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Filtering Through a Mess: A Proposal to Reduce the Confusion Surrounding the Requirements for Standing in False Advertising Claims Brought Under Section 43(a) of the Lanham Act

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Filtering Through a Mess: A Proposal to Reduce the Confusion Surrounding the Requirements for Standing in False Advertising Claims Brought Under Section 43(a) of the Lanham Act

Peter S. Massaro, III*

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I. Introduction

Wellwood Avenue is home to two of the best pizza parlors in the town of Lindenhurst, Carlo's and Giuseppe's. The two stores engage in heavy competition, but both have been consistently profitable. Last year, though, Carlo's began advertising its new "Healthy Pizza"—a pizza with zero grams of fat that tastes just like Carlo's traditional pizzas. Carlo's advertises its amazing new product throughout the town. The Healthy Pizza becomes the talk of Lindenhurst, and soon Carlo's profits have quadrupled. Giuseppe's, on the other hand, is floundering since the debut of the Healthy Pizza.

After three months of incredibly poor sales, Giuseppe's becomes desperate to discover the secret behind the Healthy Pizza and sends a sample of the amazing product to a laboratory to discover its ingredients. After performing some tests, the laboratory informs Giuseppe's that there is no secret ingredient in the Healthy Pizza—the pizza has just as many grams of fat as a typical pizza. Carlo's has been selling the same product it has always sold, just advertising it to be something different. Giuseppe's alerts the local media of the scam, and soon after, Giuseppe's sales return to what they were prior to the unveiling of the Healthy Pizza.

Giuseppe's, however, feels that Carlo's should compensate it for the sales it lost due to the Healthy Pizza, and retains an attorney to sue Carlo's. The attorney performs some research and discovers Section 43(a) of the Lanham Act,¹ which seems tailor-made to protect a party like Giuseppe's. The attorney

1. See 15 U.S.C. § 1125(a) (2000) (providing a federal cause of action for false advertising). The relevant portion of the statute is the following:

Any person who, on or in connection with any goods or services, or any container for goods, uses in commerce any . . . false or misleading description of fact, or false

files suit in the federal district court in Lindenhurst, expecting the case to be an easy win. However, the case becomes complicated when Carlo's submits a motion to dismiss, arguing that Giuseppe's lacks standing to sue under Section 43(a)'s false advertising protection. The district court is located in a circuit that has yet to determine a standard for prudential standing in Section 43(a) false advertising claims. The court, therefore, turns to the Section 43(a) false advertising standing jurisprudence of other circuits. After examining the decisions in which other circuits have developed standards for standing in Section 43(a) claims, the district court determines that Giuseppe's does not have standing to sue. Despite the fact that under the plain meaning of Section 43(a) Giuseppe's standing would seem apparent,² the district court, through examining the Section 43(a) standing jurisprudence of the other circuits, is able to find that Giuseppe's lacks standing to make a Section 43(a) false advertising claim against Carlo's.

The above hypothetical may seem unrealistic, but the Eleventh Circuit's recent ruling in *Phoenix of Broward, Inc. v. McDonald's Corp.*,³ which

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 likely to be damaged by such act.

Id.

2. The plain meaning being that "any person who believes that he or she is likely to be damaged" by the false advertising may pursue a claim against the party allegedly engaging in the false advertising. *Id.* Here, Giuseppe's is not just a person who "believes" that the false advertising damaged it; it is a party that clearly was damaged by the false advertisements disseminated by Carlo's. Courts, however, rarely have interpreted "any person" language in a statutory standing provision to mean literally *any* person. See *infra* note 22 and accompanying text (discussing cases where "any person" language in a statute was interpreted to require the plaintiff to be more than just a person to have standing).

3. See *Phoenix of Broward, Inc. v. McDonald's Corp.*, 489 F.3d 1156, 1173 (11th Cir. 2007) (finding that the plaintiff did not have standing to bring a Section 43(a) false advertising claim under an application of the *Conte Bros.* test, despite the fact that the plaintiff's business was in direct competition with the defendant's business). In *Phoenix*, a Burger King franchisee brought a Section 43(a) false advertising suit against McDonald's on behalf of himself and all similarly situated Burger King franchisees. *Id.* at 1160. The basis of the suit was a scandal involving the promotional games that McDonald's offered between 1995 and 2001. *Id.* at 1159–60. In these promotional games, McDonald's offered high-value prizes, including automobiles and cash prizes up to one million dollars. *Id.* at 1159. McDonald's advertised "that all customers who participated in the games had a fair and equal opportunity to win the offered prizes." *Id.* In actuality, however, customers did not have a fair and equal opportunity to win the high-value prizes because the Director of Security at the firm that McDonald's had hired to operate the games had devised and implemented a scheme that "diverted at least \$20 million in high-value prizes" away from McDonald's customers and to his cohorts who shared the embezzled prizes with him. *Id.* at 1160. The Burger King franchisee argued that

prevented a Burger King franchisee from suing McDonald's for alleged false advertising under Section 43(a), lends it credibility.⁴ If rulings like the one against the Burger King franchisee become common, Section 43(a)'s protection against false advertising effectively will become a dead letter. This is troubling not only to commercial players who rely on Section 43(a) to prevent their competitors from engaging in activities like that in which Carlo's engaged, but also to consumers who are protected indirectly from false advertising by the liability Section 43(a) places on those who engage in false advertising.⁵ A clear standard for standing in Section 43(a) false advertising claims that can easily be applied in a consistent manner and is true to the plain meaning of the statute's language is, therefore, necessary.

The goal of this Note is to establish that the current state of Section 43(a) false advertising standing jurisprudence is unstable and that this instability in the law is troubling because it permits courts to reach outcomes which remove the teeth from Section 43(a)'s false advertising protection. Part II provides an explanation of standing in general. Part III gives a history of the Lanham Act, particularly its false advertising protection. Part IV describes several different standards for prudential standing that courts have used in Section 43(a) false advertising claims. Part V explains the problems that result from the existence of so many different standards. Part VI argues that the U.S. Supreme Court

McDonald's advertisements, representing that all customers had a fair and equal chance to win the high-value prizes, amounted to false advertising under Section 43(a), due to the embezzlement scheme. *Id.* McDonald's countered that the Burger King franchisee did not have standing to make a Section 43(a) false advertising claim. *Id.* The Eleventh Circuit agreed with McDonald's and found that under the court's newly-adopted standard for standing in Section 43(a) false advertising cases, the *Conte Bros.* test, the Burger King franchisee did not have standing. *Id.* at 1173.

4. See *id.* at 1173 (denying standing to the plaintiff who was a direct competitor of the defendant). The Eleventh Circuit stated:

Although Phoenix [the Burger King franchisee] and the class it seeks to represent [all Burger King franchisees] are McDonald's 'direct competitors,' Phoenix has alleged a competitive harm to their commercial interests, and there is no identifiable class of persons that is more proximate to the claimed injury, because of the attenuated link between the alleged injury and McDonald's alleged misrepresentations, the speculative nature of the claimed damages, the potential complexity in apportioning damages, and the significant risk of duplicative damages, we hold that Phoenix does not have prudential standing to bring a false advertising claim under the Lanham Act against McDonald's.

Id.

5. See Richard A. De Sevo, *Consumer Standing Under Section 43(a)—An Issue Whose Time Has Passed*, 88 TRADEMARK REP. 1, 2 (1998) (arguing that standing under Section 43(a) does not need to be extended to consumers to protect consumers from false advertising because "the ever-present threat of litigation by competitors under Section 43(a) . . . provides more than sufficient deterrence to false advertising").

should establish a standard for prudential standing in false advertising claims brought under Section 43(a) and suggests that the standard should include a categorical approach filter. Finally, Part VII provides a brief summary of the Note's analysis.

II. Standing, Generally

To a layperson, standing is the act of "assum[ing] or maintain[ing] an erect attitude on one's feet,"⁶ but in the legal field standing refers to a party's ability to bring a matter before a court for adjudication.⁷ Regardless of the merits of the claim, if the party bringing the claim does not have standing, then a court cannot grant relief.⁸ The concept of standing is particularly important in federal causes of action like Section 43(a) false advertising claims because the Supreme Court has interpreted Article III of the U.S. Constitution as prohibiting federal courts from hearing claims that are brought to them by parties that do not meet several standing requirements.⁹ The Court, however, has also imposed additional requirements for establishing standing that go beyond that which Article III requires.¹⁰ These additional nonconstitutional requirements are the requirements for prudential standing.¹¹

A. Article III Standing Requirements

While the Section 43(a) standing controversy addressed in this Note does not involve Article III requirements, a brief discussion of Article III standing requirements is warranted because prudential standing requirements are largely

6. 16 THE OXFORD ENGLISH DICTIONARY 491 (2d ed. 1989).

7. See ERWIN CHERMERINSKY, FEDERAL JURISDICTION 56 (4th ed. 2003) ("Standing is the determination of whether a specific person is the proper party to bring a matter to the court for adjudication.").

8. See Richard J. Pierce, Jr., *Is Standing Law or Politics?*, 77 N.C. L. REV. 1741, 1749 (1999) (stating that if a party does not have standing he or she is denied "access to the courts" and therefore "cannot prevail in even the most meritorious legal action").

9. See CHERMERINSKY, *supra* note 7, at 59–60 ("The [Supreme] Court has said that some of these [standing] requirements are constitutional; that is, they are derived from the Court's interpretation of Article III and as constitutional restrictions they cannot be overridden by statute.").

10. See *id.* at 60 (stating that the Court has identified principles that are not identified by the Constitution but must be considered by federal courts when they assess whether a party has standing as part of "prudent judicial administration").

11. See *id.* ("In addition to . . . constitutional requirements, the Court also has identified three prudential standing principles.").

irrelevant if the Article III requirements are not met.¹² Article III of the U.S. Constitution limits the jurisdiction of the judiciary branch to settling cases and controversies.¹³ The Court has interpreted this constitutional limit to require a party to make three allegations in order to establish standing.¹⁴ The party's claim must allege "that he or she has suffered or imminently will suffer an injury" (injury), "that the injury is fairly traceable to the defendant's conduct" (causation), and "that a favorable federal court decision is likely to redress the injury" (redressability).¹⁵ Because the Court has interpreted these requirements as part of the Constitution, Congress cannot abrogate them through the passage of mere statutes.¹⁶

B. Prudential Standing Requirements

In most Section 43(a) false advertising claims, however, the plaintiff is able to meet the constitutional standing requirements.¹⁷ The question of whether a plaintiff has standing in Section 43(a) claims generally has centered on whether the plaintiff meets the prudential requirements.¹⁸ Prudential standing is not a constitutional requirement, and the principles which have controlled its doctrinal development, therefore, are not based on the Constitution but rather on "prudent judicial administration."¹⁹ As prudential standing requirements do not originate from the Constitution, Congress may override them through statutory provisions.²⁰ Courts, however, will presume

12. See *Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1, 11 (2004) (stating that the Court has established "two strands" of standing requirements that must be met, Article III standing and prudential standing).

13. See U.S. CONST. art. III, § 2 (defining the scope of judicial power).

14. See CHEMERINSKY, *supra* note 7, at 60 ("[T]he Supreme Court has identified three constitutional standing requirements.").

15. *Id.*

16. See *id.* at 59–60 (stating that standing requirements that are constitutional "cannot be overridden by statute").

17. See, e.g., *Phoenix of Broward, Inc. v. McDonald's Corp.*, 489 F.3d 1156, 1162 (11th Cir. 2007) (finding that the plaintiff's Section 43(a) claim satisfied constitutional requirements for standing); *Conte Bros. Auto., Inc. v. Quaker State-Slick 50, Inc.*, 165 F.3d 221, 225 (3d Cir. 1998) (same).

18. See, e.g., *Phoenix*, 489 F.3d at 1173 (finding that the plaintiff in Section 43(a) claim lacks standing because it cannot meet the prudential requirements of standing); *Conte Bros.*, 165 F.3d at 234–36 (same).

19. CHEMERINSKY, *supra* note 7, at 60.

20. See *Bennett v. Spear*, 520 U.S. 154, 162 (1997) ("[U]nlike their constitutional counterparts, [prudential standing requirements] can be modified or abrogated by Congress.").

that Congress did not intend to abrogate the requirements of prudential standing unless Congress clearly expresses such an intention in the text of the statute.²¹

Statutory language that merely states that any person may make a claim enforcing the statute, like that in Section 43(a), will not necessarily be considered a clear expression of an intent to abrogate prudential standing requirements.²² For this reason, courts have been able to dismiss Section 43(a) claims for lack of standing despite the fact that the text of Section 43(a) states that "any person who believes that he or she is likely to be damaged"²³ by an act of false advertising may bring a civil action against the alleged false advertiser.

While the Supreme Court has yet to define fully the requirements of prudential standing,²⁴ it has focused on three principles when discussing prudential standing.²⁵ First, a party who asserts the rights of a third party lacks prudential standing.²⁶ Second, a party may not bring a claim as a taxpayer if such a claim could be raised by all other taxpayers.²⁷ Third, the party's claim must be one that falls within the zone of interests that Congress intended to address with the statute under which the party is suing.²⁸

Courts developing a standard for prudential standing in Section 43(a) claims seem to be addressing this third principle because such courts generally state that their standard is meant to limit the class eligible to bring suit under

21. See *id.* at 163 (stating that the prudential standing doctrine applies "unless it is expressly negated"); *Conte Bros.*, 165 F.3d at 227 ("As a matter of statutory interpretation, Congress is presumed to incorporate background prudential standing principles, unless the statute expressly negates them.").

22. See *Assoc. Gen. Contractors of Cal. v. Cal. State Council of Contractors*, 459 U.S. 519, 535 (1983) (finding that prudential limits still apply to the plaintiff's Clayton Act claim despite the relevant statute's language that "[a]ny person who shall be injured in his business or property" had standing to sue); *Phoenix*, 489 F.3d at 1162 (finding that Congress did not intend to abrogate prudential standing requirements in Section 43(a) claims despite Section 43(a)'s "any person" language); *Conte Bros.*, 165 F.3d at 227 (same). But see *Bennett*, 520 U.S. at 164 (finding that the language "any person may commence a civil suit" in the Endangered Species Act abrogated prudential standing requirements).

23. 15 U.S.C. § 1125(a) (2000).

24. See *Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1, 12 (2004) ("[W]e have not exhaustively defined the prudential dimensions of the standing doctrine.").

25. See *CHEMERINSKY*, *supra* note 7, at 60 ("[T]he Court . . . has identified three prudential standing principles.").

26. See *id.* ("[A] party generally may assert only his or her own rights and cannot raise the claims of third parties not before the court.").

27. See *id.* ("[A] plaintiff may not sue as a taxpayer who shares a grievance in common with all other taxpayers.").

28. See *id.* ("[A] party must raise a claim within the zone of interests protected by the statute in question.").

Section 43(a) to those who Congress intended to protect.²⁹ Nonetheless, when deciding whether a party has prudential standing to sue under Section 43(a), courts have refused to use the "zone of interests" framework developed by the Supreme Court.³⁰

1. The "Zone of Interests" Test for Standing

One reason why courts may not apply the zone of interests test when assessing standing in Section 43(a) claims is because the Supreme Court has applied the test in such an inconsistent manner that lower courts, along with virtually everyone else, cannot discern what the test is and when it should be applied.³¹ In *Ass'n of Data Processing Service Organizations, Inc. v. Camp*,³²

29. See, e.g., *Colligan v. Activities Club of N.Y., Ltd.*, 442 F.2d 686, 689 n.8 (2d Cir. 1971) (stating that the "proper focus" in deciding whether the plaintiffs in a Section 43(a) claim had prudential standing was whether the plaintiffs' claims "partake of the nature of the injury sought to be prevented and/or remedied by Congress through Section 43(a)"); *Conte Bros. Auto., Inc. v. Quaker State-Slick 50, Inc.*, 165 F.3d 221, 236 (3d Cir. 1998) (implying that the court's standard for prudential standing in Section 43(a) claims "serve[s] the underlying purpose of the Lanham Act").

30. See, e.g., *Procter & Gamble Co. v. Amway Corp.*, 242 F.3d 539, 563 n.49 (5th Cir. 2001) ("This is not an administrative law case, . . . so standing is not governed by administrative law's 'zone of interest' test."); *Conte Bros.*, 165 F.3d at 226 ("We believe it is more appropriate to inquire as to the class's statutory standing free from the formalistic constraints of the 'zone of interests' test and its links to administrative review.").

31. See *CHEMERINSKY*, *supra* note 7, at 100 ("More recent [Supreme Court] cases are inconsistent in applying the [zone of interests] requirement.").

32. See *Ass'n of Data Processing Serv. Org., Inc. v. Camp*, 397 U.S. 150, 157 (1970) (finding that purveyors of data processing services had standing to challenge the Comptroller of the Currency's decision to allow banks to provide data processing services to other banks and bank customers). In *Camp*, the issue was whether providers of data processing services could challenge the Comptroller of the Currency's decision to allow banks to provide data processing services to other banks and to bank customers. *Id.* at 151. The providers of data processing services argued that the Comptroller's decision violated Section 4 of the Bank Service Corporation Act of 1962, which prohibits banks from engaging in any activity other than providing bank services. *Id.* at 155. The lower courts had dismissed the providers' suit because Section 4 did not give the providers standing to challenge the Comptroller's decision. *Id.* at 151. The Supreme Court found that whether the providers had standing under Section 4 depends on "whether the interest [they] sought to [protect] . . . is arguably within the zone of interests to be protected or regulated by [Section 4]." *Id.* at 153. After examining the legislative history of the Bank Service Corporation Act, noting a trend toward "enlarg[ing] . . . the class of people who may protest administrative action" through the use of statutes, and finding that "the mere failure to provide specially by statute for judicial review is certainly no evidence of intent to withhold review," the Court found that the providers did have standing to sue because their interest at stake was arguably within the zone of interests intended to be protected by Section 4. *Id.* at 154-58.

the Court first announced this requirement for prudential standing. In *Camp*, the Court stated that to have prudential standing, a plaintiff must be seeking to protect an interest that "is arguably within the zone of interests to be protected or regulated by the statute or constitutional guarantee in question."³³ Slightly less than two decades later in *Clarke v. Securities Industry Ass'n*,³⁴ the Court made it clear that this test was not meant to be "especially demanding" and that a plaintiff could have standing to sue under a statute even if there was "no indication of congressional purpose to benefit the would-be plaintiff."³⁵ While the Court adhered to this permissive formulation of the test in *Bennett v. Spear*³⁶ and *National Credit Union Administration v. First National Bank & Trust Co.*,³⁷ the Court construed the test more strictly in *Air Courier Conference v. American Postal Workers Union*³⁸ and found that the postal

33. *Id.* at 153.

34. *See* *Clarke v. Sec. Indus. Ass'n*, 479 U.S. 388, 403 (1987) (finding that a trade association representing securities brokers, underwriters, and investment bankers had standing to challenge the Comptroller of the Currency's decision that a bank office offering discount brokerage services was not a branch under the National Bank Act). In *Clarke*, a trade association for the securities industry challenged the Comptroller of the Currency's decision that a bank office which provided discount brokerage services was not a branch under the National Bank Act, and, therefore, could be opened outside of the bank's home state despite the National Bank Act's limitation on out-of-state branching. *Id.* at 392-93. The Comptroller argued that the trade association lacked standing because its interest was not within the zone of interests that Congress sought to protect with the National Bank Act. *Id.* at 393. The Court stated that the zone of interests test "is not meant to be especially demanding" and should deny a plaintiff standing only when "the plaintiff's interests are so marginally related to or inconsistent with the purposes implicit in the statute that it cannot reasonably be assumed that Congress intended to permit the suit." *Id.* at 399. The Court also acknowledged that a plaintiff would fail the zone of interests test if Congress, within the statute, made "fairly discernable a congressional intent to preclude review" of claims like that of the plaintiff's. *Id.* at 403. Finding that the trade association's interest had "a plausible relationship to the policies underlying [the National Bank Act]" and that there was no "fairly discernible . . . congressional intent to preclude review" of claims like the trade association's, the Court held that the trade association had standing to challenge the Comptroller's ruling. *Id.*

35. *Id.* at 399-400.

36. *See* *Bennett v. Spear*, 520 U.S. 154, 164 (1997) (finding that ranch operators and irrigation districts that objected to a restriction on lake levels imposed to protect endangered species of fish had standing to make a claim under the citizen-suit provision of the Endangered Species Act because they fell within the provision's zone of interests).

37. *See* *Nat'l Credit Union Admin. v. First Nat'l Bank & Trust Co.*, 522 U.S. 479, 499 (1998) (finding that commercial banks had standing under Section 109 of the Federal Credit Union Act to object to the expansion of the class of parties who could become members of credit unions because its interests were arguably within the zone of interests that Section 109 was intended to protect).

38. *See* *Air Courier Conference v. Am. Postal Workers Union*, 498 U.S. 517, 530 (1991) (finding that postal workers did not have standing to object to the Postal Service's suspension of its monopoly on certain routes because the workers were not within the zone of interests that

workers' union lacked standing to challenge the Postal Service's suspension of its monopoly over certain routes, which arguably violated the Postal Express Statutes, because the "particular language of the statutes" did not show a congressional intention "to protect jobs with the Postal Service."³⁹ *Air Courier*, therefore, conflicts with *Clarke*, and for this reason lower courts may be confused as to the scope of the zone of interests test.

The more probable reason for why lower courts have not used the Supreme Court's zone of interests framework when developing standards for Section 43(a) prudential standing is because they believe that the test applies only when a party is challenging an administrative agency's action.⁴⁰ While this formulation of the test contradicts the Court's articulation of the test in *Camp*,⁴¹ in *Conte Bros. Automotive, Inc. v. Quaker State-Slick 50, Inc.*,⁴² the Third Circuit explicitly embraced it.⁴³ The *Conte Bros.* court found that it could look beyond the zone of interests test when establishing requirements for prudential standing in Section 43(a) false advertising claims because the "zone of interests test developed in the administrative law context."⁴⁴ In its subsequent exploration outside the zone of interests test, the *Conte Bros.* court found that for the purposes of "determining statutory standing outside of the administrative context," it need not give the "liberal tilt toward recognizing standing," which the zone of interests test affords claimants.⁴⁵ Other lower courts, which have decided not to apply the zone of interests test and the tilt toward recognition of standing that comes along with it, have not been as forthcoming as the *Conte Bros.* court in stating their reasons for not applying

Congress sought to protect when it passed the statute that granted the monopoly to the Postal Service).

39. *Id.* at 524–25.

40. See CHEMERINSKY, *supra* note 7, at 102 ("There is a strong argument that the zone of interests test is an additional standing requirement only in cases seeking review of agency decisions under the Administrative Procedures Act.").

41. See *Ass'n of Data Processing Serv. Org., Inc. v. Camp*, 397 U.S. 150, 153 (1970) (implying that the zone of interests test applies to whatever "statute or constitutional guarantee [that is] in question"). *Camp*'s articulation does not seem to limit the zone of interests test to just administrative law cases. *Id.*

42. See *Conte Bros. Auto., Inc. v. Quaker State-Slick 50, Inc.*, 165 F.3d 221, 233 (3d Cir. 1998) (adopting a five-prong test for determining standing in Section 43(a) claims).

43. See *id.* at 226 (stating that outside of the administrative law context, the zone of interests test is not controlling as to whether a plaintiff has prudential standing to sue under a statute).

44. *Id.* (internal quotation marks omitted).

45. *Id.*

the test, but one could hypothesize that they also believe that the test applies only to administrative law claims.⁴⁶

Regardless of the reason for why lower courts have declined to apply the Supreme Court's zone of interests standards when establishing prudential standing standards for Section 43(a) claims, the effect generally has been the same—the establishment of a standard which is tougher to meet than the zone of interests test. Usually, these other standards are more difficult to meet because their development is based on an assumption that an "indication of congressional purpose to benefit the would-be plaintiff"⁴⁷ is necessary for a plaintiff to establish prudential standing, a requirement which the *Clarke* court stated was not necessary to establish standing.

III. False Advertising Protection Under the Lanham Act

It is debatable whether congressional intent should matter in developing prudential standing standards for Section 43(a) false advertising claims. Yet, because courts so often rely on congressional intent when establishing such standards,⁴⁸ the history of the Lanham Act's false advertising protection in Section 43(a) remains relevant.

A. The Original Enactment of the Lanham Act

Prior to the passage of the Lanham Act in 1948, Congress had passed several other statutes intended to regulate trademarks,⁴⁹ but these acts proved to

46. *But see* Proctor & Gamble Co. v. Amway Corp., 242 F.3d 539, 563 (5th Cir. 2001) (stating that the zone of interests test does not apply in Section 43(a) claims because such claims are not administrative law cases).

47. *Clarke v. Sec. Indus. Ass'n*, 479 U.S. 388, 399–400 (1987).

48. *See, e.g.,* Serbin v. Ziebart Int'l Corp., 11 F.3d 1163, 1177–78 (3d Cir. 1993) (examining the legislative history of the 1988 amendment to Section 43(a)); Colligan v. Activities Club of N.Y., Ltd., 442 F.2d 686, 689–90 (2d Cir. 1971) (looking briefly at the Lanham Act's legislative history in regards to Section 43(a) and then deeming it "inconclusive"); L'Aiglon Apparel, Inc. v. Lana Lobell, Inc., 214 F.2d 649, 651 (3d Cir. 1954) ("We find nothing in the legislative history of the Lanham Act to justify the view that [Section 43(a)] is merely declarative of existing law.").

49. *See* 1 J. THOMAS MCCARTHY, MCCARTHY ON TRADEMARKS AND UNFAIR COMPETITION § 5:3 (4th ed. 1996) (providing a history of federal trademark legislation leading up to passage of the Lanham Act); Ethan Horwitz & Benjamin Levi, *Fifty Years of the Lanham Act: A Retrospective of Section 43(a)*, 7 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 59, 60–63 (1996) (same).

be inadequate.⁵⁰ One purpose of the Lanham Act was essentially to reenact these prior statutes in a manner that would give them the teeth that Congress originally intended them to have.⁵¹ The Lanham Act was also a response to the seminal case of *Erie Railroad Co. v. Tompkins*,⁵² which effectively eliminated federal common law, including that which had developed to regulate trademarks and unfair competition.⁵³ Congress enacted the Lanham Act to codify the common law that *Erie* had eliminated.⁵⁴

The portion of the Lanham Act that pertains to this discussion is located in Section 43(a) and is the following:

Any person who shall . . . use in connection with any goods or services . . . any false description or representation . . . shall be liable to a civil action . . . by any person who believes that he or she is likely to be damaged by the use of any such false description or representation.⁵⁵

During the development and eventual passage of the Lanham Act, this provision, and Section 43(a) as a whole, received little attention.⁵⁶ Congress regarded Section 43(a) as "a minor, but useful section,"⁵⁷ whose primary purpose was to codify the federal common law of unfair trade practices that had developed prior to *Erie*.⁵⁸ Courts, initially, interpreted Section 43(a) in a similar light, allowing it to be used only in "situations akin to traditional

50. See I MCCARTHY, *supra* note 49, § 5:3 ("[E]ven with the 1920 amendments, the basic 1905 [federal] Trademark Act remained inadequate to cope with the realities of twentieth century commerce and brand names."); Jean Wegman Burns, *Confused Jurisprudence: False Advertising Under the Lanham Act*, 79 B.U. L. REV. 807, 812 (1999) (stating that "changes in commerce and business" had rendered the pre-Lanham Act federal trademark statutes inadequate).

51. See Horwitz & Levi, *supra* note 49, at 63 (stating that the Lanham Act was passed to solve the problems caused by earlier federal trademark statutes).

52. See *Erie R.R. Co. v. Tompkins*, 304 U.S. 64, 78 (1938) (eliminating the "federal general common law").

53. See Burns, *supra* note 50, at 812–13 ("[T]he Supreme Court's 1938 decision in *Erie Railroad v. Tompkins*, which eliminated the doctrine of federal common law, arguably left trademark protection to state-by-state interpretation—a prospect Congress saw as unacceptable given the interstate nature of twentieth century commerce.").

54. See *id.* at 813–14 (suggesting that a purpose of the Lanham Act was to codify the federal common law relevant to trademarks).

55. Lanham Act § 43(a), 60 Stat. 427, 441 (1946) (current version at 15 U.S.C. § 1125(a) (2000)).

56. See Burns, *supra* note 50, at 813 ("Congress . . . did not view Section 43(a) as a critical section.").

57. *Id.*

58. See *id.* at 813–14 ("The scant legislative history for Section 43(a) suggests that Congress was, as with the trademark sections of the [Lanham] Act, reacting to the *Erie* decision, which had eliminated the federal common law of unfair trade practices . . .").

trademark infringement."⁵⁹ It was not until the 1954 case of *L'Aiglon Apparel, Inc. v. Lana Lobell, Inc.*⁶⁰ that courts began to recognize that Section 43(a) created a new statutory tort of false advertising.⁶¹

B. Expansion of Section 43(a) to False Advertising

In *L'Aiglon*, the Second Circuit explicitly rejected the notion that Section 43(a) is only applicable in cases involving traditional trademark infringement.⁶² The defendants in *L'Aiglon* argued that the plaintiffs could not make a claim under Section 43(a) because they could not prove that "palming off" had occurred.⁶³ In other words, the plaintiff could not prove that the defendant's misrepresentation caused or was likely to cause consumers to purchase defendant's products with the mistaken belief that they were purchasing the plaintiff's product.⁶⁴ As "palming off" was a necessary component of

59. *Id.* at 816.

60. See *L'Aiglon Apparel, Inc. v. Lana Lobell, Inc.*, 214 F.2d 649, 651 (3d Cir. 1954) (finding that Section 43(a) of the Lanham Act created "a statutory civil wrong of false representation of goods in commerce"). In *L'Aiglon*, the plaintiff, a dress designer, sold a "distinctively styled dress" nationwide. *Id.* at 650. The plaintiff's advertisements for this dress included a picture of the distinctive dress next to its price, \$17.95. *Id.* The defendant sold a dress through mail order that was similar to the plaintiff's dress, but was "much inferior to plaintiff's in quality and notably different in appearance." *Id.* In its advertisements, the defendant used a picture of the plaintiff's dress next to the price of its dress, \$6.95. *Id.* The plaintiff argued that this was a violation of the plain meaning of the language of Section 43(a) because the defendant's actions were "about as plain a use of false representation in the description of goods sold in commerce as could be imagined." *Id.* The defendant countered that Congress only intended for Section 43(a) to codify the federal common law for unfair competition, and as the plaintiff would not have recovered for the defendant's action under the common law, the plaintiff should not be able to recover under Section 43(a) either. *Id.* The Third Circuit discounted the defendant's argument as it found no support for the argument in the Lanham Act's legislative history. *Id.* at 651. The court, therefore, declared that through Section 43(a), Congress had created "a statutory civil wrong of false representation of goods in commerce." *Id.*

61. See Maury Tepper, *False Advertising Claims and the Revision of the Lanham Act: A Step in Which Direction?*, 59 U. CIN. L. REV. 957, 957 (1991) ("In 1954, eight years after the passage of the Lanham Act, the United States Court of Appeals for the Third Circuit broadened the scope of Section 43(a) to cover false advertising claims in *L'Aiglon Apparel, Inc. v. Lana Lobell, Inc.*").

62. See *id.* ("The *L'Aiglon* court specifically rejected a restrictive reading of Section 43(a), noting that on its face, the section created a new statutory tort.")

63. See *L'Aiglon*, 214 F.2d at 651 (explaining the defendant's argument that Section 43(a) could not be violated unless "'palming off,' narrowly conceived" occurred).

64. See *id.* (explaining the meaning of "palming off"). For a discussion of how some courts incorrectly define "palming off," see 4 MCCARTHY, *supra* note 49, § 25:2.

traditional trademark infringement under federal common law, the defendant essentially argued that Section 43(a) was just meant to codify the body of trademark infringement components of the federal common law.⁶⁵ The *L'Aiglon* court, however, rejected this argument. The court noted that there was "nothing in the legislative history of the Lanham Act to justify the view that . . . [Section 43(a) was] merely declarative of existing law [at the time of its enactment]."⁶⁶ The court, finding "no ambiguity in the relevant language in the statute," concluded the following: "It seems to us that Congress has defined a statutory civil wrong of false representation of goods in commerce and has given a broad class of suitors injured or likely to be injured by such wrong the right to relief in the federal courts."⁶⁷ While it would take some time for the bar to fully take advantage of this ruling,⁶⁸ *L'Aiglon* marked the first opening of the floodgates for Section 43(a) false advertising claims.⁶⁹

C. Judicial Narrowing of Section 43(a)'s False Advertising Protection

Following *L'Aiglon*, while acknowledging that Section 43(a) created a new federal tort of false advertising, courts attempted to narrow the number of situations in which the provision could be enforced. For instance, courts consistently found that Section 43(a) did not apply in situations where the defendant's advertisements misrepresented the plaintiff's product.⁷⁰ The Third Circuit first articulated this limitation on Section 43(a) in *Bernard Food Industries, Inc. v. Dietene Co.*⁷¹ In *Bernard*, the Third Circuit followed a

65. See *L'Aiglon*, 214 F.2d at 650 ("[I]t is argued, [that] federal courts should so construe [Section 43(a)] as to preserve . . . the judge-made [common law] limitations on liability.").

66. *Id.* at 651.

67. *Id.*

68. Judge Clark of the Second Circuit predicted that it may take a while for the bar to recognize the potential broad applicability of Section 43(a). See *Maternally Yours v. Your Maternity Shop*, 234 F.2d 538, 546 (2d Cir. 1956) (Clark, J., concurring) ("[T]he bar has not yet realized the potential impact of this statutory provision.").

69. See Burns, *supra* note 50, at 817 n.46 (explaining that while *L'Aiglon* was the first to acknowledge that Section 43(a) provided a cause of action for false advertising, such claims were not made often until the 1970s).

70. See Tepper, *supra* note 61, at 958 ("Since 1969, courts interpreting Section 43(a) had consistently limited its application in false advertising claims to misrepresentations concerning the advertiser's own product.").

71. See *Bernard Food Indus., Inc. v. Dietene Co.*, 415 F.2d 1279, 1283-84 (7th Cir. 1969) (limiting the scope of Section 43(a)'s false advertising protection to remedying false advertisements in which the defendant's alleged false statements describe his or her own product).

rationale similar to pre-*L'Aiglon* courts that considered the scope of Section 43(a) and found that the Section could only be used to address injuries that were similar to traditional trademark infringement.⁷² As one can only be held liable for trademark infringement involving his or her own product, the *Bernard* court found that Section 43(a) could only be used when the misrepresentation in question was describing the defendant's own product.⁷³ Even after courts abandoned the notion that Section 43(a) claims should be limited to addressing harms similar to traditional trademark infringement, they continued to follow the *Bernard* rule that defendants could only be held responsible under Section 43(a) for misrepresentations describing their own products.⁷⁴

A judicial narrowing of the applicability of Section 43(a) that is more pertinent to the present discussion, however, is the courts' imposition of various standing requirements on plaintiffs in Section 43(a) false advertising claims. While the standing requirements that courts created varied,⁷⁵ the judiciary largely agreed that consumers could not take advantage of Section 43(a)'s false advertising protection.⁷⁶ The first major case to consider whether consumers could bring false advertising claims under Section 43(a) was *Colligan v. Activities Club of New York, Ltd.*⁷⁷

72. See *id.* at 1283 (stating that Section 43(a)'s application should be limited to claims similar in nature to trademark infringement).

73. See *id.* at 1283–84 (concluding that "disparagement of the plaintiff's product . . . does not come within the purview of [Section 43(a) of] the Lanham Act").

74. See Tepper, *supra* note 61, at 959 ("Oddly enough, courts retained the *Bernard* rule that only false statements about a defendant's own product were actionable under Section 43(a), though courts later abandoned the underlying rationale that Section 43(a) claims should be limited to trademark-type violations.").

75. See *infra* Part IV (discussing the different standing requirements which each circuit placed on plaintiffs in Section 43(a) false advertising claims).

76. See De Sevo, *supra* note 5, at 9–18 (discussing the cases that show that the circuit courts have consistently refused to grant consumers standing to bring Section 43(a) false advertising claims).

77. See *Colligan v. Activities Club of N.Y., Ltd.*, 442 F.2d 686, 691–92 (2d Cir. 1971) (finding that consumers do not have standing to bring false advertising claims under Section 43(a)). In *Colligan*, the plaintiffs, a group of high school students, sued a ski tour company that had advertised that its trips included ski equipment for each tour participant, qualified skiing instruction, and safe and reliable transportation to the ski resort. *Id.* at 687. When the plaintiffs went on their ski trip, the defendant only provided them with sufficient skiing equipment for approximately half of their party. *Id.* at 688. Furthermore, the defendant only provided one qualified ski instructor, who did very little teaching while the plaintiffs were on the ski slopes, and several of the defendant's buses had various mechanical difficulties that affected the plaintiffs' trips to and from the ski resort. *Id.* The Second Circuit acknowledged that if read in isolation, Section 43(a) of the Lanham Act conferred standing upon the plaintiffs to make a false advertising claim. *Id.* at 689. The court, however, ultimately found that the plaintiffs did not

In *Colligan*, the Second Circuit rejected the plaintiffs' argument that the legislative history of Section 43(a) showed that Congress intended to grant consumers standing.⁷⁸ The court found that Section 43(a)'s legislative history was "inconclusive and therefore of little or no help in resolving the issue [of whether consumers have standing to sue under Section 43(a)'s false advertising protection]."⁷⁹ The court, therefore, turned to the congressional purpose stated within the Lanham Act. That is, the court referred to Section 45,⁸⁰ which states: "The intent of this chapter is . . . to protect persons engaged in commerce against unfair competition."⁸¹ The court reasoned that because Section 45 made no mention of protecting consumers, Congress did not intend for the Lanham Act to directly protect consumers.⁸² Consumers, therefore, could not bring a false advertising suit under Section 43(a).⁸³ Other courts soon followed the *Colligan* court's rationale,⁸⁴ and it eventually became widely accepted among the courts that a plaintiff whose only relationship to a defendant was that of a consumer could not bring a false advertising claim under Section 43(a).⁸⁵

have standing to pursue their claim because when Section 43(a) is read in conjunction with Section 45, Congress's intent to limit standing to a commercial class of plaintiffs becomes clear. *Id.* at 691–92.

78. *See id.* at 690 (rejecting the plaintiff's argument that the legislative history of the Lanham Act is evidence that Congress intended to grant consumers standing to make false advertising claims under Section 43(a)).

79. *Id.*

80. *See id.* at 691 ("The congressional statement of purpose of the [Lanham] Act is contained in § 45.").

81. 15 U.S.C. § 1127 (2000).

82. *Colligan*, 442 F.2d at 691.

83. *See id.* (finding that Section 43(a) was not intended to protect consumers). The Second Circuit stated:

We conclude . . . that Congress'[s] purpose in enacting § 43(a) was to create a special and limited unfair competition remedy, virtually without regard for the interests of consumers generally and almost certainly without any consideration of consumer rights of action in particular. The Act's purpose, as defined in § 45, is exclusively to protect the interests of a purely commercial class against unscrupulous commercial conduct.

Id.

84. *See* Courtland L. Reichman & M. Melissa Cannady, *False Advertising Under the Lanham Act*, 21 FRANCHISE L.J. 187, 192 (2002) (stating that courts "generally root" their conclusion that consumers do not have standing to bring a Section 43(a) claim in the language of Section 45).

85. *See id.* ("[C]ourts almost universally hold that the Lanham Act requires some showing of a potential for commercial or competitive injury [for a plaintiff to have standing].").

D. 1988 Congressional Revision of Section 43(a)

In 1988, Congress sought to amend Section 43(a) as part of the Trademark Law Revision Act.⁸⁶ Congress considered two major changes to Section 43(a)—explicitly permitting false advertising actions concerning misrepresentations of a plaintiff's product and explicitly granting standing to consumers.⁸⁷ There was little to no disagreement on the former proposed change,⁸⁸ and when passed, the Trademark Law Revision Act modified Section 43(a) in a manner that permitted false advertising claims to be made regardless of whether the alleged misrepresentations concerned the defendant's product or the plaintiff's product.⁸⁹ The latter proposed change, however, sparked considerable debate.

The original Senate bill that eventually became the Trademark Law Revision Act contained a provision that explicitly denied consumers standing to make claims under Section 43(a).⁹⁰ When the Senate eventually passed the bill, however, the provision had been eliminated, and the portion of Section 43(a) concerning standing remained in its original form.⁹¹ The original House bill

86. See Tepper, *supra* note 61, at 957 (stating that in 1988, Congress passed the Trademark Law Revision Act, which amongst other things, amended Section 43(a)). For more information on the passage of the Trademark Law Revision Act, see S. REP. NO. 100-515 (1988), as reprinted in 1988 U.S.C.C.A.N. 5577; H.R. REP. NO. 100-1028 (1988); 134 CONG. REC. 32,052-56 (1988); 134 CONG. REC. 31,842-61 (1988).

87. See Tepper, *supra* note 61, at 957-58 (stating that Congress considered revisions to Section 43(a) that would clarify consumer standing and overturn "a line of judicial opinions that limited false advertising actions under Section 43(a) to false statements about a defendant's own products").

88. See *id.* at 960 (stating that both the Senate Judiciary Committee and the Trademark Review Commission agreed that the *Bernard* limitation on Section 43(a) false advertising claims should be lifted).

89. See 15 U.S.C. § 1125(a)(1)(B) (2000) (imposing liability on those who misrepresent "the nature, characteristics, qualities, or geographic origin of his or her or another person's goods, services, or commercial activities"); 5 MCCARTHY ON TRADEMARKS, *supra* note 49, § 27:10 (stating that as amended by the Trademark Law Revision Act, Section 43(a) "covers not only false representations about the defendant's own goods and services, but false representations about the plaintiff's goods and services as well"); Tepper, *supra* note 61, at 958 ("As amended [by the Trademark Law Revision Act], Section 43(a) allows an action for false advertising about one's own or another person's goods or services.").

90. See 133 CONG. REC. 32,816 (1987) (proposing a change to Section 43(a) that would limit standing to bring a claim under the section to "any person who believes that he is or is likely to be damaged in his business or profession by such action").

91. See S. REP. NO. 100-515, at 41 (1988), as reprinted in 1988 U.S.C.C.A.N. 5577, 5604 (stating that the committee had decided to modify the bill so that Section 43(a)'s standing provision would not be changed); Tepper, *supra* note 61, at 963 ("[B]y the time the Senate passed the bill [that would become the Trademark Law Revision Act] in May of 1988, the language of [the standing provision] of Section 43(a) had been returned to its original form.").

also contained a provision that explicitly prohibited consumer standing in Section 43(a) claims.⁹² The House, however, later removed that provision from its bill and replaced it with a provision that clearly granted consumers standing to pursue Section 43(a) claims.⁹³ With differing bills in the Senate and the House, a joint conference committee formed to amend the bills so that they corresponded with one another.⁹⁴ The joint conference committee eliminated the provision in the House's bill that explicitly gave consumers standing and produced a bill that made no changes to Section 43(a)'s standing provision.⁹⁵

What these changes in the bills that became the Trademark Law Revision Act said about Congress's intent was in the eye of the beholder.⁹⁶ The House Report stated that the deletion of its provision explicitly granting consumer standing was due to the fact that such a provision was unnecessary as "[t]he plain meaning of the statute already includes consumers, since it grants any 'person' the right to sue."⁹⁷ At least one member of the House, however, clearly disagreed with the report's explanation for why the House deleted the consumer standing provision; Congressman Fish stated that the House removed the provision because it "would have radically altered the nature of the Lanham Act and would have had the likely effect of turning the [f]ederal courts into a small claims court."⁹⁸ Furthermore, the Senate committee report stated that the lack of a change in the standing provision of Section 43(a) should be considered a decision to maintain the status quo in regards to standing

92. See *Trademark Law Revision Act of 1988: Hearing on H.R. 4156 Before the Subcomm. on Courts, Civil Liberties and the Admin. of Justice of the H. Comm. on the Judiciary*, 100th Cong. 79 (1988) (statement of Ronald S. Kareken, President, United States Trademark Association) (stating that H.R. 4156, the original House bill to revise the Lanham Act, contains a provision that limits standing to make a claim under Section 43(a) to those whose business or professional interests are injured by the alleged violation).

93. See H.R. REP. NO. 100-1028, at 7 (1988) (stating that the bill the committee is presenting makes it explicit that consumers do have standing to sue under Section 43(a)).

94. See *Tepper*, *supra* note 61, at 964. ("Because the House and Senate bills differed, a joint meeting was called to harmonize them.").

95. See Scott E. Thompson, *Consumer Standing Under Section 43(a): More Legislative History, More Confusion*, 79 TRADEMARK REP. 341, 351 (1989) (stating that a compromise was reached in the joint meeting that resulted in the retention of Section 43(a)'s original standing provision).

96. See *Tepper*, *supra* note 61, at 964 ("Subsequent statements made by the drafters [of the Trademark Law Revision Act] do little to clarify [the compromise which resulted in the retention of Section 43(a)'s original standing provision].").

97. 134 CONG. REC. 31,852 (1988) (citing H.R. REP. NO. 100-1028, at 13-15).

98. *Id.* at 31,854.

determinations in Section 43(a) claims.⁹⁹ In its own words, the Senate committee stated:

It is the committee's intention that . . . standing under Section 43(a) . . . should continue to be decided on a case-by-case basis, and that the amendments . . . made to the legislation with respect to this issue [deleting the proposed amendment which would have prohibited consumer standing] should not be regarded as either limiting or extending applicable decisional law.¹⁰⁰

In short, the Trademark Law Revision Act did little to help courts determine a proper standard for determining which plaintiffs should be granted standing in Section 43(a) claims.¹⁰¹ As a result, following passage of the Trademark Law Revision Act, the standards for Section 43(a) standing continue to differ, sometimes significantly, from one circuit to another¹⁰² with one constant—consumers cannot bring Section 43(a) claims.¹⁰³

IV. The Different Standards for Determining Prudential Standing

The current standards for Section 43(a) standing can be grouped into three categories. The Ninth and Tenth Circuits take the categorical approach. The First and Second Circuits apply a reasonable interests test. Finally, the Third, Fifth, and Eleventh Circuits use a five-prong test that is commonly referred to as the *Conte Bros.* test, a reference to the case in which the Third Circuit developed the test.

99. See De Sevo, *supra* note 5, at 6 (explaining that the Senate committee report stated that the Trademark Revision Act and its legislative history should have no impact on judicial decisions regarding consumer standing to make Section 43(a) claims).

100. S. REP. NO. 100-515, at 41 (1988), as reprinted in 1988 U.S.C.C.A.N. 5577, 5604.

101. See Tepper, *supra* note 61, at 963 ("If courts found the history of the 1946 Lanham Act to be frustrating, they are almost certain to be driven to despair by the history of the Trademark Law Revision Act.").

102. See *infra* Part IV (discussing the different standing requirements that each circuit placed on plaintiffs in Section 43(a) false advertising claims).

103. See Reichman & Cannady, *supra* note 84, at 192 ("[C]ourts almost universally hold that the Lanham Act requires some showing of a potential for commercial or competitive injury [for a plaintiff to have standing].").

A. The Categorical Approach

In jurisdictions that use the categorical approach, a plaintiff in a Section 43(a) false advertising claim¹⁰⁴ has standing only if he or she is a direct competitor of the defendant.¹⁰⁵ In adopting this standard, the Tenth Circuit relied on Section 45's statement of congressional purpose.¹⁰⁶ The court reasoned that because Section 45 states that the intent of the Lanham Act is to prevent unfair competition, the plaintiff "must be a competitor of the defendant and allege a competitive injury" to invoke Section 43(a)'s false advertising protection.¹⁰⁷

The Ninth Circuit also turned to Section 45's statement of purpose when adopting the categorical approach. In *Halicki v. United Artists Communications, Inc.*,¹⁰⁸ the court found that Section 45 made it clear that Section 43(a) "is directed against unfair competition," and that, therefore, to have a false advertising cause of action under Section 43(a) the conduct in question "must not only be unfair but must in some discernible way be competitive."¹⁰⁹ While requiring that the tortious conduct in some discernible way be competitive appears to be not as stringent as the Tenth Circuit's clear statement that a Section 43(a) false advertising plaintiff must be a competitor, the language has had the same effect as the Tenth Circuit's standard. That is, it has prevented anyone but direct competitors from bringing Section 43(a) false advertising claims.¹¹⁰

104. Jurisdictions using the categorical approach make a distinction between false advertising claims brought under Section 43(a) (claims alleging false representations concerning the quality of goods) and false association claims brought under Section 43(a) (claims alleging false representations concerning the origin or endorsement of goods). "For a false advertising claim . . . the plaintiff 'must be a competitor of the defendant and allege a competitive injury;' for a false association claim . . . the plaintiff must allege a 'reasonable interest to be protected' in the subject goods or services, or in the misused mark causing a misidentification." *Hutchinson v. Pfeil*, 211 F.3d 515, 520 (10th Cir. 2000) (quoting *Stanfield v. Osborne Indus., Inc.*, 52 F.3d 867, 873 (10th Cir. 1995)).

105. See Lawrence Weinstein & Alexander Kaplan, *Barring Direct Competitor from Standing to Claim False Advertising*, N.Y.L.J., Oct. 1, 2007, at S6 (explaining the categorical approach).

106. See *Stanfield v. Osborne Indus., Inc.*, 52 F.3d 867, 873 (10th Cir. 1995) ("A false advertising claim implicates the Lanham Act's purpose of preventing unfair competition.").

107. *Id.*

108. See *Halicki v. United Artists Commc'n, Inc.*, 812 F.2d 1213, 1214 (9th Cir. 1987) (finding that the defendant must be in competition with the plaintiff for the plaintiff to have standing to bring a false advertising claim under Section 43(a)).

109. *Id.*

110. See, e.g., *Jack Russell Terrier Network of N. Cal. v. Am. Kennel Club*, 407 F.3d 1027, 1037 (9th Cir. 2005) (refusing to grant standing in a Section 43(a) false advertising claim to a

B. The Reasonable Interest Test

While the jurisdictions that use the reasonable interest test apply the test in slightly different manners, the basic requirement of the test is that the plaintiff "has a reasonable interest in being protected against [the alleged] false advertising."¹¹¹ When the First Circuit adopted this test as its standard for standing in Section 43(a) false advertising claims, the court asserted that the standard was appropriate because "the Lanham Act was intended to enlarge the category of activities proscribed by federal law at the time of its enactment in 1946"¹¹² and there was a "general consensus [among courts] that the plaintiff . . . [did] not have to be a competitor in order to have standing to sue."¹¹³ While this second rationale is now inaccurate due to the Ninth and Tenth Circuit's later adoption of the categorical approach,¹¹⁴ courts within the First Circuit continue to use the reasonable interest test.¹¹⁵ The First Circuit, however, does require the plaintiff to show more than just that he or she has a reasonable interest in being protected from the alleged advertising; the plaintiff must also establish "a link or 'nexus' between itself and the alleged falsehood [in the defendant's advertising]."¹¹⁶ Because the court has been less than clear as to what exactly the plaintiff must show to meet the nexus requirement, to gain a sense of what the nexus requirement entails, one must look to the cases where the court has had to decide whether a nexus exists between a non-competitor plaintiff and alleged false advertising. Unfortunately, the First Circuit has only once faced the question of whether a noncompetitor plaintiff in a Section 43(a) false advertising claim met the nexus requirement for standing.

In *Camel Hair & Cashmere Institute of America, Inc. v. Associated Dry Goods Corp.*,¹¹⁷ the court found that manufacturers and marketers of cashmere had a sufficient nexus with the mislabeling of coats as containing more

non-competitor plaintiff); *Barrus v. Sylvania*, 55 F.3d 468, 470 (9th Cir. 1995) (same).

111. *Camel Hair & Cashmere Inst. of Am., Inc. v. Associated Dry Goods Corp.*, 799 F.2d 6, 11 (1st Cir. 1986).

112. *Quabaug Rubber Co. v. Fabiano Shoe Co.*, 567 F.2d 154, 160 (1st Cir. 1977).

113. *Camel Hair*, 799 F.2d at 11.

114. See *supra* Part IV.A (discussing the development of the categorical approach for determining standing in Section 43(a) false advertising claims).

115. See *Landrau v. Solis Betancourt*, 554 F. Supp. 2d 102, 109 (D.P.R. 2007) (using the reasonable interest test to determine whether the plaintiff had standing to make a Section 43(a) false advertising claim).

116. *Camel Hair*, 799 F.2d at 11–12.

117. See *id.* (finding that noncompetitor plaintiffs had standing to bring a Section 43(a) false advertising claim because they met the requirements of the reasonable interest test).

cashmere material than they actually did.¹¹⁸ *Camel Hair* implies that to meet the nexus requirement, the plaintiff's business must be injured in some manner by the alleged false advertising, but because the court has yet to state explicitly that this is in fact what the nexus prong requires, whether a noncompetitor plaintiff meets the First Circuit's standing requirements for Section 43(a) false advertising claims will be questionable in each case.

The Second Circuit also requires that the plaintiff show more than just that he or she has a reasonable interest in being protected from the defendant's false advertising. To have standing, the plaintiff also must show that there is a reasonable basis for concluding that his or her reasonable interest likely will be injured by the alleged false advertising.¹¹⁹ While the language of this standard is similar to the First Circuit's requirements, the Second Circuit has described in greater detail what its standard means. The court has stated that its reasonable basis prong requires the plaintiff to show "both likely injury and a causal nexus to the false advertising."¹²⁰ Furthermore, the court has stated that the likely injury must be of a competitive or commercial nature.¹²¹ Additionally, the reasonable interest requirement includes "commercial interests, direct pecuniary interests, and even a future potential for a commercial or competitive injury."¹²²

C. *The Conte Bros. Test*

In 1998, in search of "an appropriate method for adding content"¹²³ to the reasonable interest test it had been applying, then-Judge Alito, writing for the Third Circuit in *Conte Bros. Automotive, Inc. v. Quaker State-Slick 50, Inc.*, turned to antitrust law.¹²⁴ The result was a third test for determining whether a

118. *See id.* at 12 ("We find that the plaintiff's members do have a sufficient nexus to the alleged wrong to sue in their own right.").

119. *Ortho Pharm. Corp. v. Cosprophar, Inc.*, 32 F.3d 690, 694 (2d Cir. 1994) (stating that a plaintiff must show both a "reasonable interest" and a "reasonable basis" for believing that such interest may be damaged in order to have standing in a Section 43(a) false advertising claim).

120. *Id.*

121. *See Berni v. Int'l Gourmet Rests. of Am., Inc.*, 838 F.2d 642, 648 (2d Cir. 1988) ("Although a Section 43 plaintiff need not be a direct competitor, . . . it is apparent that, at a minimum, standing to bring a Section 43 claim requires the potential for a commercial or competitive injury.").

122. *ITC Ltd. v. Punchgini, Inc.*, 482 F.3d 135, 169 (2d Cir. 2007).

123. *Conte Bros. Auto., Inc. v. Quaker State-Slick 50, Inc.*, 165 F.3d 221, 233 (3d Cir. 1998).

124. *See id.* (stating that the test for antitrust standing is also an appropriate test for

plaintiff in a Section 43(a) false advertising claim has standing. The Third Circuit's new test came from *Associated General Contractors, Inc. v. California State Council of Carpenters*,¹²⁵ a case where the U.S. Supreme Court developed a test to determine whether a plaintiff had standing to make a claim under Section 4 of the Clayton Act.¹²⁶ Pointing to *McCarthy on Trademarks and Unfair Competition*¹²⁷ and the *Restatement (Third) Unfair Competition*¹²⁸ for support, the Third Circuit found that the Supreme Court's *Associated General* test was also appropriate for determining whether a plaintiff in a Section 43(a) false advertising claim has standing to sue.¹²⁹ This rationale has proved to be popular as in the last few years both the Fifth¹³⁰ and Eleventh¹³¹ Circuits have decided to adopt this test, which when applied in Section 43(a) false advertising claims has become known as the *Conte Bros.* test.¹³²

The test contains five factors for courts to consider when addressing a plaintiff's prudential standing in a Section 43(a) false advertising claim. First, the court should ask whether the plaintiff's injury is of a type that Congress sought to remedy with Section 43(a).¹³³ Second, the court should consider the extent to which the plaintiff's injury directly resulted from the defendant's

standing in Section 43(a) false advertising claims).

125. See *Associated Gen. Contractors, Inc. v. Cal. State Council of Carpenters*, 459 U.S. 519, 545 (1983) (listing factors that courts should consider when determining whether a plaintiff has standing to bring an antitrust violation claim under Section 4 of the Clayton Act).

126. See *id.* (stating the factors the Court used to determine whether the plaintiff had standing to make a claim under Section 4 of the Clayton Act).

127. See 5 MCCARTHY ON TRADEMARKS, *supra* note 49, § 27:32 n.1 (advocating the use of a test for standing in Section 43(a) claims that is similar to the test used for antitrust standing).

128. See RESTATEMENT (THIRD) UNFAIR COMPETITION § 3 cmt. f (1995) (advocating the use of a test for standing in Section 43(a) claims that is similar to the test used for antitrust standing).

129. See *Conte Bros. Auto., Inc. v. Quaker State-Slick 50, Inc.*, 165 F.3d 221, 233 (3d Cir. 1998) (adopting the test for antitrust standing developed in *Associated General* for determining standing in Section 43(a) claims).

130. See *Procter & Gamble Co. v. Amway Corp.*, 242 F.3d 539, 562–63 (5th Cir. 2001) (adopting the *Conte Bros.* test for determining whether a plaintiff has standing to make a Section 43(a) claim).

131. See *Phoenix of Broward, Inc. v. McDonald's Corp.*, 489 F.3d 1156, 1167 (11th Cir. 2007) (adopting the *Conte Bros.* test for determining whether a plaintiff has standing to make a Section 43(a) claim).

132. See *Eleventh Circuit Adopts Conte Bros. Test, Denies Rival Standing Against McDonald's*, 76 U.S.L.W. 1015, 1015 (July 3, 2007) (referring to the Third Circuit's current test for standing in Section 43(a) claims as the *Conte Bros.* test).

133. See *Conte Bros.*, 165 F.3d at 233 (stating that the first factor of the test is whether Congress intended to remedy the harm the plaintiff is alleging).

alleged Section 43(a) violation.¹³⁴ Third, the proximity of the plaintiff in relation to the defendant's alleged false advertising should be noted.¹³⁵ Fourth, the court should look at how speculative the plaintiff's damages claim is.¹³⁶ Fifth and finally, the court should consider the risk of duplicative damages and/or how complex it will be to apportion damages among potential plaintiffs.¹³⁷

How exactly the *Conte Bros.* factors should be weighed is not apparent. Can one factor pointing heavily towards granting standing outweigh the other four factors pointing against a grant of standing, or must at least three factors point towards a grant of standing for a Section 43(a) claim to survive? In *Conte Bros.*, this issue was irrelevant because the court found that all five factors pointed away from granting standing.¹³⁸ In the case in which it adopted the *Conte Bros.* test, the Fifth Circuit also found that all five factors pointed against a grant of standing.¹³⁹ The Eleventh Circuit, however, did have to address this issue when it adopted the *Conte Bros.* test, and while not stating that it was necessary for three factors to weigh towards granting standing for a plaintiff to have standing, it found that the plaintiff in the case at hand did not have standing because only two factors pointed towards standing existing.¹⁴⁰ The Eleventh Circuit's application is anything but definitive, and therefore, if the *Conte Bros.* test continues to proliferate among the circuit courts, the courts eventually will have to decide how exactly the five factors should be weighed.

134. See *id.* (stating that the second factor of the test is "the directness or indirectness of the asserted injury").

135. See *id.* (stating that the third factor of the test is "the proximity or remoteness of the party to the alleged injurious conduct").

136. See *id.* (stating that the fourth factor of the test is "the speculativeness of the damages claim").

137. See *id.* (stating that the final factor of the test is "the risk of duplicative damages or complexity in apportioning damages").

138. See *id.* at 234–35 (finding that each factor of the test weighs against granting the plaintiffs standing).

139. See *Procter & Gamble Co. v. Amway Corp.*, 242 F.3d 539, 564 (5th Cir. 2001) ("This analysis [applying the *Conte Bros.* test] shows that all five factors unanimously . . . counsel against granting standing in this circumstance.").

140. See *Phoenix of Broward, Inc. v. McDonald's Corp.*, 489 F.3d 1156, 1173 (11th Cir. 2007) ("[T]he first and third *Conte Bros.* factors weigh in favor of prudential standing, while the second, fourth, and fifth factors weigh against prudential standing. Admittedly it is a close question, but we conclude that on balance, Phoenix does not have prudential standing to bring its claim against McDonald's.").

V. Why a New Universal Standard is Necessary

The existence of three different standards for prudential standing in Section 43(a) false advertising claims creates two major concerns. First, having many different standards causes uncertainty in every court. Additionally, the fact that the standard varies from one circuit to another encourages forum shopping. Both of these problems are discussed in more detail in this Part. After the intricacies of these problems are articulated, the need for the establishment of a definitive standard becomes apparent.

A. Many Different Standards Create Too Much Uncertainty

One of the largest problems with the existence of different standards among the circuits is that it creates uncertainty in all the circuits. In circuits that have yet to address the issue, the uncertainty is obvious. For instance, in the opening hypothetical, counsel for Giuseppe's cannot make a reliable prediction as to whether or not the district court will grant standing because the standard upon which the court will make its ruling is unpredictable until the court renders its decision. That is, under the current status of Section 43(a) standing jurisprudence, no one can predict what a circuit court that has yet to confront the issue (or a district court located within a circuit that has yet to confront the issue) will do because the persuasive authority at which the court will look before rendering its decision is all over the map. Furthermore, the fact that there is no consensus on the issue arguably makes it more likely that the court will reject the three existing standards and create a new standard of its own. Additionally, even in circuits that have adopted a standard for standing in Section 43(a) false advertising claims, whether or not a party will be granted standing is still somewhat unpredictable because the issue is so unsettled nationwide that a circuit may be willing to change its standard.

The Third Circuit's Section 43(a) standing jurisprudence supports this theory. In a span of less than two decades, the Third Circuit articulated three different standards for standing in Section 43(a) false advertising claims.¹⁴¹

141. Compare *Conte Bros. Auto., Inc. v. Quaker State-Slick 50, Inc.*, 165 F.3d 221, 233 (3d Cir. 1998) (establishing a five-part test for determining a litigant's prudential standing in claims arising under Section 43(a) of the Lanham Act), with *Serbin v. Ziebart Int'l Corp.*, 11 F.3d 1163, 1177 (3d Cir. 1993) (stating that in order to bring a claim under Section 43(a) a party must be a direct competitor of the alleged false advertiser or a "particularly appropriate standard bearer" for the commercial interests harmed by the alleged false advertising), and *Thorn v. Reliance Van Co.*, 736 F.2d 929, 933 (3d Cir. 1984) (stating that standing should be based on whether the party has a reasonable interest in being protected from false advertising).

Initially, the court took an extremely permissive approach, finding that standing should depend on whether the plaintiff has a reasonable interest in seeking protection from the defendant's alleged false advertising.¹⁴² Nine years later, the same court had a turnaround and took a much more restrictive approach, finding that to have standing, a plaintiff must be a direct competitor of the defendant or a "particularly appropriate standard bearer" for the commercial interests that the alleged false advertising harmed.¹⁴³ A mere five years after that decision, the court found that standard to be too restrictive and became the first circuit to adopt the five-part *Conte Bros.* test previously discussed.¹⁴⁴ In each of these cases, the court seems more willing than usual to distinguish its prior rulings and to dismiss cases from other circuits as incorrect.¹⁴⁵ One could argue that this emboldening of the court is because the issue is so unsettled that they can deviate from already established rules without being labeled a maverick court.¹⁴⁶

In short, the lack of consensus on this standing issue seems to make judges more willing to act as trailblazers, and this increased willingness to veer from previously stated standards makes it nearly impossible for potential litigants to know whether or not they can make a Section 43(a) false advertising claim. This uncertainty defeats one of the primary purposes of standing requirements, which is to promote judicial efficiency by limiting the number of cases on the courts' dockets.¹⁴⁷ If the standard for standing is uncertain, then all litigants who think they might under some theory have a false advertising claim under Section 43(a) will file their claim with the reasonable hope that the court will

142. See *Thorn*, 736 F.2d at 933 (stating that standing should be based on whether the party has a reasonable interest in being protected from false advertising).

143. *Serbin*, 11 F.3d at 1177.

144. See *Conte Bros.*, 165 F.3d at 233 (establishing a five-part test for determining a litigant's prudential standing in claims arising under Section 43(a) of the Lanham Act).

145. See *id.* at 232 (rejecting the Ninth Circuit's categorical approach); *Serbin*, 11 F.3d at 1177 (distinguishing *Thorn* and ignoring its focus on the plain meaning of Section 43(a)'s statutory standing provision); *Thorn*, 736 F.2d at 932 (rejecting the Second Circuit's *Colligan* decision "to the extent that it is contrary to the plain meaning rule").

146. Professors Scott Meinke and Kevin Scott argue that judges' decisions are impacted by their desire to obtain the respect of fellow judges. See Scott R. Meinke & Kevin M. Scott, *Collegial Influence and Judicial Voting Change: The Effect of Membership Change on U.S. Supreme Court Justices*, 41 LAW & SOC'Y REV. 909, 910 ("Judges are concerned about the esteem of their colleagues . . . and may alter their behavior in order to secure respect."). Following this theory, a judge is more likely to create a new test or standard when no existing test or standard is widely accepted because doing so will probably not impact the level of respect they receive from other judges.

147. See CHEMERINSKY, *supra* note 7, at 58 ("[S]tanding is said to serve judicial efficiency by preventing a flood of lawsuits by those who have only an ideological stake in the outcome.").

adopt their theory as the new standard for standing. In this way, the lack of a consistently applied judicial standard for standing does little to promote judicial efficiency.

B. Different Standards Among the Circuits Encourage Forum Shopping

Forum shopping is another problem that arises from the existence of three different standards for Section 43(a) standing.¹⁴⁸ In the opening hypothetical, assuming the Ninth and Tenth Circuits could exercise personal jurisdiction over Carlo's, counsel for Giuseppe's should have filed in a district court in the Ninth or Tenth Circuit because a court in those circuits probably would have applied the categorical approach, and Giuseppe's, as a direct competitor of Carlo's, definitely would have had standing to make a Section 43(a) false advertising claim.¹⁴⁹ If Giuseppe's, however, had filed in a district court located in the Third or Eleventh Circuit, then its standing would be less clear as the multi-factor *Conte Bros.* test probably would be applied. The fact that whether or not Giuseppe's can make a claim is at least partially dependent on where Giuseppe's files its claim means that the current status of Section 43(a) false advertising standing jurisprudence encourages forum shopping. The U.S. Supreme Court has stated that it will not interpret a statute in a manner which encourages forum shopping and that a federal law's enforceability should not depend on the forum in which a claim is brought.¹⁵⁰ Under Section 43(a)'s current jurisprudence, however, whether a plaintiff can enforce a Section 43(a) false advertising claim does depend on where the plaintiff files his or her claim, and therefore, it is necessary for the Supreme Court to establish a clear, universal standard for determining whether a plaintiff has standing to make a false advertising claim under Section 43(a).

148. *But see* Richard Maloy, *Forum Shopping? What's Wrong With That?*, 24 QUINNIPIAC L. REV. 25, 59–60 (2005) (highlighting the fact that forum shopping is not always viewed as problematic, such as when it takes the form of choice of law and forum choice provisions in contracts).

149. This also is assuming that conflicts of laws rules would have no impact on the standard for standing that the Ninth or Tenth Circuit would apply.

150. *Southland Corp. v. Keating*, 465 U.S. 1, 15 (1984) ("We are unwilling to attribute to Congress the intent . . . to create a right . . . and yet make the right dependent for its enforcement on the particular forum in which it is asserted.").

VI. *What the New Universal Standard Should Be*

As the legislative history of the Trademark Law Revision Act makes apparent,¹⁵¹ the likelihood of Congress agreeing, anytime soon, on a clarification of Section 43(a)'s standing provision that would result in a universally applied standard for standing in Section 43(a) false advertising claims is low. The U.S. Supreme Court is, therefore, potential Section 43(a) plaintiffs' best hope for a universal standard being adopted in the near future. Resolution of this issue from the high court is also appropriate as prudential standing limitations are judicially created,¹⁵² and as the problem regarding Section 43(a) standing concerns only prudential limitations,¹⁵³ one could argue that the judiciary created this problem.¹⁵⁴ In other words, the judiciary created this mess, and the judiciary, therefore, should be the one to clean it. Hopefully, the U.S. Supreme Court will confront the Section 43(a) standing problem soon, but if the Court takes on the issue, the question then becomes the following: What should the universal standard be for determining whether a plaintiff has standing to sue for false advertising under Section 43(a)?

A. *Not Another Malleable Standard!*

When choosing a universal standard, the Court should avoid standards like the reasonable interest test and the *Conte Bros.* test because adopting these standards would not alleviate the current problems that exist with Section 43(a) false advertising standing. The reasonable interest test and the *Conte Bros.* test give so much discretion to judges that the application of both standards likely would vary from one court to another. For example, courts likely would vary in their definition of a reasonable interest or in the controlling weight they placed on each prong of the *Conte Bros.* test. In short, the uncertainty and encouragement of forum shopping that currently exists as a result of the use of

151. See *supra* Part III.D (stating that various congressional representatives and senators debated how to change Section 43's standing provision to make it more clear and when they could not agree on how to change it, they decided to leave it untouched).

152. See CHEMERINSKY, *supra* note 7, at 60 (stating that prudential standing principles are not constitutionally imposed, but judicially imposed as part of "prudent judicial administration").

153. See *Conte Bros. Auto., Inc. v. Quaker State-Slick 50, Inc.*, 165 F.3d 221, 225 (3d Cir. 1998) (stating that prudential standing concerns, rather than constitutional standing concerns, could prevent the plaintiff from making a Section 43(a) false advertising claim).

154. See *Pierce*, *supra* note 8, at 1786-87 (arguing that standing law as a whole is currently in a "sad state" and that because the judiciary created standing law, it is the judiciary's "sole responsibility to reduce the problems inherent in modern standing law").

three different standards would continue to exist if the Supreme Court adopted the reasonable interest test or *Conte Bros.* test because the malleability of these standards would make the occurrence of new circuit splits on issues involving their application likely.

Already, the circuits that have adopted the *Conte Bros.* test have differed significantly in their application of it. In *Conte Bros.*, the Third Circuit, while rejecting the categorical approach¹⁵⁵ and the notion that the mere fact that any competition occurred between the plaintiff and the defendant would give the plaintiff standing,¹⁵⁶ implied that the new standard that it was adopting was meant to expand the class of eligible Section 43(a) false advertising plaintiffs beyond direct competitors.¹⁵⁷ In other words, the Third Circuit presented the *Conte Bros.* test as a standard that was more permissive than the categorical approach. When, however, the Eleventh Circuit adopted the *Conte Bros.* test as its standard for standing in Section 43(a) false advertising claims, it applied the test in a manner which prevented a Burger King franchisee from suing McDonald's under Section 43(a) for alleged false advertising.¹⁵⁸ As McDonald's is the epitome of a direct competitor to Burger King and certainly competes with Burger King in more than just a limited sense, the Eleventh Circuit applied the *Conte Bros.* test in a manner that made it more restrictive than the categorical approach.

Another concern that would arise with the adoption of the reasonable interest test or the *Conte Bros.* test as the universal standard is that both tests give judges a large amount of discretion, and judges could use this discretion to arrive at an outcome not rooted in prudential standing principles, but instead based on the merits of the plaintiff's case.¹⁵⁹ That is, judges could use these highly discretionary tests to prevent claims which they perceive as having little merit (but a sufficient amount to prevent the court from dismissing the claim at summary judgment on its merits) from moving forward in the litigation process.¹⁶⁰

155. See *Conte Bros.*, 165 F.3d at 231 (rejecting the district court's approach, which was the categorical approach).

156. See *id.* at 235 (stating that the court's decision to deny standing would not change even if it assumed that some percentage of the plaintiff's sales occurred in a manner which made the plaintiff a competitor of the defendant in "some limited sense").

157. See *id.* at 230 (quoting *Thorn* positively to state that a non-competitor could have standing to bring a false advertising claim under Section 43(a)).

158. See *Phoenix of Broward, Inc. v. McDonald's Corp.*, 489 F.3d 1156, 1173 (11th Cir. 2007) (finding that the plaintiff, a Burger King franchisee, did not have prudential standing to make a Section 43(a) false advertising claim against McDonald's).

159. See *Pierce*, *supra* note 8, at 1742–43 (arguing that judges use standing doctrine to support parties that further their "political and ideological agendas").

160. See *id.* at 1743 (stating that when standing doctrines are so malleable, it is easy for

The findings of Professor Richard J. Pierce, Jr. lend credibility to this concern. Pierce examined five Supreme Court standing cases heard between 1991 and 1998 and found a "strong convergence between the ideological preferences of the Justices and their voting patterns."¹⁶¹ Pierce asserts that in the five cases he examined, "[a] political scientist with no knowledge of the law of standing would have had no difficulty predicting the outcome of each case and predicting thirty-one of the thirty-three votes cast by Justices with clear ideological preferences, based solely on his knowledge of the ideological preferences of the Justices."¹⁶² Furthermore, Pierce found that judicial manipulation of malleable standing principles to rationalize an outcome that meets the judge's ideological preferences is not limited to Supreme Court Justices. Pierce examined all the circuit court cases considering the standing of environmental plaintiffs that were decided between January 1, 1993 and May 1, 1998 and found that "Republican judges voted to deny standing to environmental plaintiffs in 43.5% of cases, while Democratic judges voted to deny standing to environmental plaintiffs in only 11.1% of cases."¹⁶³ Based on this finding, Pierce stated that he was "able to reject the hypothesis that decisionmaking in standing cases is not influenced by a judge's political affiliation at the 99% confidence level."¹⁶⁴ Pierce's work supports the notion that a highly malleable standard, such as the reasonable interest test or the *Conte Bros.* test, should not be adopted as the universal standard for determining whether a plaintiff has standing to make a Section 43(a) false advertising claim. Pierce's findings suggest that adopting an easily malleable standard would create a high risk that courts would make Section 43(a) standing determinations based not on prudential standing principles, but rather on whether the merits of the plaintiff's claim align with their ideological preferences.¹⁶⁵

B. The Simple Solution (At Least for Direct Competitors): A Categorical Approach Filter

As it is unclear whether Congress intended to allow parties who are not direct competitors to bring false advertising claims under Section 43(a), it may be

judges to manipulate the doctrines "to rationalize their . . . preferred results").

161. *Id.* at 1754.

162. *Id.* at 1754–55.

163. *Id.* at 1760.

164. *Id.*

165. *See id.* at 1745 (stating that a judge's decision is more likely to turn on his political preference when the doctrine that applies to the matter at hand is "relatively indeterminate" or malleable).

appropriate for courts to continue to use the reasonable interest and/or *Conte Bros.* tests to evaluate whether plaintiffs who are not direct competitors have standing, despite the aforementioned flaws of those tests. Congress's intent to confer standing upon direct competitors to make such claims, however, is clearer,¹⁶⁶ and therefore, a universal adoption of the categorical approach as a filter would be appropriate. That is, courts should apply a two-step test when evaluating a plaintiff's standing in Section 43(a) false advertising claims. First, the court should apply the categorical approach. If the court determines that the plaintiff is a direct competitor of the alleged false advertiser, then the court's evaluation should stop, and the court should grant standing to the plaintiff. If the court determines that the plaintiff is not a direct competitor, then the court could choose to move to a second step where it would apply the reasonable interest or *Conte Bros.* tests to evaluate the plaintiff's standing.¹⁶⁷

1. Why the Filter Is an Appropriate Solution

A universal adoption of the categorical approach¹⁶⁸ as a filter for deciding standing issues in Section 43(a) false advertising claims would end the current

166. See *infra* Part VI.B.1 (discussing how the text of Section 43(a) and Section 45, considered together, make a congressional intent to grant standing to direct competitors evident).

167. One could make an argument that standing in Section 43(a) false advertising claims should not extend beyond direct competitors. See, e.g., *Stanfield v. Osborne Indus., Inc.*, 52 F.3d 867, 873 (10th Cir. 1995) (finding that a plaintiff must be a direct competitor to bring a false advertising claim under Section 43(a)); *Halicki v. United Artists Commc'n, Inc.*, 812 F.2d 1213, 1214 (9th Cir. 1987) (finding that the defendant must be a competitor of the plaintiff for a plaintiff to have standing to make a Section 43(a) false advertising claim). One, however, also could argue that courts should extend standing to bring such claims beyond direct competitors. See, e.g., *Joint Stock Soc'y v. UDV N. Am., Inc.*, 266 F.3d 164, 180 (3d Cir. 2001) (stating that a non-competitor who had commercial interests that were harmed by the alleged false advertising would have standing to make a claim under Section 43(a)); *Camel Hair & Cashmere Inst. of Am., Inc. v. Associated Dry Goods Corp.*, 799 F.2d 6, 11 (1st Cir. 1986) (finding that the plaintiff in a Section 43(a) false advertising claim "does not have to be a competitor in order to have standing to sue"); *Burns*, *supra* note 50, at 888 (advocating an extension of Section 43(a) false advertising standing to consumers). The resolution of this dispute, however, is beyond the scope of this Note. Furthermore, this Note takes no position on what standard for standing should be used to evaluate whether a plaintiff who is not a direct competitor can bring a false advertising claim under Section 43(a).

168. While this Note advocates for the universal implementation of a standard for standing in Section 43(a) false advertising claims that includes the use of the categorical approach as an initial step, the author takes no position on whether courts also should adopt the distinction that the categorical approach makes between false advertising claims and false association claims. This distinction has been criticized. See, e.g., *Conte Bros. Auto., Inc. v. Quaker State-Slick 50, Inc.*, 165 F.3d 221, 232 (3d Cir. 1998) ("Section 43(a) provides no support for drawing a

uncertainty regarding direct competitors' standing and decrease the encouragement of forum shopping that current Section 43(a) false advertising jurisprudence creates. Furthermore, it would not be as susceptible to judicial manipulation as the reasonable interest and *Conte Bros.* tests. The categorical approach is a simple test. Whether the plaintiff has standing hinges merely on whether he or she is a direct competitor of the alleged false advertiser, and deciding whether a plaintiff is a direct competitor is a much more factual determination than deciding whether a plaintiff has a reasonable interest or meets a sufficient number of prongs of the *Conte Bros.* test.¹⁶⁹

For instance, Giuseppe's is clearly a direct competitor of Carlo's, and a Burger King franchisee is obviously a direct competitor of McDonald's. It is less clear, however, whether Giuseppe's and the Burger King franchisee have a reasonable interest or meet enough prongs of the *Conte Bros.* test. This simplicity of the categorical approach prevents courts from varying in their application of the standard to such an extent that different standards for direct-competitor plaintiffs begin to exist in different jurisdictions; the categorical approach's simplicity also decreases the likelihood that courts will manipulate the standard to arrive at results that satisfy their ideological preferences.¹⁷⁰ The U.S. Supreme Court, therefore, should adopt a universal standard for deciding whether or not a plaintiff has standing to bring a false advertising claim under Section 43(a) that includes a categorical approach filter.

distinction in standing depending on the type of § 43(a) violation alleged."); James S. Wrona, *False Advertising and Consumer Standing Under Section 43(a) of the Lanham Act: Broad Consumer Protection Legislation or a Narrow Pro-Competitive Measure?*, 47 RUTGERS L. REV. 1085, 1138 (1995) ("The Ninth Circuit should apply the same criteria when reviewing standing under both Section 43(a) subparts."). Whether, despite the criticisms, such a distinction should be adopted is beyond the scope of this Note. This Note merely argues that the standard that the categorical approach implements for determining whether a plaintiff has standing in Section 43(a) false advertising claims, one whose outcome turns on whether the plaintiff is a direct competitor, should be a component of a universal standard for evaluating a plaintiff's standing in Section 43(a) false advertising claims.

169. One could certainly argue that courts could define "direct competitor" in some complicated way so that the categorical approach would cause the same problems as the reasonable interest or *Conte Bros.* tests. The more definite a standard is, however, the less likely courts are to manipulate it. See Pierce, *supra* note 8, at 1745 (stating that judges are less likely to veer from an established standard to achieve a desired outcome if the standard is determinate). As a direct competitor is a less nebulous term than reasonable interest or the many terms used in the prongs of the *Conte Bros.* test, judicial complication of a categorical approach filter is less likely to occur.

170. See *id.* at 1776 (suggesting that the simplification of tests for standing would make judges less likely to manipulate standing tests to reach decisions that match their ideological preferences).

A categorical approach filter also is appropriate because it ensures that the parties upon which Congress clearly intended to confer standing are granted standing. When one looks at the seemingly expansive language of Section 43(a)'s "any person" standing provision and Section 45's statement that the act is meant to protect against "unfair competition," it becomes apparent that while arguably Congress may have intended to protect more than just direct competitors from false advertising, it, at the very least, intended to protect direct competitors from false advertising.¹⁷¹ When courts apply highly malleable standards like the reasonable interest or *Conte Bros.* tests, then they are able to prevent direct competitors from making false advertising claims under Section 43(a).¹⁷² In this way, the adoption of a categorical approach filter as part of a universal standard for determining whether a plaintiff has standing to bring a Section 43(a) false advertising claim ensures that courts follow congressional intent.

VII. Conclusion

Section 43(a) false advertising standing jurisprudence is currently in a state of disarray for which the judiciary is largely responsible. For this reason, the U.S. Supreme Court, in the near future, should grant certiorari to a case that will allow it to set a universal standard for determining whether a plaintiff has standing to bring a false advertising claim under Section 43(a). This universal standard should include the use of the categorical approach as a filter because the simplicity that such a filter would add would make it more difficult for judges to manipulate the standard to arrive at a result that matches their ideological preferences. More importantly, using the categorical approach as a filter would ensure that direct competitors, a class of plaintiffs upon which Congress clearly intended to confer standing, are not denied standing.

171. See Gregory Apgar, Note, *Prudential Standing Limitations on Lanham Act False Advertising Claims*, 76 *FORDHAM L. REV.* 2389, 2427 (2008) ("To deny standing to a plaintiff alleging a commercial injury caused by the conduct of a direct competitor distorts Section 43(a)'s purpose of preventing unfair competition in commerce.").

172. See *Phoenix of Broward, Inc. v. McDonald's Corp.*, 489 F.3d 1156, 1173 (11th Cir. 2007) (finding that under the *Conte Bros.* test, the plaintiff, a Burger King franchisee, did not have standing to make a Section 43(a) false advertising claim against McDonald's, one of its direct competitors).

