No. 07-659

In the Supreme Court of the United States

PHOENIX OF BROWARD, INC., PETITIONER

V.

MCDONALD'S CORPORATION, RESPONDENT

On Petition For A Writ Of Certiorari To The United States Court of Appeals For The Eleventh Circuit

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether, in a suit involving a claim for false advertising under section 43(a) of the Lanham Act, the Eleventh Circuit correctly determined that an allegation that the plaintiff was the defendant's "direct competitor" was not *per se* sufficient to confer prudential standing and that—given the attenuated and speculative injury alleged and the potential for duplicative damages under the particular facts of the case—the plaintiff should be denied prudential standing to press a claim.

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INTRODUCTION

This case does not merit this Court's review. The Eleventh Circuit's decision employs a flexible, multifactor test to assess prudential standing in light of the particular facts before the court. This test was first adopted for Lanham Act cases in *Conte Brothers Automotive, Inc.* v. *Quaker State-Slick 50, Inc.*, 165 F.3d 221 (3d Cir. 1998) (Alito, J.), based on authority from this Court in the antitrust context, and its appropriateness has not been questioned by any court since. To the extent that there is any remaining tension in the case law, it concerns only whether "direct competitor" status is *necessary* for a plaintiff to have prudential standing to press a claim under the Lanham Act. No court of appeals has held that "direct competitor" status is categorically *sufficient* to confer such standing, regardless of the other circumstances in the case—here, for example, the attenuated and speculative nature of the alleged damages and the significant risk of duplicative recovery. In short, this case does not implicate any conflict of authority, either among the circuits or with this Court's cases. The petition should be denied.

STATEMENT OF THE CASE

A. Background

The circumstances giving rise to this case are unique in the history of Lanham Act litigation. The case's origins lie in a criminal conspiracy to which McDonald's and its customers fell victim. As the district court below acknowledged, there appears never to have been any other case "where a company brought a Lanham Act claim against a competitor whose advertising became false or misleading due to

the *felonious conduct* of *third* parties." Pet. App. 42a (emphases in original).

In the late 1980s, McDonald's introduced various prize promotions, including its popular "Monopoly" game, in which customers were given the opportunity to win food and cash prizes by collecting game pieces patterned after the popular board game. Participants could win up to $1 million by obtaining "instant win" pieces or by grouping pieces to form "monopolies." The promotional games were operated under contract by a third-party vendor, Simon Marketing, which was entrusted with the sole responsibility to "seed" the games by randomly placing winning game pieces into the stream of commerce.

In 2000, the Department of Justice informed McDonald's for the first time that it was conducting an investigation into the promotional games. Ultimately, on August 21, 2001, the FBI announced that it had arrested Simon Marketing's director of security, Jerry Jacobson, and several other people, all of whom were charged with conspiring to compromise McDonald's games through the theft and fraudulent redemption of winning high-value game pieces.

Immediately after the FBI's announcement, a variety of consumer class actions were filed against McDonald's, alleging claims for consumer fraud, negligence, unjust enrichment, and a host of related torts. Less than a year later, McDonald's settled these cases by, among other things, agreeing to implement a $15 million instant giveaway that provided class members and the general public with an opportunity to win fifteen $1 million prizes. This giveaway—coupled with another $10 million in prizes that McDonald's voluntarily awarded immediately

after the FBI's announcement—resulted in McDonald's providing its customers with an opportunity to win a total of $25 million. This exceeded the dollar value of the game pieces that Jacobson and his co-conspirators had diverted from customers through their criminal conduct.

The Jacobson conspiracy was a disaster for McDonald's. In addition to the $25 million in additional giveaways, the company suffered massive damage to its reputation and goodwill—damage that, because it is rooted in the loss of the public's trust, will require significant time and effort to regain.

B. Proceedings Below

Nearly five years after the FBI announced the arrest of Jacobson and his co-conspirators, and nearly four years after McDonald's settled all the consumer class action lawsuits arising from the conspiracy, Phoenix of Broward—a Florida company owning a single Burger King franchise in Fort Lauderdale—brought this putative class action lawsuit under the false advertising provision of the Lanham Act, 15 U.S.C. § 1125(a). The suit alleged that "McDonald's explicitly and implicitly represented to the public that players stood a fair and equal opportunity to win certain grand prizes * * * when in fact the promotional games had been fixed by a criminal ring who embezzled the high-value game pieces and prevented the public from winning such prizes." The result of these "misrepresentations," the complaint alleged, was to "divert business away" from Phoenix and force it to incur costs to combat that diversion.

McDonald's moved to dismiss the lawsuit, asserting, among other things, that Phoenix lacked prudential standing to press its false advertising

claim. The district court granted the motion. It noted that "[t]he Eleventh Circuit has not addressed what test the court should use in determining whether a plaintiff has prudential standing to bring a Lanham Act false advertising claim." Pet. App. 43a. It then examined the approaches used in other circuits before concluding that the correct analysis was set forth by the Third Circuit in *Conte Brothers Automotive, Inc.* v. *Quaker State-Slick 50, Inc.*, 165 F.3d 221 (3d Cir. 1998). Pet. App. 44a. The *Conte Brothers* court—seeking to provide decisional clarity for prudential standing in the context of the Lanham Act—had adopted the prudential standing test for antitrust claims articulated by this Court in *Associated General Contractors of California* v. *California State Council of Carpenters*, 459 U.S. 519 (1983), which employs a five-factor analysis to assess the fundamental question underlying the concept of prudential standing, namely, whether the claimant is the "proper plaintiff" to bring the claim. *Id.* at 544. The five factors include "(1) the nature of the plaintiff's alleged injury, (2) the directness or indirectness of the asserted injury, (3) the proximity or remoteness of the party to the alleged injurious conduct, (4) the speculativeness of the damages claim, and (5) the risk of duplicative damages or complexity in apportioning damages." Pet. App. 44a (citing *Conte Bros.*, 165 F.3d at 563).

Noting its "doubts that Congress [in the Lanham Act] sought to redress advertising rendered false by the criminal conduct of third parties," Pet. App. 45a, and its conclusion that "the injury to Phoenix's commercial interests caused by the advertisements can hardly be described as typical," *id.* at 46a, the district court conducted a careful analysis of the five

Conte Brothers factors. It concluded that Phoenix lacked standing to pursue its Lanham Act claim:

> Given the existence of more directly injured parties, the tenuousness and sheer speculativeness of Phoenix's damages claim, and the possibility of multiple duplicative recoveries, the court concludes that Phoenix does not have prudential standing to bring a § 43(a) false advertising claim against McDonald's.

Id. at 50a.

The Eleventh Circuit affirmed. It first undertook to determine whether the prudential standing doctrine applied to limit the scope of Lanham Act standing at all. Noting that "Congress is presumed to incorporate background prudential standing limitations unless the statute expressly negates such principles," the court of appeals joined both of the other circuits to address this question in concluding that "Congress did not intend to abrogate prudential standing limitations when it enacted the Lanham Act." Pet. App. 9a-11a.

Having concluded that prudential standing principles may operate to restrict the scope of Lanham Act standing, the court went on to consider what approach it should employ in determining the availability of prudential standing for a claim under the Lanham Act. "After surveying the caselaw," the court elected to "join the Third and Fifth Circuits and adopt the test for prudential standing articulated in *Conte Bros.*" *Id.* at 12a. In so doing, it rejected Phoenix's proposed "categorical" test, which would have conferred standing upon every plaintiff that claimed to be a direct competitor alleging a

competitive injury. *Id.* at 14a. Such a categorical rule, the court suggested, would not comport with the purposes of the Lanham Act or the *Conte Brothers* analysis, which "is designed to determine whether the injury alleged is the type of injury that the Lanham Act was designed to redress—harm to the plaintiff's 'ability to compete' in the marketplace and erosion of the plaintiff's 'good will and reputation' that has been directly and proximately caused by the defendant's false advertising." *Id.* at 20a (quoting *Conte Bros.*, 165 F.3d at 234-36).

The Eleventh Circuit then undertook a careful analysis of the facts of this case in light of the *Conte Brothers* factors, ultimately concluding that the court had correctly denied prudential standing. The court of appeals based its decision on "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." Pet. App. 32a.

Specifically, the court noted that the fraud by Jacobson and his cohorts rendered only *some* representations false—namely, the representations that customers had a fair and equal chance of winning one of the "rare 'high-value'" prizes. After all, the odds of winning millions of lower or mid-value prizes, including free food and other awards, were not affected by the conspiracy. Thus, Phoenix's claim would have required proof that McDonald's representations relating to the "rare, 'high-value'" prizes—as opposed to the other prizes that customers were far more likely to win—lured customers away from Phoenix's restaurant. According to the Eleventh Circuit, this was simply too tenuous and attenuated,

and the damages resulting from such an injury would have been speculative at best. *Id.* at 24a-25a, 28a. Further, the Eleventh Circuit noted that if Phoenix were afforded standing in the case, then every potential competitor of McDonald's in the nation would also be entitled to standing, presenting a serious risk of duplicative damages. *Id.* at 30a-32a.

The totality of these factors indicated that although Phoenix alleged itself to be a "direct competitor" alleging a "competitive injury," it did not have prudential standing to bring a Lanham Act claim against McDonald's for any advertising rendered false by the Jacobson conspiracy. *Id.* at 32a-33a. This petition followed.

REASONS FOR DENYING THE PETITION

The petition fails to satisfy any of this Court's usual criteria for certiorari. The circuit conflict asserted in the petition is illusory, constructed from *dicta* and a misinterpretation of the cases. Moreover, to the extent that any tension exists in the cases, it is not implicated here. No court has held that an allegation of direct competitor status is, by itself, categorically sufficient to support prudential standing regardless of the other facts and circumstances in the case. Thus there is no decision in conflict with the Eleventh Circuit's decision here, which denied standing to a direct competitor because of the attenuated and speculative nature of the alleged claim of injury, among other things.

To be sure, some circuits have, in the past, articulated a relatively rigid and categorical approach to prudential standing under the Lanham Act—holding that a plaintiff that is *not* in direct competition with the defendant may *not* establish

prudential standing, regardless of the other facts. The emergence of the *Conte Brothers* analysis represents a move away from that more rigid approach, such that courts will now consider a variety of facts and circumstances in deciding whether *any* plaintiff—even one *not* in direct competition with the defendant—has standing to sue under the Lanham Act. As *Conte Brothers* itself explained, "standing under the Lanham Act does not turn on the label placed on the relationship between the parties." 165 F.3d at 235.

At the same time, no circuit has held categorically that a plaintiff who *is* a "direct competitor" *always* has prudential standing to assert a claim under the Lanham Act no matter how attenuated or speculative the alleged competitive injury is. And of the jurisdictions that have had occasion to apply the *Conte Brothers* five-factor test, not one of them has held that the test is limited to cases involving non-competitors, as Phoenix contends it should be. It is not surprising, then, that the petition provides no plausible reason to conclude that any other court of appeals would have decided this case differently under its own case law—the *sine qua non* of a "square" conflict warranting this Court's attention.

Although Phoenix contends that denying standing to direct competitors who have alleged a distinct competitive injury would "undermine[]" the objectives of the Lanham Act (Pet. 27), the *Conte Brothers* test employed by the Eleventh Circuit and others will *not* likely deny standing to direct competitors in the typical case. As Phoenix itself recognized below, "any direct competitor [should] readily satisfy the elements of the [*Conte Brothers*]

test." Reply Br. on Appeal at 2. Thus the real question is not whether applying the *Conte Brothers* test in direct competitor cases is systematically inconsistent with the purposes of the Lanham Act—and it plainly is not—but rather whether the Eleventh Circuit's application of the *Conte Brothers* analysis was correct based on the facts of this particular case.

This is not a typical case. The false advertising claim here—which arose in highly unusual circumstances involving criminal wrongdoing by third parties—was asserted against McDonald's Corporation by an individual Burger King franchisee with a particularly attenuated and speculative claim of injury. The claim by this franchisee (and by the other franchisees it hoped to represent) rested on the notion that it lost customers because of alleged misrepresentations about whether consumers would have a fair and equal chance of winning the rarest few of the many prizes offered in a McDonald's promotional game. Further, the attenuated claim of injury asserted here was no different than those that could have been asserted by any other restaurant or group of restaurants that McDonald's customers might also patronize.

Whether the courts below properly denied Phoenix prudential standing under these circumstances is a fact-bound question that does not merit this Court's review. The petition should be denied.

I. There is no conflict among the circuits with regard to the Question Presented.

Phoenix devotes the bulk of its petition to a purported circuit conflict between "categorical"

jurisdictions, which award standing to direct competitors based on a mere allegation of "competitive injury," and "flexible" jurisdictions, which permit consideration of other facts as well, as part of a more holistic inquiry into the appropriateness of prudential standing. The conflict is illusory. There are no truly "categorical" jurisdictions in this sense, and the "flexible" jurisdictions do not align as Phoenix describes them. The petition thus has no basis for asserting an "intolerable" circuit conflict or, indeed, any continuing circuit conflict at all.

A. The *Conte Brothers* analysis is garnering an emerging consensus among the circuits.

There cannot be any serious doubt about the appropriateness of the standing analysis that then-Judge Alito and the *Conte Brothers* court drew from this Court's decision in *Associated General Contractors of California* v. *California State Council of Carpenters*, 459 U.S. 519 (1983). And if there were any such doubt, that doubt would be dispelled by the broad acceptance of *Conte Brothers* by every court that has considered it thus far. *Conte Brothers* has been on the books for nearly 10 years, and its application of this Court's flexible, multifactor standing analysis in the Lanham Act context has never been questioned by another court, much less rejected. The Third, Fifth, and Eleventh Circuits all have adopted the *Conte Brothers* analysis to determine prudential standing for false advertising claims. *Joint Stock Soc'y* v. *UDV N. Am., Inc.*, 266 F.3d 164, 180 (3d Cir. 2001); *Procter & Gamble Co.* v.

Amway Corp., 242 F.3d 539 (5th Cir. 2001).[1] The *Conte Brothers* approach has been endorsed by both the Restatement (3d) of Unfair Competition, § 3, cmt f (1995) and the leading scholarly authority on competition law. *See* 4 *McCarthy on Trademarks and Unfair Competition* § 7:32 n.1 (4th ed. 1996) ("In the author's opinion, some limit on the § 43(a) standing of persons remote from the directly impacted party should be applied by analogy to antitrust law, such as use of the criteria listed in *Associated General Contractors* * * *.").

Phoenix does not challenge *Conte Brothers* head-on but instead complains that it is or should be limited to cases where the plaintiff is not in direct competition with the defendant. In other words, Phoenix contends that as long as the plaintiff alleges that it falls within the category of "direct competitors," any allegation of competitive injury will necessarily suffice to demonstrate prudential standing.

The cases do not support that view. To date, only two of the courts of appeals—the Fifth and the Eleventh, in the decision below—have had the opportunity to apply *Conte Brothers* in a case involving parties who claimed to be direct competitors. Those courts have reached the same conclusion: the multifactor analysis outlined in

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[1] The Eighth Circuit also has considered the *Conte Brothers* test but has not yet had occasion to decide whether to adopt it for all Lanham Act standing inquiries. See *American Assoc. of Orthodontists* v. *Yellow Book USA, Inc.*, 434 F.3d 1100, 1104 (8th Cir. 2006) (declining to determine appropriate test for Lanham Act standing where plaintiff could not satisfy any possible test).

Conte Brothers applies equally in all cases—as it was designed to—regardless of the "label" attached to the parties. *Conte Bros.*, 165 F.3d at 235; see also Pet. App. 20a; *Procter & Gamble Co.* v. *Amway Corp.*, 242 F.3d 539, 562 (5th Cir. 2001); *Logan* v. *Burgers Ozark Country Cured Hams, Inc.*, 263 F.3d 447, 461 (5th Cir. 2001).[2] This is not surprising. As the *Conte Brothers* court explained, its aim in importing this analysis into the Lanham Act context was to "provide[] appropriate flexibility in application to address factually disparate scenarios that may arise in the future, while at the same time supplying a principled means for addressing standing" under §43(a). 165 F.3d at 236.

As discussed further below, there simply is no contrary authority. No court of appeals has held that direct competitor status is, by itself, sufficient to confer prudential standing. No court of appeals has attached "categorical" significance to the plaintiff's status as a direct competitor and refused to look beyond its bare allegation of injury when prudential standing was at issue. And Phoenix's attempt to draw such a categorical distinction from *Conte Brothers* itself also fails. In short, there is no conflict of law for this Court to resolve.

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[2] District courts from all the circuits that have adopted *Conte Brothers* also have applied it in cases involving direct competitors. See, *e.g.*, *Pernod Ricard USA LLC* v. *Bacardi USA*, 505 F. Supp. 2d 245, 252 (D. Del. 2007); *KIS, S.A.* v. *Foto Fantasy, Inc.*, 240 F. Supp. 2d 608, 610-11, 616 (N.D. Tex. 2002); *Alphamed Pharm. Corp.* v. *Arriva Pharm. Corp.*, 391 F. Supp. 2d. 1148 (S.D. Fla. 2005).

B. No circuit holds that a plaintiff's status as a direct competitor alleging competitive injury is categorically sufficient to confer prudential standing no matter how speculative or attenuated the claimed injury is.

Phoenix's argument for a circuit conflict is based on *dicta* and a logical fallacy. It begins with cases holding that *non*-competitors necessarily *lack* standing—an issue on which there may be some tension among the circuits, but which is not presented here. Then it suggests that, in those cases, competitor status is the sole criterion for standing. As long as the plaintiff is a direct competitor of the defendant, any allegation of competitive injury will be enough to confer prudential standing and to entitle the plaintiff to proceed with its claim, regardless of the nature of that injury or any other facts or circumstances.

This is a *non sequitur*. Even if a competitive relationship is *necessary* for prudential standing, it does not follow that such a relationship is always *sufficient* for prudential standing. And the petition identifies no case in which any court of appeals has held that a plaintiff's allegation that it is a direct competitor alleging a competitive injury is *per se* sufficient to confer prudential standing, even in the face of arguments that the alleged injury is simply too attenuated.

The petition characterizes five circuits as having embraced the purported "categorical" position: the Ninth, Seventh, Tenth, Second, and Third. But the cases do not support that characterization. Of the sixteen court of appeals cases cited in the petition to support the proposition that a direct competitor

alleging competitive injury categorically has Lanham Act standing, only one actually involved both a direct competitor and a finding of prudential standing, and even in that case the court did not confer such standing "categorically," based upon an allegation of injury of the kind at issue here. It is true, of course, that some of those cases contain language suggesting the existence of a "categorical" rule, under which being "a competitor of the defendant and alleg[ing] a competitive injury" is the central criterion for prudential standing. *Stanfield* v. *Osborne Indus.*, 52 F.3d 867, 873 (10th Cir. 1995); see also *Telecom Int'l Am., Ltd.* v. *AT&T*, 280 F.3d 175, 197 (2d Cir. 2001) (quoting *Stanfield*). But not one of them reaches the very different conclusion for which Phoenix cites them: that direct competitor status is categorically *sufficient* to confer standing, no matter how attenuated the injury.

For example, of the three Ninth Circuit cases Phoenix cites, only one upheld the plaintiff's standing—and in that case, the plaintiff was a non-competitor. *Waits* v. *Frito-Lay*, 978 F.2d 1093, 1109 (9th Cir. 1993), cited in Pet. 17-18. The *Waits* court's general statement that "claims of false representations in advertising are actionable * * * when brought by competitors of the wrongdoer" was *dicta* and, in any event, was a statement not about prudential standing but about the existence of a cause of action for false advertising under Section 43(a). *Ibid.* *Waits* does not purport to set out a general rule about the *sufficiency* of competitor status to confer prudential standing. In *Jack Russell Terrier Network of N. Cal.* v. *American Kennel Club*, 407 F.3d 1027 (9th Cir. 2005), by contrast, the court concluded that the plaintiffs lacked standing where

they conceded that they did not compete with the defendants. And in *Barrus* v. *Sylvania*, 55 F.3d 468, 470 (9th Cir. 1995), the Ninth Circuit refused to find standing for *consumers* who had failed to allege either "commercial injury [or] competitive injury."

Similarly, all the Seventh Circuit cases cited by Phoenix deny prudential standing, and none can reasonably be read to support Phoenix's claim that direct competitor status is sufficient to confer prudential standing for Lanham Act claims. See Pet. 17. In *L.S. Heath & Sons, Inc.* v. *AT&T Information Systems*, 9 F.3d 561 (7th Cir. 1993), the court denied prudential standing because the parties were not competitors. In *Johnny Blastoff, Inc.* v. *Los Angeles Rams Football Co.*, 188 F.3d 427 (7th Cir. 1999), the court denied standing because the plaintiff could show no injury at all, never mind "competitive injury." And the court in *Dovenmuehle* v. *Gilldorn Mortgage Midwest Corp.*, 871 F.2d 697, 699 (7th Cir. 1989), denied standing on the ground that the plaintiff lacked any ownership interest in the trade name that allegedly was misused. In fact, the *Dovenmuehle* passage cited in the petition states only that "*[t]ypically*, plaintiffs suing under [the Lanham Act] are business competitors * * *." Pet. 17. While this is undeniably true, it is not helpful in determining whether *all* business competitors would necessarily have prudential standing.

The Tenth Circuit, too, rejected prudential standing in both cases cited by Phoenix. See Pet. 17. In *Stanfield* v. *Osborne Industries*, 52 F.3d 867 (10th Cir. 1995), the court denied prudential standing to a plaintiff whose relationship with the defendant was contractual and non-competitive. In *Hutchinson v. Pfeil*, 211 F.3d 515 (10th Cir. 2000), the court denied

standing because the alleged injury—which involved only the "*potential* for harmful competition" in the future—was deemed too speculative to support either Article III or prudential standing. *Id.* at 520 (emphasis added).

Finally, of the four Second Circuit cases cited by Phoenix in support of its claim that the Second Circuit is a "categorical" jurisdiction, all but one rejected prudential standing. *ITC Ltd.* v. *Punchgini, Inc.*, 482 F.3d 135 (2d Cir.), cert. denied, 128 S. Ct. 288 (2007); *Telecom Int'l Am., Ltd.* v. *AT&T*, 280 F.3d 175, 197 (2d Cir. 2001); *Ortho Pharm. Corp.* v. *Cosprophar, Inc.*, 32 F.3d 690, 694 (2d Cir. 1994); see Pet. 17-18 & n.6. And in the remaining case, the court based its finding of prudential standing, not on the fact that the plaintiff was a "direct competitor alleging competitive injury," but rather on the fact that the allegedly false advertising drew a direct comparison between the plaintiff's and defendant's products. *Societe Des Hotels Meridien* v. *La Salle Hotel Operating P'ship*, 380 F.3d 126, 130 (2d Cir. 2004). Thus the court's resolution rested as much on the nature of the injury—an injury markedly different from the one here—as it did on the competitor status of the plaintiff.

In short, none of the cases cited by Phoenix is actually in conflict with the Eleventh Circuit's decision here. No circuit has held that a party's status as a direct competitor is sufficient to support prudential standing no matter how attenuated the alleged competitive injury is.

C. Phoenix's contention that the Third Circuit itself intended the *Conte Brothers* analysis to apply only to non-competitors is belied by the unequivocal language of *Conte Brothers* and the cases that followed it.

Phoenix also attempts to draw support for the supposed conflict of authority from the Third Circuit itself, arguing that *Conte Brothers* was designed as a test specifically "for non-competitors" (Pet. 21), on the theory that direct competitors would categorically have standing. This ignores the express language of then-Judge Alito's opinion in *Conte Brothers*, which takes care to explain that the case would have come out the same way even if the parties *did* compete at the same level of the marketplace. 165 F.3d at 235. As the court's opinion explained, "[u]nder the reasoning we adopt today, standing under the Lanham Act does *not* turn on the label placed on the relationship between the parties." *Ibid.* (emphasis added).

The insignificance of the "label" attached to the parties' relationship was confirmed by the Third Circuit in *Joint Stock Society* v. *UDV North America, Inc.*, 266 F.3d 164 (3d Cir. 2001). In that case, then-Judge Alito emphasized "the premise implicit in the * * * *Conte Brothers* test that a direct competitor will *usually* have a stronger commercial interest than a non-competitor." *Id.* at 183 n.10 (emphasis added). This language confirms that plaintiffs in different competitive (or non-competitive) relationships with the defendant should be subjected to the same five-factor test articulated in *Conte Brothers.* See *Pernod Ricard USA LLC* v. *Bacardi USA*, 505 F. Supp. 2d 245, 252 (D. Del. 2008) (applying *Conte Brothers* test

in determining that direct competitor had Lanham Act standing).

In addition, while the Third Circuit has not yet expressly applied *Conte Brothers* in a direct competitor case, it has never limited its *Conte Brothers* decision or been faced with (and declined) an opportunity to apply it in any direct competitor case where prudential standing was at issue. The petition cites *Novartis Consumer Health, Inc.* v. *Johnson & Johnson-Merck Consumer Pharmaceutical Co.*, 290 F.3d 578 (3d Cir. 2002), as a case presenting such an "opportunity" (Pet. 23), but that case did not involve Lanham Act prudential standing at all. Rather, *Novartis* examined the standard for determining whether a Lanham Act plaintiff could demonstrate the irreparable harm necessary to justify a preliminary injunction. Indeed, the Third Circuit expressly held that the irreparable harm standard was *not* identical to the prudential standing standard. 290 F.3d at 595. Similarly, in both *GlaxoSmithKline Consumer Healthcare, L.P.* v. *Merix Pharmaceutical Corp.*, 197 Fed App'x 120 (3d Cir. 2006), and *Wellness Publishing* v. *Barefoot*, 128 Fed. App'x 266 (3d Cir. 2005)—also cited as evidence of the Third Circuit's unwillingness to apply *Conte Brothers* in direct competitor cases—the defendant did not challenge prudential standing before the Third Circuit.[3] It goes without saying that a

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[3] In a later proceeding in *Barefoot* involving the same parties, prudential standing *was* challenged—and the district court applied the *Conte Brothers* analysis, concluding that the direct competitor plaintiff had standing. *Wellness Publishing* v. *Barefoot*, No. 02-3773 (JAP), 2008 WL 108889, *13 (D. N.J., Jan. 9, 2008).

litigant's decision not to challenge prudential standing has no bearing on how the court would have analyzed such a challenge if one had been raised.

Phoenix's resort to Third Circuit cases from before *Conte Brothers* is unpersuasive. As with the cases from other circuits discussed above, these cases do not support the proposition that as long as the plaintiff and defendant are direct competitors, any allegation of competitive injury is sufficient to confer prudential standing. The case of *Thorn* v. *Reliance Van Co.*, 736 F.2d 929, 931 (3d Cir. 1984) holds only that a *non*-competitor may have Lanham Act standing in appropriate circumstances. And *Sandoz Pharmaceuticals Corp.* v. *Richardson-Vicks, Inc.*, 902 F.2d 222, 230 (3d Cir. 1990), does not address standing at all.[4]

Given the broad acceptance of the *Conte Brothers* analysis among the courts that have considered it—and the fact that no court ever has limited *Conte Brothers* or refused to apply it in a direct competitor case—there is no reason to believe that the analysis for direct competitor standing is particularly controversial or that it will be any more controversial

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[4] The case of *Warner-Lambert Co.* v. *BreathAssure, Inc.*, 204 F.3d 87 (3d Cir. 2000), cited in Pet. 19 n.7, is not a standing case either. The passage Phoenix quotes actually describes a Second Circuit case that does not itself support Phoenix's position. See *id.* (discussing *Ortho Pharm. Corp.* v. *Cosprophar, Inc.*, 32 F.3d 690, 694 (2d Cir. 1995) (noting that a Lanham Act plaintiff "need not demonstrate that it is in direct competition with the defendant" to have standing, and that "[o]n the whole, we have tended to require a more substantial showing where the plaintiff's products are not obviously in competition with defendant's products, or the defendant's advertisements do not draw direct comparisons between the two")).

in the future than it has been in the past. Again, every court to consider a true dispute about prudential standing in the context of direct competitor claims has concluded that the *Conte Brothers* multifactor analysis should apply, rather than any *per se* or categorical rule. There is no need for this Court to weigh in on the issue.

II. The Eleventh Circuit's treatment of prudential standing is entirely consistent with the purposes underlying the Lanham Act and advances the principles of prudential standing.

On its merits, the Eleventh Circuit's approach to prudential standing is in no way inconsistent with the purposes of the Lanham Act, as Phoenix contends. Pet. 27 ("[d]enying standing to direct competitors undermines" the purposes of the Lanham Act"). In practice, the *Conte Brothers* analysis employed below will result in the denial of standing to a direct competitor only in cases involving claims that bear a tangential relationship at best to the values embodied in the Lanham Act. Moreover, Phoenix's contrary view would have the effect of entirely eliminating prudential standing considerations from Lanham Act cases involving direct competitors—a result for which there is no reason or authority.

1. Contrary to Phoenix's contention, the *Conte Brothers* analysis applied by the courts below does not, and does not purport to, "deny[ ] standing to direct competitors"—at least in any but the most unusual circumstances. Indeed, Phoenix itself argued below that "[t]he *Conte Bros.* test * * * has little utility when applied to direct competitors alleging competitive harm[,] because such plaintiffs

invariably satisfy its requirements." Opening Br. on Appeal at 9 (emphasis added). As then-Judge Alito pointed out in *Joint Stock Society*, the flexible *Conte Brothers* test includes "the premise * * * that a direct competitor will *usually* have a stronger commercial interest than a non-competitor," and thus will typically survive a Lanham Act standing challenge. 266 F.3d at 183 n.10 (emphasis added).

The cases confirm that genuinely "prototypical" plaintiffs who are the direct competitors of the defendants will be found to have prudential standing under the *Conte Brothers* test—and that only those with marginal, highly attenuated Lanham Act claims will not. For example, in *Logan v. Burgers Ozark Country Cured Hams, Inc.*, 263 F.3d 447, 461 (5th Cir. 2001), the Fifth Circuit applied *Conte Brothers* in a direct-competitor case and held that where the defendant's "literally false advertising about its own goods influenced its customers to buy its products instead of Logan's product," and where the plaintiff was the only person who could bring a Lanham Act false advertising claim against the defendant, the plaintiff had standing to bring the claim. Similarly, in *Pernod Ricard USA LLC v. Bacardi USA*, 505 F. Supp. 2d. 245, 252 (D. Del. 2007), the district court employed the *Conte Brothers* test in concluding that the plaintiff had standing to bring a Lanham Act claim where the parties were direct competitors and the defendant allegedly made false representations about its own product that harmed the plaintiff's reputation, goodwill, and ability to compete in the marketplace.

As noted above, only one court of appeals (other than the court below) ever has determined that a direct competitor's claim was so attenuated that it

failed to meet the *Conte Brothers* standing analysis. That lone case was *Procter & Gamble Co.* v. *Amway Corp.*, in which the Fifth Circuit denied standing to plaintiff Procter & Gamble in a Lanham Act suit based upon "fraudulent misrepresentations"—specifically, false and inflammatory accusations that Procter & Gamble had links to Satanic cults—made to potential employees to convince them to work for and buy from Amway, "resulting ultimately in lower sales of some of P&G's products." 242 F.3d at 563. Phoenix itself conceded to the court below that *Procter & Gamble* was a "bizarre case" involving a "non-traditional injury." Opening Br. on Appeal at 16. Thus by Phoenix's own admission, the only court of appeals case ever to deny a competitor standing under the *Conte Brothers* analysis—other than this one—was strange and aberrational. Accordingly, there can be no serious concern that the Eleventh Circuit's approach will erode the fundamental protections the Lanham Act offers to competitors in the marketplace.

2. Further, Phoenix's proposed standing rule is overbroad and would effectively eliminate prudential standing as a requirement for an entire class of plaintiffs in suits under the Lanham Act. The categorical rule advocated by Petitioner would confer standing on *all* direct competitor plaintiffs alleging competitive injury in *all* circumstances, without consideration of factors like the remoteness of the alleged injury, the potential for duplicative damages, the existence of other potential plaintiffs who have been more directly harmed, and so on—in short, without consideration of the principles of prudential standing at all. What Phoenix is claiming, in effect, is that *any* prudential limitation on Lanham Act

standing for direct competitors somehow contravenes the purposes of the statute.

Neither the cases nor the statute itself supports that view. It is possible, of course, for Congress to eliminate prudential limitations on standing if it so desires. See *Bennett* v. *Spear*, 520 U.S. 154, 162 (1997). But as the Eleventh Circuit explained, "Congress is presumed to incorporate background prudential standing principles [in legislation] unless the statute expressly negates such principles." Pet. App. 9a-10a. Every court to consider this issue, including the court below, has concluded that Congress did not abrogate prudential standing principles in the Lanham Act. See *ibid.*; *Procter & Gamble*, 242 F.3d at 562. Although Phoenix has not challenged that conclusion in this forum, the upshot of its argument here is that a § 43 claim—by its terms available to "*any person* who believes that he or she is or is likely to be damaged" by false advertising—must be given its maximum Article III scope, unlimited by the considerations of "judicial governance" that make prudential standing a fundamental component of federal jurisprudence. There is simply no justification, either in the jurisprudence of this Court or in the legislative history of the Lanham Act, for limiting the usual scope and limitations of prudential standing in this context.

III. The unusual facts of this case would make it a poor vehicle for resolving any issues related to prudential standing for Lanham Act claims.

As shown above, there is no circuit conflict on the question presented—and certainly not a "deep" or "intolerable" one—and there is no merit to Phoenix's

claim that applying a flexible, fact-based analysis in determining whether a direct competitor has prudential standing somehow violates the purposes of the Lanham Act. Even if there were some arguable conflict in the cases, however, the anomalous circumstances from which this case arose make it an inappropriate vehicle for resolving the true scope of prudential standing for Lanham Act claims.

1. Most fundamentally, the issue of whether the parties are genuinely "direct competitors" was not litigated below, and McDonald's does not contest it here. But in light of Phoenix's attempt to imbue "direct competitor" status with categorical legal significance, the Court would do well to wait to resolve the issue presented in this petition until it has the opportunity to review a case in which the parties' "direct competitor" status is both well defined and, on the facts of the case, inarguable.

In fact, this case cleanly illustrates the emptiness of a "categorical" approach that turns the words "direct competitor" into a shibboleth for Lanham Act standing. "Direct competitor" status is, in the words of the *Conte Brothers* court, merely a "label" that tells us little or nothing about the appropriateness of prudential standing in a particular case.[5] Put simply, there are different degrees of "directness." 165 F.3d at 233. The competitive relationship in this case is far from typical in Lanham Act cases. Phoenix operates a single Burger King restaurant in Fort Lauderdale, Florida. McDonald's is an international corporation with annual revenues approaching $22

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[5] Cf. *Bell Atlantic* v. *Twombly*, 127 S.Ct. 575 (2006) (bare allegation of conduct described as "parallel" is not sufficient to state a claim for restraint of trade under the antitrust laws).

billion. McDonald's does not own or operate any restaurants in Fort Lauderdale, Florida, although its franchisees do operate several such restaurants in the area.[6] Those franchisees pay McDonald's rent, fees, and royalties based upon a percentage of their monthly sales. Thus it is the franchisees who would benefit most directly from any customers lured away from Phoenix's restaurant.

In short, this particular plaintiff operates at a different level of the marketplace than the entity it chose to sue. McDonald's Corporation "competes" with Phoenix in the same sense that it competes with each of the 7,171 Burger King restaurants, 6,673 Wendy's restaurants, and tens (if not hundreds) of thousands of other national and independent quick-service restaurants in the United States. The operative question, though, is whether the relationship between McDonald's and Phoenix is the kind of relationship that should trigger a finding of prudential standing, giving Phoenix (and the tens of thousands of similarly situated plaintiffs) the ability to bring a claim under the Lanham Act. That is a question that the facile use of the term "direct competitor" does not answer.

To illustrate this point more vividly, consider the striking similarities between the competitive relationship in this case and the competitive relationship in *Conte Brothers*. In both cases, the parties were engaged in business in the same industry, but at different economic levels—the plaintiffs at the "retail" level, selling products directly

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[6] Although McDonald's does own and operate approximately 15% of its restaurants nationwide, all the McDonald's locations in Fort Lauderdale are operated by McDonald's franchisees.

to consumers, and the defendants at the "wholesale" level, selling products to retailers and other middlemen. In both cases, the "wholesaler" defendant was accused of disseminating false advertising that increased sales of its own product (which it did not sell directly to consumers) at the expense of other wholesalers' products that were sold by the plaintiff retailers. *Conte Bros.*, 165 F.3d at 224. Economically, the competitive relationships at issue in the two cases were very similar. But in *Conte Brothers*, the Third Circuit concluded—based in part upon the plaintiff's concession—that the parties were *not* "direct competitors." *Id.* at 235. In this case, the court reached the opposite conclusion, observing generally that "Burger King is one of McDonald's direct competitors in the fast food industry." Pet. App. 22a n.6. These different labels attached to similar facts highlight the dangers of a categorical approach: it simply does not provide a principled way to identify which Lanham Act claims merit standing and is likely to lead to inconsistent results.

At a minimum, though, if the Court were otherwise inclined to consider whether to require a categorical approach to prudential standing for "direct competitors," the Court would be well served to wait for a case in which the competitive status of the parties is *more direct* than it is here—or at least where the parties' competitive status has been explored in a more complete record.

2. The atypical nature of the "false advertising" claim and alleged injury at issue here also makes this case a poor vehicle for considering the question presented. As noted above, the false advertising claim in this case is highly unusual—if not unique in

the history of Lanham Act litigation. The district court explained that it was "unable to locate any case where a company brought a Lanham Act claim against a competitor whose advertising became false or misleading due to the *felonious conduct* of *third* parties." Pet. App. 42a (emphasis in original). The core purpose of the Lanham Act is to make advertisers liable for "anticompetitive conduct." No such conduct occurred here: indeed, the Department of Justice publicly declared that McDonald's was a "victim" of the same criminal conspiracy that allegedly rendered the advertising at issue "false."

Further, in light of the unusual facts of this case, the alleged injury here was indeed extremely attenuated. As the courts below recognized, Phoenix would be required to prove that its particular franchise lost customers because of representations that McDonald's customers had a fair and equal chance of winning certain rare and specific high-value prizes—rather than because of the customers' personal preference for McDonald's, differences in quality or convenience, McDonald's other advertising, or the customers' interest in winning the more common, lower and mid-value prizes that were unaffected by the third-party conspiracy. This is a heavy burden for Phoenix to bear, and it may make it difficult for Phoenix to prove that it suffered any injury at all. Cf. *Holmes* v. *SIPC*, 503 U.S. 258, 270-74 (1992) (finding no standing to sue under the Clayton Act in part because of a lack of proximate cause, in that if certain plaintiffs were allowed to sue, the court would first need to determine the extent to which their losses were the result of the alleged conspiracy or other factors, including potentially their own poor business practices). The Eleventh Circuit

properly concluded that this theory was insufficiently direct, concrete, and distinct—even at the pleading stage—to support a finding of prudential standing.

Even apart from the merits of the Eleventh Circuit's decision, Phoenix's unusual theory of causation and injury makes this case far from typical. For this reason as well, this case would be a poor vehicle for this Court's consideration of the question presented in Phoenix's petition.

CONCLUSION

This Court's intervention is not required here. The Eleventh Circuit's decision does not present any unresolved issue of law, and the petition does not demonstrate any conflict of authority among the circuits or with any decision of this Court. The petition should be denied.

Respectfully submitted.

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