, really, he's not going to lose  
25 much money, and he's quite distant, a health restaurant



1 in a foreign city, I mean -- you know, you see?

2 And the reasonable interest test, I think,  
3 is trying both to get at that and also to figure out  
4 what kind of supplier you are. Are you one who falls  
5 within the scope of the false statement or the -- or are  
6 you not? You don't want the electricity company to be  
7 able to sue.

8 So what do you think about using the  
9 reasonable interest test, but explaining it in something  
10 like the terms I've just said?

11 MR. JONES: If the Court were to adopt the  
12 reasonable interest test and explain it in those terms,  
13 I think we would be happy with that result. The -- I  
14 think that it looks -- it's perhaps a little bit better  
15 to think about what is a reasonable interest with  
16 respect to the proximity to the falsity of the  
17 statement, to the subject matter of what was at issue,  
18 because you are dealing with --

19 JUSTICE ALITO: Well, it's not a reasonable  
20 interest test then.

21 JUSTICE SCALIA: It isn't whether the  
22 interest is reasonable. It's -- it's whether it was the  
23 type of interest that the statute sought to protect.  
24 And -- and the term "zone of interest" is a better  
25 expression of that concept, it seems to me, than

1 "reasonable interest."

2 I mean -- you know, that's my objection to  
3 the reasonable interest test.

4 MR. JONES: And that is precisely why, in  
5 our brief, we do believe that it would be better for the  
6 Court to step back to that level and talk about the  
7 interests in protecting goodwill and commercial actors'  
8 standing in the marketplace vis-a-vis the subject matter  
9 of the false advertising.

10 JUSTICE SCALIA: That may be better --

11 JUSTICE GINSBURG: Your zone of interests --

12 CHIEF JUSTICE ROBERTS: I'm sorry. Justice  
13 Ginsburg.

14 JUSTICE GINSBURG: Your zone of interest, in  
15 response to Justice Scalia, would establish another tier  
16 of zone of interest. The -- arguably, within the zone  
17 is the APA standard. And you said, here, you could  
18 strike "arguably" and just have it within the zone.

19 MR. JONES: The Court said, in *Bennett v.*  
20 *Spear*, that how the zone of interest will apply will  
21 depend upon the text and history of the statute, and it  
22 will vary somewhat based upon the statutory text and  
23 context. And if, for different types of statutes, the  
24 Court can look to what Congress meant to protect as  
25 that, and I believe that once those interests are

1 defined, the "arguably" language does mean that in a  
2 close case parties should have standing because that's  
3 generally what -- when courts do, when they are  
4 interpreting otherwise clear statutory text, I think the  
5 deference should be to the words that Congress passed in  
6 a close case.

7 JUSTICE SCALIA: "Arguably" could refer to  
8 factual matters; that is, you -- you are within the zone  
9 of interest if certain facts are established. And, if  
10 you don't establish those facts, you are not. That's  
11 how I've always understood the "arguably." I don't  
12 think it means -- you know, "close enough for government  
13 work." It doesn't mean that.

14 It means you -- you are within the zone of  
15 interest if, indeed, these facts that you have asserted  
16 exist.

17 MR. JONES: And that understanding of the  
18 word, Justice Scalia, would fit with this Court's  
19 pleading rules and whether or not somebody has plausibly  
20 pled that certain facts that would show that the test is  
21 met. And I think that would make sense in this context.

22 JUSTICE BREYER: What about --

23 JUSTICE KAGAN: What I think, Mr. Jones,  
24 just a couple of years ago, we made clear that  
25 "arguably" was to be taken very seriously and -- and

1 essentially established a kind of buffer zone, so that  
2 if you kind -- you know, we weren't going to be too  
3 strict about it. And the reason we did that, again, is  
4 because the way the APA works is it's on top of a lot of  
5 federal statutes that have no rights of action  
6 themselves.

7 So there is nothing for us to interpret in  
8 those federal statutes. And we say, well, if you  
9 arguably come within the scope of that statute, then you  
10 are aggrieved for purposes of the APA.

11 But this is a very different situation.  
12 This is a situation where we have a particular right of  
13 action. And rather than create any kind of buffer zone  
14 around it, we should just ask how is it sensible to  
15 interpret that right of action?

16 MR. JONES: Two responses to that, Justice  
17 Kagan. I do believe that may be one way to look at how  
18 you are looking at prudential standing in this Court's  
19 doctrines. In certain contexts, where Congress has  
20 abrogated limits on suit that courts had erected at the  
21 common law, to say that a certain cause of action is not  
22 going to be available to a particular plaintiff, I do  
23 believe courts need to be careful in applying prudential  
24 rules to avoid resurrecting those same policy concerns  
25 that had led courts to say that no cause of action

1 existed in the first place.

2 And so, I think, at least in this context,  
3 where you have a brand-new cause of action that did not  
4 exist at the common law, that "arguably" language may be  
5 more appropriate than with respect to a different  
6 statute where there are different issues at stake.

7 JUSTICE ALITO: Am I correct to think that  
8 your rule is that the only people who have standing  
9 under the Lanham Act are competitors and people whose  
10 products are disparaged? And, if that is true, then are  
11 you not "arguably" advocating the most restrictive test  
12 for Lanham Act standing, other than the categorical  
13 rule?

14 MR. JONES: Competition and competitors will  
15 line up in -- in a lot of ways with those who are  
16 affected by the subject matter of the suit. I don't  
17 know whether it makes sense. I don't believe it makes  
18 sense to get at the rule as competition, plus those who  
19 are talked about, as opposed to looking to who's  
20 affected by the falsity of the statement in their  
21 commercial goodwill.

22 JUSTICE BREYER: If it's who's affected, who  
23 specifically are we leaving out? Look, you put in -- I  
24 don't want to leave out -- you've read all the cases. I  
25 haven't read them all. But I see that you put in -- we

1 put in the direct competitors. They fall within it. We  
2 put in certain suppliers, those who are disparaged. We  
3 don't want the electricity company to be able to sue,  
4 according to you and the cases, and I guess we have the  
5 mirror case, which we'd put in, would be certain buyers  
6 like retailers or wholesalers and probably applying the  
7 same rule about their being mentioned in the -- in the  
8 false advertising -- or in the statement.

9 Who have we left out? Who has been given  
10 standing in some of these cases that is left out of the  
11 description I just gave?

12 MR. JONES: I'm not sure I know of any that  
13 have been left out that should not have been left out.

14 JUSTICE BREYER: All right. Who do you --  
15 who do you -- well, who -- who has not been left out who  
16 should have been left out? I mean, I'm trying to see --  
17 I'm trying to see am I forgetting someone that -- that  
18 your reading of the cases suggests has been given  
19 standing.

20 MR. JONES: So one example that may clarify  
21 this with Justice Alito's question about competition is  
22 the Proctor & Gamble case that Mr. Loy talked about.  
23 That was a false advertisement that Amway made about the  
24 lucrateness of being an employee of Amway.

25 Proctor & Gamble is a direct competitor, but

1 should not have standing to sue for those false  
2 statements because it's not related to Amway's  
3 statements about how much they pay to their employees.  
4 The subject matter doesn't go to that -- that competitor  
5 and that competitor's product.

6 And so I think it's better to look at it in  
7 terms of where -- what the falsity of the statement is  
8 and how close or far a particular plaintiff is to that  
9 statement, rather than trying to get at it through  
10 competition.

11 Does that help, Justice Breyer?

12 JUSTICE KENNEDY: Am I correct that no  
13 circuit has adopted the zone of interest test in the  
14 context of the Lanham Act?

15 MR. JONES: No circuit has adopted it as the  
16 test for the Lanham Act. There are cases that talk  
17 about zone of interest policies, and there are cases  
18 that talk about the interests of protecting goodwill and  
19 the reputation of companies who are involved in  
20 interstate commerce.

21 But the other tests that courts have layered  
22 on to it, I think, don't necessarily get at the direct  
23 question that is really at issue, which is did Congress  
24 really intend for these injuries to be the subject of a  
25 cause of action.

1 JUSTICE GINSBURG: So what's wrong with  
2 the -- what is it -- AGC, the antitrust standard? So  
3 it's got five things. And Justice Alito just suggested  
4 that maybe that's more generous to finding standing  
5 than -- than the reasonable interest.

6 MR. JONES: The experience -- Justice  
7 Ginsburg, the experience of the courts would show that  
8 applying agency actually would be more restrictive, I  
9 believe, than a zone of interest analysis. Two of the  
10 factors from the AGC test are facially inconsistent with  
11 the Lanham Act.

12 The concerns about the speculativeness of  
13 damages, at least as it relates to quantum, and the  
14 concern about the complexity and apportionment and  
15 duplicative damages cannot be applied here in a statute  
16 where Congress explicitly abrogated limits on suit  
17 related to certainty of damages. Section 43(a), when it  
18 talks about a cause of action to somebody who's likely  
19 injured, that shows that those concerns about damages  
20 should not be applied.

21 Similarly, the flexibility and the remedy  
22 that can be recovered under the Lanham Act, in terms of  
23 disgorgement remedies, injunctive relief, and a party's  
24 own lost profits, shows that concerns about those  
25 factors shouldn't be applied either.



1 CHIEF JUSTICE ROBERTS: Thank you, counsel.  
2 Three minutes, Mr. Loy.

3 REBUTTAL ARGUMENT OF STEVEN B. LOY  
4 ON BEHALF OF THE PETITIONER

5 MR. LOY: I have three short points. The  
6 straightforward question for this Court is what test to  
7 apply for Lanham Act. And we believe AGC is that test.  
8 On the facts of this case, we believe that the district  
9 court, in analyzing these facts, got it correct when it  
10 found that Static did not have standing under that test  
11 and when it found that Static was not a target, like the  
12 Sixth Circuit actually found that Static was not a  
13 target.

14 Second point, through the entire  
15 briefing and at, now, oral argument, I -- I still have  
16 not heard -- we have not heard how Static Control is  
17 conceptually any different than the union was in AGC.  
18 And that just goes to show the target is not always the  
19 inquiry.

20 Third point, if this Court --

21 JUSTICE GINSBURG: I'm sorry. You used  
22 "target" twice. Once, you said SCC was not a target,  
23 and the other time, you said it was, but it -- target  
24 isn't a test.

25 MR. LOY: I'm sorry. What I intended to

1 say, and if I misspoke, I apologize, the district court  
2 found that the SCC lacked standing. The district court  
3 found that SCC was not a target, although the Sixth  
4 Circuit decided that a different test should be used,  
5 the Sixth Circuit also found that Static Control was not  
6 a target.

7 My final point is if this Court -- I'm  
8 sorry.

9 JUSTICE GINSBURG: Explain that. Because,  
10 if we accept the allegation of the complaint as true,  
11 the allegation is that Static's product was disparaged,  
12 that remanufacturers were told, don't use this product  
13 because, if you do, you're going to be involved in  
14 infringement.

15 MR. LOY: The -- Static Control's  
16 counterclaim never alleges target. And it alleges, in  
17 fact, that the remanufacturers were the ones whose  
18 activities we were trying to -- to direct. If this  
19 Court were to adopt a zone of interest test, it would be  
20 the first time this Court has adopted that test outside  
21 the APA or APA-like context.

22 JUSTICE GINSBURG: Well, was Title VII an  
23 APA -- when I asked Mr. Jones?

24 MR. LOY: If Title -- no, it was not an APA,  
25 but the language for standing that the Court analyzed is

1 party aggrieved. The Court then looked at  
2 the similarity of that language to -- the language in the  
3 APA and there -- thereby justified using that test in  
4 that case with similar statutory language.

5 I think opposing counsel said that they --  
6 that under their zone of interest test, any person whose  
7 products or services are expressly or implicitly  
8 implicated should have standing under the Lanham Act.  
9 We think that goes too far.

10 If there are no further questions.

11 CHIEF JUSTICE ROBERTS: Thank you, counsel.

12 The case is submitted.

13 (Whereupon, at 12:14 p.m., the case in the  
14 above-entitled matter was submitted.)

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