In the Supreme Court of the United States



REBECCA CURTIN,

Petitioner,

v.

UNITED TRADEMARK HOLDINGS, INC.,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Federal Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether a party desiring to participate in an administrative agency proceeding, including a trademark opposition proceeding at the United States Patent and Trademark Office, must satisfy the zone-of-interests and proximate-causation tests set forth in *Lexmark International*, *Inc.* v. Static Control Components, *Inc.*, 572 U.S. 118 (2014), for causes of action in federal court.

PARTIES TO THE PROCEEDINGS

Petitioner and Appellant below

• Rebecca Curtin

Respondent and Appellee below

• United Trademark Holdings, Inc.

Note: The United States Patent and Trademark Office participated as amicus curiae before the U.S. Court of Appeals for the Federal Circuit.

LIST OF PROCEEDINGS

U.S. Court of Appeals for the Federal Circuit No. 2023–2140

Rebecca Curtin, Appellant, v. United Trademark Holdings, Inc., Appellee

Opinion: May 22, 2025

U.S. Trademark Trial and Appeal Board No. 91241083

Rebecca Curtin v. United Trademark Holdings, Inc..

Opinion: May 4, 2023

TABLE OF CONTENTS

Page
QUESTION PRESENTEDi
PARTIES TO THE PROCEEDINGSii
LIST OF PROCEEDINGSiii
TABLE OF AUTHORITIESvi
PETITION FOR A WRIT OF CERTIORARI 1
OPINIONS BELOW 1
JURISDICTION1
STATUTORY PROVISIONS INVOLVED2
INTRODUCTION2
STATEMENT OF THE CASE
I. Legal Background5
A. Trademark Registration5
B. Entitlement to Oppose or Cancel Trademark Registration
II. Background of the Case 8
A. Opposition Proceedings 8
B. The Decision Below 12
REASONS FOR GRANTING THE PETITION 14
I. The Federal Circuit Has Split from Other Circuits, and Its Decisions are Inconsistent With Precedent of This Court
A. The Court should grant certiorari in this case because the decision below marks the culmination of the Federal Circuit's break from other circuits on a basic principle of administrative law

	TABLE OF CONTEN	NTS – Continued	
		Pa	age
	B. The Federal Circ conflicts with decision	cuit's decision also ions of this Court	19
II.	The Importance of the	Issues Warrants This	
	Court's Review		23
CON	CLUSION		26
	APPENDIX TABLE	OF CONTENTS	
-	ion, U.S. Court of Appea Federal Circuit (May 22,		1a
· •	ion, U.S. Trademark Tri		25a

TABLE OF AUTHORITIES

Page	e
CASES	
Alexander Sprunt & Son, Inc. v. United States, 281 U.S. 249 (1930)	1
Amoskeag Mfg. Co. v. D. Trainer & Sons, 101 U.S. 51 (1879)28	5
Ass'n of Battery Recyclers, Inc. v. EPA, 716 F.3d 667 (D.C. Cir. 2013)	2
Associated Gen. Contractors of Cal., Inc. v. Ca. State Council of Carpenters, 459 U.S. 519 (1983)20	0
Bennett v. Spear, 520 U.S. 154 (1997)22	2
Brazoria County, Tex. v. EEOC, 391 F.3d 685 (5th Cir. 2004)18	8
Corcamore, LLC v. SFM, LLC, 978 F.3d 1298 (Fed. Cir. 2020) 10, 11, 12, 15 	
Davis v. Passman, 442 U.S. 228 (1979)	2
Delaware & Hudson Canal Co. v. Clark, 80 U.S. 311 (1871)	5
Ecee, Inc. v. Fed. Energy Regul. Comm'n, 645 F.2d 339 (5th Cir. 1981)14, 17, 18	8
Empresa Cubana del Tabaco v. Gen. Cigar Co., 753 F.3d 1270 (2014)	5
Envirocare of Utah, Inc. v. Nuclear Regul. Comm'n, 194 F.3d 72 (D.C. Cir. 1999) 17, 18, 19	9

TABLE OF AUTHORITIES - Continued
Page
FCC v. Pottsville Broad. Co., 309 U.S. 134 (1940)
FDRLST Media, LLC v. Nat'l Labor Relations Bd., 35 F.4th 108 (3d Cir. 2022)
Fly v. Heitmeyer, 309 U.S. 146 (1940)
Gardner v. FCC, 530 F.2d 1086 (D.C. Cir. 1976)19
Lexmark International, Inc. v. Static Control Components, Inc., 572 U.S. 118 (2014)i, 3, 10-13, 15,
Lipton Indus., Inc. v. Ralston Purina Co., 670 F.2d 1024 (CCPA 1982)
Norac Co. v. Occidental Petroleum Corp., 197 USPQ 306 (TTAB 1977)7
Park'n Fly, Inc. v. Dollar Park & Fly, Inc., 469 U.S. 189 (1985)
Pension Ben. Gar. Corp. v. LTV Corp., 496 U.S. 633 (1990)
Pittsburgh & W.Va. Ry. v. United States, 281 U.S. 479 (1930)
Ritchie v. Simpson, 170 F.3d 1092 (Fed. Cir. 1999) 7-9, 12, 14, 15
Shepard v. NLRB, 459 U.S. 344 (1983)
Warth v. Seldin, 422 U.S. 490 (1975)

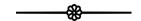
TABLE OF AUTHORITIES - Continued Page CONSTITUTIONAL PROVISIONS **STATUTES** 15 U.S.C. § 1051 et seq., Lanham (Trademark) Act, Pub. L. No. 79-489, 60 Stat. 427 15 U.S.C. § 1052.......

TABLE OF AUTHORITIES - Continued
Page
LEGISLATIVE MATERIALS
S. Rep. No. 1333, 79th Cong. 2d Sess. (1946)
SECONDARY SOURCES
Black's Law Dictionary (11th ed. 2019)
McCarthy on Trademarks and Unfair Competition (5th ed.)



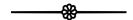
PETITION FOR A WRIT OF CERTIORARI

Petitioner Rebecca Curtin respectfully petitions for a writ of certiorari to review the decision of the United States Court of Appeals for the Federal Circuit.



OPINIONS BELOW

The Federal Circuit's opinion is reported at 137 F.4th 1359 and is reproduced in the appendix to this petition at Pet.App.1a-24a. The underlying order of the United States Patent and Trademark Office is not reported and is reproduced in the appendix to this petition at Pet.App.25a-39a.



JURISDICTION

The Federal Circuit entered judgment on May 22, 2025, Pet.App.1a. On August 6, 2025, the Court entered an order extending the time to file a petition for a writ of certiorari to October 3, 2025. (No. 25A157) This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

15 U.S.C. § 1063

Section 13 of the Lanham Act, codified in 15 U.S.C. § 1063 provides in relevant part that:

Any person who believes that he would be damaged by the registration of a mark upon the principal register... may, upon payment of the prescribed fee, file an opposition in the Patent and Trademark Office, stating the grounds therefor, within thirty days after publication under subsection (a) of section 1062 of this title of the mark sought to be registered.

INTRODUCTION

Eighty-five years ago, this Court admonished that "[u]nless [the] vital differentiations between the functions of judicial and administrative tribunals are observed, courts will stray outside their province and read the laws of Congress through the distorting lenses of inapplicable legal doctrine." *FCC v. Pottsville Broad. Co.*, 309 U.S. 134, 144 (1940). With regard to who may participate in agency proceedings, the circuit courts have generally followed the Court's admonition. For instance, the Third, Fifth, and D.C. Circuits have held that the doctrines restricting access to federal courts, such as the zone-of-interests test, do not apply to administrative agencies. As the Third Circuit put it,

"[a]gencies 'are not constrained by Article III of the Constitution; nor are they governed by judicially created standing doctrines restricting access to the federal courts,' including the zone-of-interests test." *FDRLST Media, LLC v. Nat'l Labor Relations Bd.*, 35 F.4th 108, 119 (3d Cir. 2022). The decision below, however, marks the culmination of the Federal Circuit's break from these circuits and this Court's admonition.

In the decision below, the Federal Circuit held that to participate in an opposition to the registration of a trademark before the United States Patent and Trademark Office ("PTO"), the petitioner must satisfy the framework for statutory causes of action set forth in Lexmark International, Inc. v. Static Control Components, Inc., 572 U.S. 118 (2014)—namely, the petitioner must satisfy the zone-of-interests and proximate-causation tests. The Federal Circuit's holding directly conflicts with the decisions of the Third, Fifth, and D.C. Circuits, which hold that the zone-of-interests and similar tests do not apply to administrative agencies. It also conflicts with decisions of this Court. The Court has long held that there are wide differences between administrative agencies and courts and that the standards applicable to one should not necessarily be applied to the other. In *Lexmark*, the Court addressed only the standards applicable to a plaintiff bringing a cause of action in federal court. The notion that an agency proceeding could be a "cause of action" conflicts with this Court's explanation that "[t]he concept of a 'cause of action' is employed specifically to determine who may *judicially* enforce the statutory rights or obligations." Davis v. Passman, 442 U.S. 228, 239 (1979) (emphasis added). The Federal Circuit's imposition of the standards applicable to plaintiffs in federal court

on agency petitioners flies in the face of the basic fact that agencies are not courts, and the standards for participating in agency proceedings differ from those for participating in district court litigation.

The Court's immediate review is warranted to correct the Federal Circuit's recent break from wellestablished principles enshrined in numerous decisions of the Circuit Courts and this Court. The Court should also grant review to prevent the Federal Circuit's decisions from affecting numerous other agencies. This case arises from a trademark opposition proceeding before the PTO. However, the Federal Circuit has jurisdiction to review decisions from numerous other federal agencies. If left unchecked, the Federal Circuit's decisions could have far reaching consequences for various administrative schemes. As it stands, the Federal Circuit's decisions cut off administrative participation by consumers in trademark registration and cancellation proceedings. Consumers are now wholly dependent on marketplace sellers to challenge deficient trademarks before the PTO. This is so even though a core purpose of the Lanham Act is "to protect the ability of consumers to distinguish among competing producers." Park'n Fly, Inc. v. Dollar Park & Fly, Inc., 469 U.S. 189, 198 (1985) (emphasis added) (citing S. Rep. No. 1333, at 3, 5), and even though Congress permits "[a]ny person who believes that he would be damaged" to participate in a proceeding. 15 U.S.C. § 1063; see id., § 1064.

The Court should grant the petition.

STATEMENT OF THE CASE

I. Legal Background

A. Trademark Registration

The Lanham Act erects a system "for the registration and protection of trademarks used in commerce." Lanham (Trademark) Act, Pub. L. No. 79-489, 60 Stat. 427 (July 5, 1946), codified at 15 U.S.C. § 1051 et seq. Among other things, the Act establishes an administrative process for trademark owners to register their marks on the principal register, which is administered by the PTO, and sets forth the conditions for registration. See 15 U.S.C. §§ 1051-52.

Once an applicant files a trademark application, the PTO refers the application to a PTO examining attorney. 15 U.S.C. § 1062(a). If the PTO examining attorney determines that the applicant is not entitled to register the mark, then it provides the applicant with an opportunity to respond to the rejection or amend the application. *Id.*, § 1062(b). If, on the other hand, it appears to the PTO examining attorney that the applicant is entitled to register the mark, the PTO "shall cause the mark to be published in the Official Gazette of the Patent Office." *Id.*, § 1062(a).

Under Section 13 of the Act, "[a]ny person who believes that he would be damaged by the registration of a mark . . . may . . . file an opposition" with the PTO within 30 days of that publication. 15 U.S.C. § 1063(a). In every opposition proceeding, the PTO Director must give notice to all parties and "shall direct a Trademark Trial and Appeal Board to determine and

decide the respective rights of registration." *Id.*, § 1067. "In such proceedings," the Board (on behalf of the Director) "may refuse to register the opposed mark, . . . may modify the application . . . , or may register the mark." *Id.*, § 1068. "Unless registration is successfully opposed," the PTO shall register the trademark, issue a certificate of registration, and publish a notice of registration. *Id.*, § 1063(b).

The Lanham Act also establishes a process for challenging and enforcing trademarks after registration. Section 14 of the Lanham Act permits "[a]ny person who believes that he is or will be damaged by" a registered trademark to initiate a proceeding with the PTO by "applying to cancel said registration." 15 U.S.C. § 1064(a)-(c). The Lanham Act further provides trademark owners various avenues to enforce a registered mark in court through a civil action. See 15 U.S.C. §§ 1114(1)(a), 1125(a)(1)(A).

B. Entitlement to Oppose or Cancel Trademark Registration

Under the plain language of the Lanham Act, "[a]ny person" who believes he or she will be damaged by registration of a trademark may oppose or cancel the registration. 15 U.S.C. §§ 1063(a), 1064(a). In assessing the entitlement to oppose or cancel, the Board for many years concluded that the "determinative issue" was whether the petitioner "would be 'damaged' by the registration. Lipton Indus., Inc. v. Ralston Purina Co., 670 F.2d 1024, 1026 (CCPA 1982). Later, the Board determined that the purpose of requiring a petitioner to demonstrate statutory standing was "to preclude meddlesome parties from instituting proceedings as self-appointed guardians of the purity of the Register."

Id. (quoting Norac Co. v. Occidental Petroleum Corp., 197 USPQ 306, 320 (TTAB 1977)). To serve that purpose, the Board required a party to demonstrate a "real interest in the proceeding." Id. (quoting Norac, 197 USPQ at 320).

The Board and Federal Circuit continued developing the statutory standing requirements for petitioners before the Board, culminating in the Federal Circuit's decision in Ritchie v. Simpson, 170 F.3d 1092 (Fed. Cir. 1999). In Ritchie, the Federal Circuit explained that standing before an agency differs from standing before a federal court because the "case' and 'controversy' restrictions for standing do not apply to matters before administrative agencies and boards. such as the PTO." Id., at 1094. In so stating, the court relied on decisions emphasizing that this principle extends to "prudential standing requirements," as well as "case or controversy" requirements. Id. Thus, the starting point for assessing administrative standing was the statute, which requires a showing that the petitioner would be damaged by the registration. Id., at 1095. Nevertheless, looking to long-standing precedent such as Lipton and Norac, the Ritchie court explained that a person is entitled to oppose or cancel a trademark registration when that person can show, in addition to would-be damage, two other requirements. The "opposer must have [1] a 'real interest' in the proceedings and must have [2] a 'reasonable' basis for his belief of damage." Id., at 1095. The Ritchie court explained that the 'real interest' requirement mandates that the opposer have "a legitimate personal interest in the opposition," i.e., a "personal stake in the outcome." Id. The "reasonable basis" requirement means that the belief in damage has "a 'reasonable basis in fact" and can be shown in several ways, including by showing that others share the same belief. *Id*.

II. Background of the Case

United Trademark Holdings ("UTH") sells dolls, including dolls with long blonde hair under the name "Rapunzel." Pet.App.5a. Rapunzel is the name of a fairy-tale character known in various forms for hundreds of years. See Pet.App.5a-6a.¹ UTH nonetheless filed a trademark application in 2017 to register the term RAPUNZEL as a trademark for dolls and toy figures. Id., at 5a. A PTO examiner approved the application, and the PTO published notice of registration in the Official Gazette on April 10, 2018. Id.

A. Opposition Proceedings

Within 30 days of that publication, Curtin filed a notice of opposition under 15 U.S.C. § 1063. Pet.App.5a. Curtin is a law professor but, more importantly, a long-time, avid collector of dolls and toy figures of fairy-tale characters. CAFC JA 226, 1424-57, 2128-51, 2640. Among the dolls and toys that Curtin collects are those featuring the fairy-tale character Rapunzel. *Id.*, at 266, 1569-1620, 2640-41. As amended, Curtin's notice of opposition showed that she satisfied both the statute's and *Ritchie*'s requirements to oppose registration of UTH's registration. In particular, Curtin showed that as a longtime collector of fairy-tale dolls, she has a legitimate interest in the outcome of the proceeding. She explained that if UTH were to obtain trademark protection for the name of a famous fairy-tale character,

 $^{^1}$ Joint Appendix 263-64, 1411, 1414, 1949-72, $Curtin\ v.\ United\ Trademark\ Holdings,\ Inc.,$ 23-2140 (Fed. Cir. filed Mar. 19, 2024) (hereinafter "CAFC JA").

consumers like her would be denied healthy marketplace competition for products bearing that name. *Id.*, at 266, 2646; Pet.App.5a-6a. As a result, she and other consumers would likely face an increased cost of dolls and types that depict Rapunzel, a fairy-tale character long in the public domain. CAFC JA 266, 2646; Pet. App.5a. Additionally, registration of the trademark would chill the creation of new dolls and toys based on the fairy-tale character, reducing or eliminating the benefit of diverse interpretations of the character. CAFC JA 266, 2647; Pet.App.5a-6a. Curtin further showed that her belief was reasonable by providing affidavits from several organizations and interest groups that expressed belief that allowing registration of RAPUN-ZEL would cause damage and over 400 petition signatures, including from collectors and other consumers. all of whom shared her belief. CAFC JA 266-67, 278-98, 2700-21, 2709; Pet.App.6a.

Having shown her entitlement to oppose registration of UTH's proposed trademark, Curtin argued that the proposed mark is descriptive, generic, and fails to function as a trademark because "Rapunzel" is the name of a fairy-tale character known in various forms for hundreds of years and because the class of goods for which UTH attempted to register its mark includes dolls and toys that represent the Rapunzel character. Pet.App.5a; CAFC JA 263-64, 1411, 1414, 1949-72.

In response to Curtin's entrance into the agency proceeding, UTH moved to dismiss, contending that Curtin lacked standing to oppose registration. The Board denied the motion, looking to the standard reiterated in *Ritchie* and stating that Curtin had "sufficiently alleged that she has a direct and personal stake in the outcome of the proceeding and that her belief of damage

has a reasonable basis in fact." CAFC JA 182; see Pet.App.27a & n.4.

After approximately two years and summary judgment briefing, the Board changed course, denying Curtin's motion for summary judgment by questioning her standing to oppose registration. Pet.App.25a-26a. The Board then *sua sponte* bifurcated the proceeding into two phases with the first phase focused on Curtin's entitlement to oppose. *Id.*, at 27a; *id.*, at 6a. After proceedings on this first phase, the Board concluded that Curtin lacked entitlement to oppose UTH's registration and dismissed her opposition. *Id.*, at 6a. The Board reached its conclusion by relying on this Court's decision in *Lexmark International, Inc. v. Static Control Components, Inc.*, 572 U.S. 118 (2014), and the Federal Circuit's decision in *Corcamore, LLC v. SFM, LLC*, 978 F.3d 1298 (Fed. Cir. 2020).

In Lexmark, this Court addressed "whether . . . Static Control Components, Inc., may sue . . . Lexmark International, Inc." in federal court "for false advertising under the Lanham Act, 15 U.S.C. § 1125(a)." Lexmark, 572 U.S., at 120. The Court explained that the guestion in the case turned on "whether Static Control falls within the class of plaintiffs whom Congress has authorized to sue under § 1125(a)." Id., at 128. According to the Court, "a statutory cause of action extends only to plaintiffs whose interests 'fall within the zone of interest protected by the law invoked." Id., at 129. The Court explained that the "zone-of-interests test" had been placed "under the 'prudential' [standing] rubric in the past," but that is not the appropriate place for it. Id., at 127. Instead, the zone-of-interests inquiry is part of determining whether a plaintiff has a cause of action—i.e., "[w]hether a plaintiff comes within 'the

zone of interests' is an issue that requires [a court] to determine . . . whether a legislatively conferred cause of action encompasses a particular plaintiff's claim." *Id.* Additionally, statutory causes of action are limited to plaintiffs whose injuries are proximately caused by a violation of the statute. *Id.*, at 132. The Court held that Static Control had sufficient allegations to demonstrate a cause of action. *Id.*, at 140.

In Corcamore, the Federal Circuit imposed the Lexmark framework in assessing whether a petitioner had standing to petition the PTO to cancel an existing trademark registration in an agency cancellation proceeding under § 1064. There, Corcamore had argued that the Board erred by granting default judgment against it, in particular because the petitioner, SFM LLC, lacked standing to petition to cancel the mark. 978 F.3d, at 1299. The Federal Circuit concluded that Lexmark provided the applicable framework for assessing whether SFM was entitled to petition to cancel the trademark. Id., at 1304. The court stated that an administrative cancellation proceeding under § 1064 is "a statutory cause of action" and Lexmark's framework applied, namely "zone of interests and proximate causation." Id.; see id., at 1305 ("We thus hold that the Lexmark zone-of-interests and proximatecausation requirements control the statutory cause of action under § 1064.").

Just as *Corcamore* extended *Lexmark*'s applicability from federal court actions to § 1064 agency cancellation proceedings, the Board in this case extended *Lexmark*'s applicability to § 1063 agency opposition proceedings. The Board concluded that a "plaintiff may oppose registration of a mark when doing so is within the zone of interests protected by the statute and she has

a reasonable belief in damage that would be proximately caused by registration of the mark." Pet.App.29a-30a. Looking to *Lexmark*'s discussion of false advertising, the Board further concluded that the Lanham Act's zone of interests protects only entities with commercial interests. *Id.*, at 32a, 35a. The Board thus found that a consumer does not fall within the zone of interests of the Lanham Act. *Id.*, at 35a. The Board also determined that Curtin had not shown proximate causation. *Id.*, at 37a-39a. The Board thus dismissed the proceeding. *Id.*, at 39a

B. The Decision Below

Curtin appealed the Board's decision to the Federal Circuit. Curtin argued that the proper test for assessing whether Curtin is entitled to oppose UTH's registration of RAPUNZEL is the long-standing one reiterated in Ritchie and that the Board erred in imposing the Lexmark framework (requiring a zone-of-interests test and proximate causation). The Federal Circuit rejected that argument, concluding that the "Board correctly applied the *Lexmark* framework in assessing whether Ms. Curtin was entitled to bring her opposition to UTH's mark under § 1063." Pet.App.15a. After discussing the *Lexmark* framework for causes of action. the court relied on *Corcamore's* statement that "there is 'no principled reason why the analytical framework articulated by the Court in *Lexmark* should not apply' to determine the class of parties who may seek cancellation of a mark under § 1064." Id., at 10a. The court rejected Curtin's argument that an administrative proceeding under § 1063 is not a cause of action and that the *Lexmark* framework applies only to causes of action. Id., at 12a. The court reasoned that opposition and cancellation proceedings should be treated the

same and rejected Curtin's position that Federal Circuit "caselaw regarding entitlement to challenge a trademark under § 1064 is inapplicable to entitlement to challenge a trademark under § 1063." *Id.*, at 15a; *id.*, at 13a-15a.

The Federal Circuit also rejected Curtin's argument that even under the Lexmark framework. Curtin is entitled to oppose UTH's registration because she is within the zone of interests of the Lanham Act and damage to her would be proximately caused by UTH's registration. Pet.App.15a-20a. The court concluded that a consumer like Curtin who seeks to challenge a registration as descriptive or generic does not fall within the zone of interests of the provisions of the Lanham Act that Curtin had invoked. Id., at 19a-20a. The Federal Circuit further concluded that Curtin could not establish proximate causation. In Lexmark, the Court held that "the intervening step of consumer deception is not fatal to a showing of proximate causation" by a seller for the false advertising claim at issue there. 572 U.S., at 133. However, the Federal Circuit concluded that the intervening step of harm to sellers was fatal to a showing of proximate causation by a consumer like Curtin. Specifically, the Federal Circuit concluded that Curtin's harm would be too remote under its case law because those harms "are downstream harms first suffered by a commercial actor." Pet.App.23a. The Federal Circuit therefore affirmed the Board's determination. Id., at 24a.



Certiorari is warranted because the decision below is the culmination of the Federal Circuit's break from other circuits and this Court's precedents on a fundamental principle of administrative law. In earlier years, the Federal Circuit recognized that entitlement to participate in an administrative proceeding, such as a trademark opposition, differed from the standards for maintaining a lawsuit in federal court. See Ritchie. 170 F.3d, at 1094-95 (citing Ecee, Inc. v. Fed. Energy Regul. Comm'n, 645 F.2d 339, 349-50 (5th Cir. 1981)) (explaining that neither "case or controversy or prudential standing requirements apply" to administrative adjudications). Through a series of subsequent decisions, however, the Federal Circuit has now departed from that principle of law. In doing so, it has split from decisions of other circuits and erected an approach that is at odds with this Court's precedent. The importance of the issue warrants this Cout's immediate review.

- I. The Federal Circuit Has Split from Other Circuits, and Its Decisions are Inconsistent With Precedent of This Court
 - A. The Court should grant certiorari in this case because the decision below marks the culmination of the Federal Circuit's break from other circuits on a basic principle of administrative law.

As the Federal Circuit explained in *Ritchie*, the long-standing test for assessing whether a party is

entitled to oppose a trademark registration before the Board was whether that party has a real interest in the proceeding and a reasonable belief of damage, 170 F.3d, at 1095. In Empresa Cubana—the first Federal Circuit decision after *Lexmark*—the court of appeals addressed the requirements to bring a cancellation proceeding under § 1064. See Empresa Cubana del Tabaco v. Gen. Cigar Co., 753 F.3d 1270 (2014); see Corcamore, 978 F.3d, at 1304 ("Empresa Cubana was this court's first post-Lexmark appeal to address the requirements to bring a cancellation proceeding under § 1064."). The court in *Empresa* noted the *Lexmark* Court's clarification that certain "issues sometimes discussed in terms of 'standing' are more appropriately viewed as interpretations of a statutory cause of action." 753 F.3d, at 1274. However, the court continued to apply the same test from *Ritchie*, stating that a "petitioner is authorized by statute to seek cancellation of a mark where it has both a real interest in the proceedings as well as a reasonable basis for its belief in damage." Id., at 1275; see Corcamore, 978 F.3d, at 1304.

In *Corcamore*, however, the Federal Circuit changed course. There, the Board had determined that the *Lexmark* framework did not apply to a § 1064 cancellation proceeding because *Lexmark* concerned a false advertising claim in a civil action, not a cancellation proceeding. 978 F.3d, at 1305. The court of appeals concluded, however, that "the Board's interpretation of *Lexmark* [was] unduly narrow." *Id.* The court reasoned that "§ 1064, like § 1125(a), is a statutory cause of action in the Lanham Act" because a cause of action merely requires "two elements: operative facts and the right or power to seek and obtain redress for infringement of a legal right." *Id.* Accordingly, the

court must "apply the 'traditional principles of statutory interpretation' articulated in *Lexmark*: zone of interest and proximate causation." *Id.*; *see id.*, at 1305 ("The *Lexmark* analytical framework applies to § 1064 and § 1125(a) because both are statutory causes of action."). The Federal Circuit faulted the Board for failing "to recognize that *Lexmark* binds all lower courts not only regarding § 1125(a) but also with respect to the analytical framework the Court used to reach its decision." *Id.*, at 1305. The court thus held that "the *Lexmark* zone-of-interests and proximate-causation requirements control the statutory cause of action analysis under § 1064." *Id.*

In the decision below, the Federal Circuit furthered its decision in *Corcamore*. The court explained that in Corcamore it "held there is 'no principled reason why the analytical framework articulated by the Court in Lexmark should not apply to determine the class of parties who may seek cancellation of a mark under § 1064." Pet.App. 10a. The court of appeals then "reject-[ed]" Curtin's argument that its "caselaw regarding entitlement to challenge a trademark under § 1064 is inapplicable to entitlement to challenge a trademark under § 1063." Id., at 15a. The court therefore concluded that the "Board correctly applied the Lexmark framework"—i.e., the zone-of-interests and proximatecausation tests—"in assessing whether Ms. Curtin was entitled to bring her opposition to UTH's mark under § 1063." Id., at 15a-16a. The Federal Circuit thus requires a petitioner to show "(1) her interests are within the zone of interests protected by the statute and (2) she has a reasonable belief in damage that would be proximately caused by registration" to

be entitled to an administrative adjudication under § 1063 and § 1064. *Id.*, at 15a.

Requiring satisfaction of a zone-of-interests and proximate-causation test for a petitioner to participate in an administrative proceeding conflicts with decisions of the Third, Fifth, and D.C. Circuits. In FDRLST Media, LLC v. National Labor Relations Board, 35 F.4th 108 (3d Cir. 2022), the Third Circuit addressed whether only those who are aggrieved by an alleged unfair labor practice may petition the NLRB. Id., at 115. In arguing that only those who are aggrieved may petition the Board, the employer relied on "judicial doctrines of standing and zone-of-interests." Id., at 119. The Third Circuit rejected the argument. It explained that "[t]he Board is not a court; it is not even a labor court; it is an administrative agency." Id. (quoting Shepard v. NLRB, 459 U.S. 344, 351 (1983)). And there "are wide differences between administrative agencies and courts." Id. (quoting Shepard, 459 U.S. at 351). The court held that "[a]gencies 'are not constrained by Article III of the Constitution; nor are they governed by judicially-created standing doctrines restricting access to the federal courts,' including the zone-ofinterests test." Id. (quoting Envirocare of Utah, Inc. v. Nuclear Regul. Comm'n, 194 F.3d 72, 74-75 (D.C. Cir. 1999)). Thus, provided the Board "acts within its statutory authority, standing analysis is irrelevant to the question of who can file an actionable charge." *Id*. The Federal Circuit's position that the zone-of-interests analysis governs administrative cancellation and opposition proceedings under § 1064 and § 1063 conflicts directly with the Third Circuit's decision.

The Federal Circuit's decision also conflicts with decisions of the Fifth Circuit. In *Ecee*, *Inc. v. Federal*

Energy Regulatory Commission, 645 F.2d 339 (5th Cir. 1981), the Fifth Circuit addressed challenges to FERC's regulations implementing the Natural Gas Policy Act. Id., at 344. Certain petitioners sought reversal on grounds that FERC lacked authority to grant standing to any person to protest and participate in section 503(b) proceedings. Id., at 348. The Fifth Circuit rejected the challenge. The court explained that "[a]dminstrative adjudications ... are not an article III proceeding to which either the 'case or controversy' or prudential standing requirements apply; within their legislative mandates, agencies are free to hear actions brought by parties who might be without standing if the same issues happened to be before a federal court." Id., at 349; see also Brazoria County, Tex. v. EEOC, 391 F.3d 685, 691 (5th Cir. 2004) ("Administrative adjudications . . . are not article III proceedings to which either the case or controversy or prudential standing requirements apply" (cleaned up)) (quoting Ecee, 645 F.2d, at 349). As the Lexmark Court explained, the Court previously had put the zone-of-interests test under the "prudential standing" rubric. 572 U.S., at 127. Thus, the Fifth Circuit's determination that "prudential standing requirements"—which include the zone-ofinterests test—do not apply to administrative proceedings directly conflicts with the Federal Circuit's decisions.

The Federal Circuit's decisions also conflict with the decisions of the D.C. Circuit, which has consistently held that the zone-of-interests test (and prudential standing) do not apply to parties before administrative agencies. For instance, in *Envirocare of Utah, Inc. v. Nuclear Regulatory Commission*, 194 F.3d 72 (D.C. Cir. 1999), the court of appeals addressed whether an

agency may refuse to grant a hearing to persons who would satisfy the criteria for judicial standing. Id., at 74. The D.C. Circuit explained that agencies "are not constrained by Article III of the Constitution; nor are they governed by judicially-created standing doctrines restricting access to federal courts." Id. It explained that "[i]udicially-devised prudential standing requirements, of which the 'zone of interests' test is one, are . . . inapplicable to an administrative agency acting within the jurisdiction Congress assigned to it." Id., at 75; see also Gardner v. FCC, 530 F.2d 1086, 1090 (D.C. Cir. 1976) ("The adjudication in the Commission . . . was not an Article III proceeding to which either the 'case or controversy' or prudential standing requirements apply."). This is because the "doctrine of prudential standing, like that derived from the Constitution, rests on considerations 'about the proper—and properly limited—role of the courts in a democratic society." Envirocare, 194 F.3d, at 75 (quoting Warth v. Seldin, 422 U.S. 490, 498 (1975)).

Thus, the Federal Circuit's cases culminating in the decision below directly conflict with the decisions of the Third, Fifth, and D.C. Circuits.

B. The Federal Circuit's decision also conflicts with decisions of this Court.

In *Lexmark*, the Court said nothing about entitlement to participate in agency proceedings, much less § 1063 opposition proceedings. The case concerned only causes of action in federal court. The question presented was whether "Static Control Components, Inc., *may sue* petitioner, Lexmark International, Inc." in a civil action "for false advertising." *Lexmark*, 572 U.S., at 120 (emphasis added). In clarifying the origin

of the analytical framework for its decision, the Court explained that its framework stemmed from cases addressing "the 'scope of the private remedy created by' Congress in § 4 of the Clayton Act, and the 'class of persons who [could] maintain a private damages action." Id., at 126 (quoting Associated Gen. Contractors of Cal., Inc. v. Ca. State Council of Carpenters, 459 U.S. 519, 529 (1983)) (emphases added). The purpose of the zone-of-interests test, the Court explained, was to determine "whether a legislatively conferred cause of action encompasses a particular plaintiff's claim." Id., at 127. That is, the origin and purpose of the test concerned the "right to sue." Id. Indeed, the zone-ofinterests formulation itself, according to the Court, arose "as a limitation on the cause of action for judicial review conferred by the Administrative Procedure Act (APA)." Id., at 129. The Lexmark Court thus summarized "the question" presented as "whether Static Control falls within the class of plaintiffs whom Congress has authorized to sue under § 1125(a)," that is, "whether Static Control has a cause of action under the statute." *Id.*, at 128 (emphasis added).

The Federal Circuit's decisions imposing the *Lexmark* framework—which governs causes of action in federal court—on administrative agency proceedings conflicts with the "well settled" principle "that there are wide differences between administrative agencies and courts." *Shepard v. NLRB*, 459 U.S. 344, 351 (1983). As Justice Frankfurter explained some time ago, "[m]odern administrative tribunals are the outgrowth of conditions far different from those" giving rise to courts. *FCC v. Pottsville Broad. Co.*, 309 U.S. 134, 142 (1940). Agencies are vested "with power far exceeding and different from conventional judicial modes,"

precluding the imposition of judicial standards on agencies. Id. As Justice Frankfurter warned, "[u]nless these vital differentiations between the functions of judicial and administrative tribunals are observed, courts will stray outside their province and read the laws of Congress through the distorting lenses of inapplicable legal doctrine." Id., at 144. Consistent with this warning, the Court has long recognized that the criteria for establishing administrative standing is permissibly less demanding than the criteria for judicial standing. See, e.g., Pittsburgh & W.Va. Ry. v. United States, 281 U.S. 479, 486 (1930); Alexander Sprunt & Son, Inc. v. United States, 281 U.S. 249, 255 (1930). The Federal Circuit, however, has now concluded that the standard for participating in administrative proceedings is the same as the standard for maintaining a federal lawsuit—the petitioner must satisfy the zone-of-interests and proximate-causation tests. Such a determination is fundamentally at odds with this Court's precedent.

The Federal Circuit purported to harmonize its decision with *Lexmark* by determining that a § 1063 or § 1064 administrative proceeding is a "cause of action." *See Corcamore*, 978 F.3d, at 1304 ("§ 1064, like § 1125(a), is a statutory cause of action provided in the Lanham Act."); Pet.App.14a-15a. But that determination also conflicts with this Court's precedents. As the Court has explained, "[t]he concept of a 'cause of action' is employed specifically to determine who may *judicially* enforce the statutory rights or obligations." *Davis v. Passman*, 442 U.S. 228, 239 (1979) (emphasis added). The Court further distinguished jurisdiction, standing, and relief from a "cause of action" by explaining that "cause of action is a question of

whether a particular plaintiff is a member of the class of litigants that may, as a matter of law, appropriately invoke the power of the *court*." *Id.*, at 239 n.18 (emphasis added).² And this is the same sense in which the Court used the term in *Lexmark*, stating that the appropriate view of the zone-of-interests test is "whether 'this particular class of persons ha[s] a right to sue under this substantive statute." 572 U.S., at 127 (quoting *Ass'n of Battery Recyclers, Inc. v. EPA*, 716 F.3d 667, 675-76 (D.C. Cir. 2013)). "In other words," the zone-of-interests test is part of the inquiry into whether a party "has a cause of action under the statute." *Lexmark*, 572 U.S., at 128. Nothing in the Court's cases suggests that a "cause of action" includes administrative proceedings.

Indeed, the very reason for the zone-of-interests test is at odds with the Federal Circuit's imposition of that test on administrative agencies. This Court has consistently emphasized that the zone-of-interests test, like other tests, "are 'founded in concern about the proper—and properly limited—role of the courts in a democratic society." Bennett v. Spear, 520 U.S. 154, 162 (1997) (quoting Warth v. Seldin, 422 U.S. 490, 498 (1975)). The Court explained that tests assessing the zone of interests "serve to limit the role of the courts in resolving public disputes." Warth, 422 U.S., at 500. But admin-

² The Federal Circuit relied on *Black's Law Dictionary* in concluding that administrative proceedings before the Board are causes of action. *Corcamore*, 978 F.3d, at 1304. However, the *Black's Law Dictionary* relied upon in *Corcamore* makes clear that a "cause of action" is limited to proceedings "in court." *Cause of Action*, Black's Law Dictionary (11th ed. 2019) ("bases for suing"; a situation entitling a person "to obtain a remedy *in court* from another person" (emphasis added)).

istrative agencies are not constrained in the way federal courts are. Congress has invested "administrative agencies with power far exceeding and different from the conventional judicial modes for adjusting conflicting claims." *Pottsville Broad.*, 309 U.S., at 142. Imposing tests designed to limit the role of the judiciary on administrative agencies directly conflicts with this Court's precedents and the fundamental basis for such tests.

II. The Importance of the Issues Warrants This Court's Review

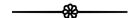
This Court's immediate review is warranted because of the importance of the issue and the potential impact of the Federal Circuit's decisions. The Federal Circuit has split from decisions of other Circuits and this Court on a fundamental issue of administrative law. The Court should grant review on that basis alone. See Fly v. Heitmeyer, 309 U.S. 146. 148 (1940) ("Because important questions of administrative law were involved, we granted certiorari."); see also Pension Ben. Gar. Corp. v. LTV Corp., 496 U.S. 633, 644 (1990) (granting certiorari "[b]ecause of the significant administrative law questions raised by this case."). But the Federal Circuit's unique position as the court of review for several administrative agencies also means the court's errant decisions could wreak havoc on several administrative schemes. The Federal Circuit reviews decisions from not only the U.S. Trademark Trial and Appeal Board, but also the U.S. Patent Trial and Appeal Board, Board of Contract Appeals, U.S. Merit Systems Protection Board, Office of Congressional Workplace Rights, Government Accountability Office Personnel Appeals Board, and U.S. International Trade Commission. See 28 U.S.C.

§ 1295. According to the Federal Circuit's decisions, the *Lexmark* framework applies anytime there are "operative facts and the right or power to seek and obtain redress." *Corcamore*, 978 F.3d, 1304. In other words, the Federal Circuit's reasoning could impose the *Lexmark* framework on any administrative adjudication. Thus, the Federal Circuit's decisions have the potential to severely impact the operation of numerous federal agencies, affecting who may petition those agencies. The Court should grant review now to ensure that the lower court's decisions do not adversely affect the petitioners before those agencies.

The Court's review is also important to preserve the ability for certain consumers to participate in the trademark registration process. The Federal Circuit imposed the zone-of-interests test on the road to deciding that no consumer can oppose the registration of a trademark on grounds that the trademark is descriptive or generic. A blanket bar against consumers participating in the administrative registration process is inconsistent with the Lanham Act. "From its earliest beginnings in legal history, trademark law has had the dual goals of both protecting property in a trademark and protecting consumers from confusion and deception." 1 McCarthy on Trademarks and Unfair Competition § 2:22 (5th ed.) (emphasis added). Indeed, this Court has remarked that a core purpose of the Lanham Act is "to protect the ability of *consumers* to distinguish among competing producers." Park'n Fly, Inc. v. Dollar Park & Fly, Inc., 469 U.S. 189, 198 (1985) (emphasis added) (citing S. Rep. No. 1333, at 3, 5). The Senate Report on the Lanham Act indicates further that a purpose of the Act "is to protect the public so it may be confident that, in purchasing a

product bearing a particular trade-mark which it favorably knows, it will get the product which it asks for and wants to get." S. Rep. No. 1333, 79th Cong. 2d Sess. (1946). The Court has also recognized consumers' interest in preventing generic or descriptive trademarks: "No one can claim protection for the exclusive use of a trade-mark or trade-name which would practically give him a monopoly in the sale of any goods other than those produced or made by himself. If he could, the public would be injured rather than protected." Delaware & Hudson Canal Co. v. Clark, 80 U.S. 311, 323 (1871) (emphasis added); see also Amoskeag Mfg. Co. v. D. Trainer & Sons, 101 U.S. 51, 53 (1879) (same). Without a doubt, consumers have a vested interest in trademarks and registration issues under the Lanham Act.

Restraints on who may maintain a lawsuit in federal court may make it difficult for consumers to participate in the judicial process. See Lexmark, 572 U.S., at 127-29. Administrative agencies, however, have a broader scope and different powers. *Pottsville Broad*., 309 U.S., 142. Consumers with sufficient interests should be allowed to participate in administrative proceedings dealing with trademark registrations. This is particularly so because if no marketplace seller desires to challenge the mark, "the public" would be left to bear the burden of the harm, and consumers may be the only ones left to ameliorate that harm. Delaware & Hudson Canal, 80 U.S., at 323. Here, UTH sought to register a trademark on the name of a fairy-tale figure that has been used throughout human history for hundreds of years. That name has entered the common lexicon to tell the story of a woman who uses her long hair to escape imprisonment from a tower. Denying the public's use of that name unquestionably harms the public. However, when no market-place seller stepped in to challenge UTH's registration, it fell to an avid collector to do so. The plain language of the Lanham Act would permit Curtin to oppose registration. 15 U.S.C. § 1063 ("Any person who believes that he would be damaged by the registration of a mark . . . may . . . file an opposition . . . ").



CONCLUSION

For the foregoing reasons, the Court should grant the petition for a writ of certiorari.

Respectfully submitted,

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October 3, 2025

APPENDIX TABLE OF CONTENTS

Opinion, U.S. Court of Appeals for the	
Federal Circuit (May 22, 2025)	1a
Opinion, U.S. Trademark Trial and	
Appeal Board (May 4, 2023)	25a

OPINION, U.S. COURT OF APPEALS FOR THE FEDERAL CIRCUIT (MAY 22, 2025)

UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

REBECCA CURTIN,

Appellant,

v.

UNITED TRADEMARK HOLDINGS, INC.,

Appellee.

2023 - 2140

Appeal from the United States Patent and Trademark Office, Trademark Trial and Appeal Board in No. 91241083.

Decided: May 22, 2025

Before: TARANTO and HUGHES, Circuit Judges, and BARNETT, Judge.¹

HUGHES, Circuit Judge.

Rebecca Curtin filed an opposition under 15 U.S.C. § 1063 to United Trademark Holdings' registration of the mark RAPUNZEL in International Class 28, which

¹ Honorable Mark A. Barnett, Chief Judge, United States Court of International Trade, sitting by designation.

covers dolls and toy figures. The Trademark Trial and Appeal Board dismissed her opposition after concluding she was not statutorily entitled to oppose a registration under § 1063. Because the Board properly applied the *Lexmark* framework to conclude that Ms. Curtin was not entitled to bring her opposition under § 1063, we affirm.

Ι

This appeal concerns whether Ms. Curtin was entitled to oppose United Trademark Holdings' (UTH's) registration of a trademark under the Lanham Act, alleging that the mark fails to function as a trademark and that the mark is generic and descriptive. We begin with an overview of the structure of the Lanham Act.

The Lanham Act created a system "for the registration and protection of trademarks used in commerce." Lanham (Trademark) Act, Pub. L. No. 79-489, 60 Stat. 427 (July 5, 1946), codified at 15 U.S.C. § 1051 et seg. The Lanham Act established an administrative process administered by the United States Patent and Trademark Office by which trademark owners may register their marks on the principal register and sets forth conditions for refusing registration of certain trademarks. One basis for refusing a trademark registration is when "a mark which . . . when used on or in connection with the goods of the applicant is merely descriptive or deceptively misdescriptive of them." 15 U.S.C. § 1052(e)(1). Another basis for refusing a trademark registration is because it is generic, meaning it "is the common descriptive name of a class of goods or services" such that it is incapable of denoting a unique source as required by the statutory definition of trademark. Royal Crown Co., Inc. v. The Coca-Cola Co., 892

F.3d 1358, 1366 (Fed. Cir. 2018) (quoting *H. Marvin* Ginn Corp. v. Int'l Ass'n of Fire Chiefs, Inc., 782 F.2d 987, 989 (Fed. Cir. 1986)); see 15 U.S.C. § 1127 (defining a trademark as being used "to identify and distinguish . . . goods, including a unique product, from those manufactured or sold by others"). In that way, genericness is encompassed by descriptiveness. See Bullshine Distillery LLC v. Sazerac Brands, LLC, 130 F.4th 1025, 1029 (Fed. Cir. 2025) ("The term descriptive encompasses generic terms because a generic term is the ultimate in descriptiveness and is ineligible for federal trademark registration." (internal citations and quotation marks omitted)). A third basis for refusing registration is that the mark "comprises any matter that, as a whole, is functional," for which trademark protection would intrude on the subject addressed by patent law. 15 U.S.C. § 1052(e)(5); see Valu Eng'g, Inc. v. Rexnord Corp., 278 F.3d 1268, 1273-75 (Fed. Cir. 2002).

After a trademark application is filed, it is referred to an examiner who determines whether the mark is entitled to registration. 15 U.S.C. § 1062. If the USPTO examining attorney allows the applicant to register the mark, the USPTO publishes the mark in its Official Gazette. *Id.* § 1062(a). 15 U.S.C. § 1063 (Section 13 of the Lanham Act) provides that "[a]ny person who believes that he would be damaged by the registration of a mark...may...file an opposition" with the USPTO within 30 days of the USPTO's publication of the mark in the Official Gazette. In the case of an opposition, the USPTO "Director shall give notice to all parties and shall direct a Trademark Trial and Appeal Board to determine and decide the respective rights of registration." 15 U.S.C. § 1067. "In such pro-

ceedings," the Board (on behalf of the Director) "may refuse to register the opposed mark, . . . may modify the application . . . , or may register the mark." *Id.* § 1068. Grounds for opposing the registration of a mark include any ground for refusing the registration. Trademark Trial and Appeal Board Manual Procedure § 309.03(c)(1) (June 2023). "Unless registration is successfully opposed," the USPTO shall register the trademark if it is "entitled to registration," issue a certificate of registration, and publish a notice of registration in the Official Gazette. 15 U.S.C. § 1063(b); see Heritage All. v. Am. Pol'y Roundtable, 133 F.4th 1063, 1071 (Fed. Cir. 2025) ("The opposition provision of the Lanham Act says that registration generally follows when an opposition, if any, fails, but the stated precondition is that the mark at issue be a 'mark entitled to registration, 15 U.S.C. § 1063(b), which might allow the PTO, after an opposition fails, to reconsider the examiner's pre-opposition allowance.").

15 U.S.C. § 1064 (Section 14 of the Lanham Act) establishes a similar administrative process to seek cancellation of a trademark registration after it has been registered on the USPTO's principal register. Like § 1063, it provides that "[a]ny person who believes that he is or will be damaged . . . by the registration of a mark" may initiate an administrative process by applying to cancel said registration "[w]ithin five years from the date of the registration of the mark[.]" 15 U.S.C. § 1064. Such a person may also apply to cancel the registration "[a]t any time if the registered mark becomes the generic name for the goods or services," the mark "has been abandoned, or its registration was obtained fraudulently," or certain other circumstances arise. *Id.* § 1064(3). The Lanham Act separately provides

trademark holders various avenues to enforce their mark in district court. See id. §§ 1114(1), 1125(a)(1).

II

UTH sells dolls, including dolls with long blonde hair under the name Rapunzel. On November 20, 2017, UTH filed an application to register the RAP-UNZEL trademark (Ser. No. 87/690,863), asserting use of the mark in commerce in connection with dolls and toy figures in International Class 28. J.A. 38–40. UTH's application was approved by the USPTO examiner and published in the Official Gazette for opposition on April 10, 2018.

On May 9, 2018, Ms. Curtin filed an opposition under 15 U.S.C. § 1063 to UTH's registration of the mark RAPUNZEL. Ms. Curtin first amended her opposition in July 2018. UTH moved to dismiss both oppositions, claiming Ms. Curtin did not have statutory standing to oppose UTH's mark. This appeal arises from Ms. Curtin's Second Amended Notice of Opposition filed on January 22, 2019, in which she opposed the RAPUNZEL mark as descriptive, generic, failing to function as a trademark, and for fraud in the application. Regarding her interest in bringing this opposition, Ms. Curtin alleged that, as a doll collector and mother to a young daughter, she is "a consumer who participates amongst other consumers in the marketplace for dolls and toy figures of fairytale characters, including Rapunzel." J.A. 266. Regarding the injury that justified her opposition, she claimed that "[she] and other consumers will be denied access to healthy marketplace competition for products that represent" Rapunzel if private companies are allowed "to trademark the name of a famous fairy tale character in the

public domain." J.A. 266. She further alleged that "[she] and other consumers will also likely face an increased cost of goods associated with Rapunzel merchandise, given the lack of competition." J.A. 266. She stated her belief that registration of UTH's mark "could chill the creation of new dolls and toys by fans of the fairvtale, crowding out the substantial social benefit of having diverse interpreters of the fairy tale's legacy," and deny her and other consumers "access to classic, already existing, Rapunzel merchandise." J.A. 266. She included a petition with 432 signatures of those who shared her belief that registration of the RAPUNZEL mark would impact consumers' ability to find Rapunzel dolls and adversely affect marketplace competition for Rapunzel dolls. UTH denied her allegations in its answer.

Ms. Curtin twice moved for partial summary judgment on the grounds that the RAPUNZEL mark is generic, descriptive, and fails to function as a trademark; the Board denied both motions. The Board bifurcated the opposition proceeding into two separate trial phases, with the first phase to focus solely on the issue of Ms. Curtin's entitlement to a statutory cause of action, and, if necessary, a second phase to focus on the specific grounds pleaded. Following briefing for Phase One by the parties, the Board dismissed the opposition, finding Ms. Curtin "failed to prove she is entitled to the statutory cause of action she invoked opposing registration of Applicant's mark." J.A. 6. The Board relied on this court's opinion in *Corcamore*, *LLC* v. SFM, LLC, 978 F.3d 1298 (Fed. Cir. 2020), which invokes the zone-of-interests test set forth by the Supreme Court in Lexmark International, Inc. v. Static Control Components, Inc., 572 U.S. 118 (2014),

to evaluate whether Ms. Curtin was entitled to bring her opposition. J.A. 5, 10. Specifically, the Board read Corcamore to instruct that "[a] plaintiff may oppose registration of a mark when doing so is within the zone of interests protected by the statute and she has a reasonable belief in damage that would be proximately caused by registration of the mark." J.A. 5. The Board explained that while "[e]ntitlement to the statutory cause of action . . . is a requirement in every inter partes case," and "mere consumers such as [Ms. Curtin] are generally not statutorily entitled to oppose registration under 15 U.S.C. § 1063." J.A. 5-6. The Board explained this deviation from its prior denial of UTH's motion to dismiss the prior versions of Ms. Curtin's Notices of Opposition for lack of statutory entitlement was based mostly on Ritchie v. Simpson, 170 F.3d 1092 (Fed. Cir. 1999), "a case that addressed a section of the Trademark Act barring registration of 'immoral' or 'scandalous' matter," but "the Supreme Court [had sincel found the bar on registration of 'immoral' or 'scandalous' matter unconstitutional" in Iancu v. Brunetti, 588 U.S. 388 (2019). J.A. 3 n.4.

Ms. Curtin timely appealed the Board's dismissal of her opposition. 15 U.S.C. § 1071(a)(2). We have jurisdiction over this appeal under 28 U.S.C. § 1295 (a)(4)(B) and 15 U.S.C. § 1071(a).

TTT

The issue before us is not whether the RAPUNZEL mark UTH seeks to register is properly registrable under trademark law. Rather, the question presented is a narrow one: whether Ms. Curtin, in her capacity as a consumer, is entitled to oppose UTH's registration of the RAPUNZEL mark under 15 U.S.C. § 1063 as

generic, descriptive, and fraudulent. Where entitlement to oppose or cancel a trademark registration "turns on statutory interpretation," we "review[] the question de novo." *Empresa Cubana Del Tabaco v. Gen. Cigar Co.*, 753 F.3d 1270, 1274 (Fed. Cir. 2014).

Ms. Curtin challenges the Board's decision to apply the *Lexmark* framework to determine whether she was entitled to bring an opposition under § 1063. She then argues that, even if its use of the *Lexmark* framework was proper, the Board erred in concluding that she did not fall within the class of individuals authorized by the statute to bring an opposition of the nature she brought here. We address each argument in turn.

A

1

The parties disagree over whether the Board's use of the Supreme Court's zone-of-interests framework set forth in *Lexmark* was proper in determining whether Ms. Curtin was entitled to oppose UTH's registration of the RAPUNZEL mark under § 1063. Ms. Curtin contends that this court's decision in *Ritchie v. Simpson* is controlling authority on entitlement to oppose a trademark registration, and that the Board erred in applying the *Lexmark* framework instead.

Ritchie v. Simpson concerned a party's entitlement to oppose the registration of a mark under § 1063 on the basis that the mark comprised "immoral or scandalous matter." 2 170 F.3d at 1093. In Ritchie, this court

² As mentioned above, this basis for barring trademark registration, stated in § 1052(a), has since been invalidated by the Supreme

noted that "case' and 'controversy' restrictions for [Article III] standing do not apply to matters before administrative agencies and boards[.]" Id. at 1094 (internal citations omitted). Instead, we held "the starting point for a standing determination for a litigant before an administrative agency...is the statute that confers standing before that agency." Id. at 1095. Accordingly, we held that § 1063's provision that "[a]ny person who believes that he would be damaged by the registration of a mark . . . may . . . file an opposition in the Patent and Trademark Office, stating the grounds therefor" "establishes a broad class of persons who are proper opposers; by its terms the statute only requires that a person have a belief that he would suffer some kind of damage if the mark is registered." *Id.* We explained that an opposer under § 1063 must also "meet two judicially-created requirements—the opposer must have a 'real interest' in the proceedings and must have a 'reasonable' basis for his belief of damage." Id. The real interest requirement mandates that the opposer have "a legitimate personal interest in the opposition;" that is, a "direct and personal stake in the outcome." Id. The reasonable basis requirement requires that the opposer's belief of damage "have a reasonable basis in fact." Id. at 1098 (internal citation and quotation marks omitted). Ms. Curtin argues that an opposer bringing a claim under § 1063 "need only satisfy the language of [§ 1063], as well

Court as unconstitutional on First Amendment grounds. See Iancu v. Brunetti, 588 U.S. 388, 388 (2019); cf. Matal v. Tam, 582 U.S. 218, 218 (2017) (affirming Federal Circuit's invalidation of "disparage[ment]" portion of § 1052(a) on First Amendment grounds).

as the 'real interest' and 'reasonable' basis requirements." Appellant's Opening Br. 29.

Fifteen years later, in *Lexmark*, the Supreme Court addressed entitlement to sue under the cause of action for false advertising provided by the Lanham Act (codified as 15 U.S.C. § 1125(a)). 572 U.S. at 129. The Supreme Court explained that "we presume that a statutory cause of action extends only to plaintiffs whose interests 'fall within the zone of interests protected by the law invoked." Id. (internal citation and quotation marks omitted). After noting that the zone-of-interests test is not "especially demanding," the Supreme Court held that "to come within the zone of interests in a suit for false advertising under § 1125(a), a plaintiff must allege an injury to a commercial interest in reputation or sales. A consumer who is hoodwinked into purchasing a disappointing product may well have an injury-in-fact cognizable under Article III, but he cannot invoke the protection of the Lanham Act[.]" Id. at 130, 131–32 (internal citations and quotation marks omitted). The Supreme Court in Lexmark further noted that "a statutory cause of action is limited to plaintiffs whose injuries are proximately caused by violations of the statute." Id. at 132. The zone-of-interests test and proximate cause requirement are together referred to as the Lexmark framework for evaluating entitlement to exercise a statutory cause of action.

In *Corcamore*, this court held there is "no principled reason why the analytical framework articulated by the Court in *Lexmark* should not apply" to determine the class of parties who may seek cancellation of a mark under § 1064. 978 F.3d at 1305. We then applied the *Lexmark* framework to conclude that the

party seeking to cancel the mark at issue "f[ell] within the class of parties whom Congress has authorized to sue under the statutory cause of action of § 1064." *Id.* at 1307. Specifically, we found that trademark challenger SFM had sufficiently alleged that it sold substantially similar goods under its mark SPROUTS to those that Corcamore, the owner of the registration for the mark SPROUT, sold under its mark. Thus, we concluded that "SFM's allegation . . . identifie[d] an interest falling within the zone of interests protected by § 1064." *Id.* at 1306–07. We also found that SFM had sufficiently alleged proximate causation by demonstrating its "reasonable belief of damage resulting from a likelihood of confusion between SFM's SPROUTS mark and Corcamore's SPROUT mark." *Id.* at 1307.

2

Ms. Curtin argues that the entitlement to bring opposition proceedings to a trademark registration under § 1063 provides for an administrative proceeding, not a cause of action, and that the Lexmark framework is only applicable to parties seeking to assert a statutory cause of action. Invoking this court's statement in a citation in *Ritchie* that "[a]dministrative adjudications . . . are not an [A]rticle III proceeding to which either the 'case or controversy' or prudential standing requirements apply," 170 F.3d at 1094 (quoting Ecee, Inc. v. Fed.l Energy Regul. Comm'n, 645 F.2d 339, 349-50 (5th Cir.1981)), she argues that § 1063 does not provide a cause of action in court, but rather a "basis for '[a]ny person' to oppose registration of a trademark in an administrative proceeding before an agency," and "[t]he distinction between participation in an administrative proceeding and a private right of action in court is critical," Appellant's Opening Br. 21,

26. Ms. Curtin argues that the Board thus erroneously relied on *Corcamore*, because *Corcamore* concerns entitlement to bring a cancellation proceeding against an existing registration under § 1064. She argues that, unlike § 1063, § 1064 does provide a cause of action to which the *Lexmark* framework is properly applied to determine who is entitled to bring such a cancellation proceeding.

Ms. Curtin accordingly contends that only the language of § 1063 and cases specifically addressing entitlement to bring an opposition under § 1063 are applicable in determining whether she is authorized to oppose the registration of UTH's RAPUNZEL mark under § 1063. See Appellant's Opening Br. 31–33. She argues that any person may oppose registration of a trademark under § 1063 subject only to the requirements articulated in *Ritchie* that she "show 'a belief that he would suffer some kind of damage if the mark is registered,' 'have a "real interest in the proceedings," and 'have a "reasonable" basis for his belief of damage." Appellant's Opening Br. 26–27 (quoting *Ritchie*, 170 F.3d at 1095). We disagree.

To start, Ms. Curtin does not address this court's prior observation that "[g]iven [their] similarities in purpose and application, a party that demonstrates a real interest in cancelling a trademark under § 1064 has demonstrated an interest falling within the zone of interests protected by § 1064." *Corcamore*, 978 F.3d at 1306. That is, she does not explain why applying the real-interest test articulated in *Ritchie* instead of the *Lexmark* analytical framework would change the

Board's ultimate determination that she is not entitled to oppose UTH's mark under § 1063.³

Regardless, Ritchie is distinguishable from the present case because in *Ritchie*, the basis for opposition under § 1063 was disparagement and reputational harm to the opposer based on statutory prohibitions of the registration of immoral or scandalous marks which may disparage persons or beliefs (which were later invalidated on First Amendment grounds). Ritchie. 170 F.3d at 1093-94. In Ritchie, we held that an opposer who stated he would suffer disparagement of his beliefs from the opposed mark's registration had adequately alleged a real interest in the outcome of that opposition proceeding. Id. at 1097. This basis for opposing a trademark is unrelated to protecting any commercial interest, and the person who alleged he would be disparaged by the mark's registration was properly found eligible to oppose the mark on that basis.

In this case, the bases for Ms. Curtin's opposition to UTH's mark (that the mark fails to function as a trademark and is generic and descriptive) are rooted in commercial interests, as discussed in more detail in the next section. *Lexmark* and *Corcamore*, which provide a framework for evaluating whether a party falls within the zone-of-interests of statutory provisions of the Lanham Act, provide the better line of cases by

³ Indeed, if the Board had applied *Ritchie*'s pre-*Lexmark* real-interest test, it likely would have reached the same conclusion that Ms. Curtin was not entitled to bring her opposition based only on her interests as a consumer, as we explain in the next section. *See*, *e.g.*, *Corcamore*, 978 F.3d at 1305–06 ("[L]ike the zone-of-interests test, a petitioner can satisfy the real-interest test by demonstrating a commercial interest.").

which to evaluate Ms. Curtin's ability to bring her opposition in this case.

Ms. Curtin further argues that *Corcamore* cannot apply to this case because it pertains to entitlement to initiate cancellation proceedings under § 1064. Her attempt to distinguish between § 1063 and § 1064 is unavailing in view of our clear precedent on this matter. First, both statutes state in nearly identical terms that the group of individuals entitled to bring an action challenging a trademark registration under their respective sections are those who believe they will be damaged by the mark's registration. Compare § 1063 ("Any person who believes that he would be damaged by the registration of a mark upon the principal register . . . may . . . file an opposition[.]"), with § 1064 ("A petition to cancel a registration of a mark, stating the grounds relied upon, may . . . be filed . . . by any person who believes that he is or will be damaged . . . by the registration of a mark on the principal register[.]"). This court has observed that "[t]he linguistic and functional similarities between the opposition and cancellation provisions of the Lanham Act mandate that we construe the requirements of these provisions consistently. There is no basis for interpreting them differently." Young v. AGB Corp., 152 F.3d 1377, 1380 (Fed. Cir. 1998) (internal citation omitted): see also Meenaxi Enter.. Inc. v. Coca-Cola Co., 38 F.4th 1067, 1072-73 (Fed. Cir. 2022) (quoting Corcamore, 978 F.3d at 1305) (explaining that the "similar statutory language" between 15 U.S.C. § 1125(a)'s false-advertising provision at issue in Lexmark and § 1064 justified "hold[ing] that the Lexmark zone-of-interests and proximate-causation requirements control the statutory cause of action

analysis under § 1064"). Indeed, in our court's most recent case addressing which parties are authorized to commence administrative proceedings challenging a trademark under the Lanham Act, Luca McDermott Catena Gift Trust v. Fructuoso-Hobbs SL, we noted that "[t]he statutory requirements to cancel registration of a mark under § 1064 are substantively equivalent to those required to oppose registration under § 1063." 102 F.4th 1314, 1321 n.1 (Fed. Cir. 2024) (emphasis added). We reject Ms. Curtin's argument that our caselaw regarding entitlement to challenge a trademark under § 1064 is inapplicable to entitlement to challenge a trademark under § 1063. The Board correctly applied the Lexmark framework in assessing whether Ms. Curtin was entitled to bring her opposition to UTH's mark under § 1063.

\mathbf{B}

Ms. Curtin next argues that even if the Board was correct to apply the *Lexmark* framework in determining whether she was entitled to oppose registration under § 1063, the Board erred in its application of the framework to conclude that she does not fall within the class of individuals whom the statutory scheme empowers to bring an opposition of the nature she brought in the present case.

Under the *Lexmark* framework, a plaintiff may oppose registration of a mark when (1) her interests are within the zone of interests protected by the statute and (2) she has a reasonable belief in damage that would be proximately caused by registration of the mark in violation of the opposition statute. *Lexmark*, 572 U.S. at 129–134; *see also Corcamore*, 978 F.3d at 1303. In *Corcamore*, this court specified "that the

purpose of the zone-of-interests test is to 'foreclose[] suit only when a 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 authorized that plaintiff to sue." *Id.* (alteration in original) (quoting *Lexmark*, 572 U.S. at 130, 134). Applying this framework, the Board concluded that Ms. Curtin, who asserts only interests in the mark's registration related to her status as a consumer of dolls, did not fall within the zone of interests to bring an opposition under § 1063, and that the damage she sought to avoid is too remote to be proximately caused by violations of the statute. We agree with the Board on both conclusions.

1

In discerning whether Ms. Curtin's interests as a consumer were within the zone of interests of § 1063. the Board determined that it must look to the interests protected by the Lanham Act as a whole. J.A. 7. The Board concluded that *Lexmark* had already addressed what those interests were: "regulat[ion] [of] commerce and protect[ing] plaintiffs with commercial interests." J.A. 7. The Board held that "Lexmark's holdings on entitlement to a statutory (Trademark Act) cause of action apply to opposition proceedings such as this one," under § 1063, even though Lexmark itself concerned the cause of action in § 1125(a) J.A. 10. And because Ms. Curtin is a "mere consumer that buys goods or services," the Board concluded she "is not under the Trademark Act's aegis" and that the "statutory cause of action is reserved for those with commercial interests," meaning actual or potential competitors or other offerors of goods or services (using

sufficiently similar marks), as opposed to consumers. J.A. 10–11.

Ms. Curtin first argues that the Board erred in concluding that her interests as "a consumer of fairytale-themed products" did not fall within the zone of interests protected by § 1063 because this "statutory cause of action is reserved for those with commercial interests." J.A. 10–11; see Appellant's Opening Br. 34. She argues that the Board incorrectly overextended the Supreme Court's holding in Lexmark to conclude that a commercial interest is necessary to oppose a mark's registration under § 1063. J.A. 7–10; see Appellant's Opening Br. 35–36 ("The Supreme Court in Lexmark nowhere suggested that it was opining broadly about all interests that might fall within the zone of interests protected by all provisions of the Lanham Act. Rather, the Supreme Court emphasized that 'the breadth of the zone of interests varies according to the provisions of law at issue.") (quoting Lexmark, 572 U.S. at 130). In reaching this conclusion, the Board invoked 15 U.S.C. § 1127, which states "[t]he intent of this chapter is to regulate commerce within the control of Congress by making actionable the deceptive and misleading use of marks in such commerce; . . . [and] to protect persons engaged in such commerce against unfair competition." The Board also quoted the Supreme Court's conclusion in *Lexmark* that "to come within the zone of interests in a suit' under Section 43(a)(1) of the Lanham Act, 15 U.S.C. § 1125(a)(1) - which, similar to [§ 1063], may be invoked only by a plaintiff 'who believes that he or she is or is likely to be damaged' by the challenged act - 'a plaintiff must allege an injury to a commercial interest in reputation or sales." J.A. 8 (emphasis omitted) (quoting *Lexmark*,

572 U.S. at 131–32). UTH invokes *Corcamore* to argue for the broader position that "a commercial interest is required to satisfy the zone-of-interests requirement." Appellee's Br. 18.

As the United States Patent and Trademark Office points out in its amicus brief, "given the potential for different provisions of the Lanham Act to protect different interests," we should not adopt UTH's "broader position that a commercial interest is always required to satisfy the zone-of-interests test," since "[o]ther grounds for opposing or seeking to cancel the registration of a mark may or may not call for a different analysis, and may or may not protect different interests." USPTO Amicus Br. 23 (citing as an example 15 U.S.C. § 1052(b), which disallows "registration of marks that consist of the 'flag or coat of arms' of certain governments"). The USPTO correctly notes that "[w]hether a zone-of-interests limitation applies in a particular administrative context, and whether the class of people who may seek administrative relief in a particular context is coextensive with the class of people who may sue in court, will depend on the language of the particular statute and the particular interests involved." USPTO Amicus Br. 23. The interest protected by a particular provision of the Lanham Act should not be subject to a blanket rule that always assumes the intended protected interest is commercial. Instead, the protected interest should be evaluated based on the particular ground for the challenge, since there are clearly grounds against registration of a mark in the Lanham Act that are not intended to protect commercial interests. In the context of challenges to a trademark under the Lanham Act, both in the form of an opposition proceeding under § 1063 or a cancellation proceeding under § 1064, the zone-of-interests test should be tailored based on the specific bases cited for opposing registration or seeking cancellation of the registration for a mark.

In the present case, the opposition under § 1063 is based on allegations that the mark fails to function as a trademark and is generic and descriptive. Ms. Curtin argues the Board failed to assess the specific interests protected by her opposition under § 1063. However, as noted above, the Board did assess her grounds for opposition and concluded the interests protected by those grounds were commercial. See J.A. 7 n.6 ("Opposer's grounds for opposition in this case arise out of the Trademark Act's 'intent' to 'protect persons engaged in . . . commerce against unfair competition." (quoting 15 U.S.C. § 1127)). Ms. Curtin does not contest our binding precedent, which unequivocally provides that the prohibitions against descriptive and generic marks protect commercial interests. This court's predecessor has noted that "[t]he major reasons for not protecting [descriptive] marks are: (1) to prevent the owner of a mark from inhibiting competition in the sale of particular goods; and (2) to maintain freedom of the public to use the language involved, thus avoiding the possibility of harassing infringement suits by the registrant against others who use the mark when advertising or describing their own products" these are commercial interests. In re Abcor Dev. Corp.. 588 F.2d 811, 813 (C.C.P.A. 1978). We have similarly explained that the prohibition against granting trademark registration for generic terms was established to avoid "grant[ing] the owner of the mark a monopoly." another commercial interest. In re Dial-A-Mattress

Operating Corp., 240 F.3d 1341, 1344 (Fed. Cir. 2001) (internal citation and quotation marks omitted).

Insofar as Ms. Curtin contends that the risk to consumers from registering this mark exists in the form of deceptive or misleading use, which may implicate consumer interests, these were not among her bases for opposing the mark before the Board, so we need not consider whether these provisions also protect commercial interests. And to the extent Ms. Curtin contends that § 1063 is also intended to protect the interests of consumers because trademark law exists to some extent to protect consumers in their ability to distinguish among products, the Supreme Court has explained that this goal may be served by conferring rights that only commercial actors have statutory standing to exercise. See POM Wonderful LLC v. Coca-Cola Co., 573 U.S. 102, 107 (2014) ("Though in the end consumers also benefit from the [Lanham] Act's proper enforcement, the cause of action [for false advertising] is for competitors, not consumers."); USPTO v. Booking.com B. V., 591 U.S. 549, 552 (2020) (explaining that while "[g]uarding a trademark against use by others . . . secures to the owner of the mark the goodwill of her business and protects the ability of consumers to distinguish among competing producers," "[t]he Lanham Act . . . arms trademark owners with federal claims for relief." (alteration omitted) (emphasis added) (internal citations and quotation marks omitted)). The Board's holding that only commercial actors affected by the mark's registration fall within the zone of interests to oppose the registration as generic, descriptive, or functional under § 1063 is not inconsistent with the Lanham Act's purpose of protecting consumers.

 $\mathbf{2}$

The Board also found Ms. Curtin's showing of injury insufficient to invoke an opposition proceeding under § 1063. The Board correctly found Ms. Curtin's evidence too "limited" and the damage "too remote" to establish proximate causation where all her alleged harms are derivative of those harms that may be suffered by UTH's commercial competitors as a result of UTH's registration of the mark. J.A. 12. We agree.

Ms. Curtin's alleged injury from the registration of the RAPUNZEL mark is that "[she] and other consumers will be denied access to healthy marketplace competition for products that represent" Rapunzel if private companies are allowed "to trademark the name of a famous fairy tale character in the public domain." J.A. 266. She further alleged that "[she] and other consumers will also likely face an increased cost of goods associated with Rapunzel merchandise, given the lack of competition." J.A. 266. She stated her "belie[f] that a trademark registration [for the name Rapunzell could chill the creation of new dolls and toys by fans of the Rapunzel fairvtale, crowding out the substantial social benefit of having diverse interpreters of the fairy tale's legacy." J.A. 266. She further testified that "[she] and other consumers will also likely be denied access to classic, already existing, Rapunzel merchandise whose sale may be precluded if Applicant receives a registration for the name 'Rapunzel." J.A. 266. Ms. Curtin included with her amended notice of opposition a petition with 432 signatures from people who shared her belief that registration of the "RAPUNZEL" mark would impact consumers' ability to find Rapunzel dolls and adversely affect marketplace competition for Rapunzel dolls.

The Board held that a person opposing a registration "must show economic or reputational injury flowing directly from" the registration, and "[t]hat showing is generally not made when' a defendant's conduct 'produces injuries to a fellow commercial actor that in turn affect the plaintiff." J.A. 11-12 (alteration in original) (quoting Lexmark, 572 U.S. at 133-34). The Board found Ms. Curtin's "limited evidence. . . is too remote from registration and is entirely speculative." J.A. 12. It found that insofar as Ms. Curtin relied on "general economic theories" to assume registration of the mark would "harm 'healthy marketplace competition," there was no evidence in the record about any specific economic theory nor evidence that fairytale related markets perform according to general economic principles. J.A. 12.

Ms. Curtin first argues the Board's analysis of direct economic or reputational injury is faulty for being limited to commercial interests. We reject this argument for the same reasons we rejected this argument in the context of the zone of interests; only injury to those interests that fall within the zone of interests are relevant to this inquiry. Ms. Curtin then argues that the Board erred in concluding her alleged injuries were "too remote, because the alleged damage to [her] depends first on the alleged effect of registration on other commercial doll makers or sellers." J.A. 13. The Board noted that the proximate cause showing "is generally not made when' a defendant's conduct 'produces injuries to a fellow commercial actor that in turn affect the plaintiff." J.A. 11–12 (quoting Lexmark, 572 U.S. at 133-34). Ms. Curtin contests this analysis as at odds with *Lexmark*'s instruction that an "intervening step" in causation "is not fatal to showing of proximate

causation." Appellant's Opening Br. 43 (quoting Lexmark, 572 U.S. at 133). However, as we explained in Luca McDermott, "a harm will be 'too remote' from the alleged unlawful conduct if it 'is purely derivative of misfortunes visited upon a third person by the defendant's acts." 102 F.4th at 1327 (quoting Lexmark, 572 U.S. at 133). This court concluded that the challenger of a registered mark had not satisfied the proximate causation requirement where the "alleged injury is merely derivative of any injury suffered by [another party], it is too remote to provide [the challenger] with a cause of action under § 1064." Id. at 1327. Ms. Curtin's alleged harms are all, as UTH points out, "speculative tertiary effects of registration, namely, reduced marketplace competition, increased cost of RAPUNZEL merchandise, and fewer interpretations and creations of RAPUNZEL dolls." Appellee's Br. 23. These harms are insufficient to establish proximate causation for the same reasons provided by Luca Mc-Dermott—they are downstream harms first suffered by a commercial actor.

Ms. Curtin's only response to the Board's contention that her evidence of harm is too speculative is a citation to the Supreme Court's statement in *Wal-Mart Stores, Inc. v. Samara Brothers, Inc.*, that a trademark may distort competition "not merely by successful suit but by the plausible threat of successful suit." Appellant's Opening Br. 45 n.3 (citing 529 U.S. 205, 214 (2000)). However, Ms. Curtin does not address how the Board erred in concluding that her speculative evidence does not establish such a plausible threat of suit that would chill competition in the ways she alleges. Neither party addresses the fact that the party alleging injury must establish that their belief

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is reasonable: Ms. Curtin has not provided any arguments refuting the Board's findings that her reliance on general economic theories without any case-specific data fails to establish a reasonable belief of proximate causation of injury. The Board properly found Ms. Curtin's allegations of harm were at best downstream effects of harms to commercial actors and were too remote to support a reasonable belief in injury.

IV

We have considered the remainder of Ms. Curtin's arguments and find them unpersuasive. Because the Board correctly applied the *Lexmark* framework to find that Ms. Curtin did not have statutory standing to oppose UTH's registration of the RAPUNZEL mark under § 1063, we affirm.

AFFIRMED

OPINION, U.S. TRADEMARK TRIAL AND APPEAL BOARD (MAY 4, 2023)

This Opinion is a Precedent of the TTAB

Hearing: November 15, 2022

Mailed: May 4, 2023

UNITED STATES PATENT AND TRADEMARK OFFICE

REBECCA CURTIN,

v.

UNITED TRADEMARK HOLDINGS, INC.,

Opposition No. 91241083

Before: ADLIN, LYNCH and DUNN, Administrative Trademark Judges.

Opinion by Adlin, Administrative Trademark Judge:

The Board, *sua sponte*, bifurcated this case into "two separate trial phases." 49 TTABVUE 6-7.1 The

¹ Citations to the record are to TTABVUE, the Board's online docketing system. Specifically, the number preceding "TTABVUE" corresponds to the docket entry number(s), and any number(s) following "TTABVUE" refer to the page number(s) of the docket entry where the cited materials appear.

first trial phase concerned, and this decision addresses, only "Opposer's entitlement to a statutory cause of action." *Id*.

More specifically, we address a single, threshold question: is Opposer Rebecca Curtin, as a purchaser of goods bearing the challenged mark, entitled to oppose the mark's registration under Section 13 of the Trademark Act, 15 U.S.C. § 1063, when she alleges the proposed mark is both invalid and the subject of a fraudulent application? Because our answer to this question is "no," we dismiss the opposition and do not reach the second (merits) trial phase.

I. The Pleadings

Applicant United Trademark Holdings, Inc. seeks registration of RAPUNZEL, in standard characters, for "dolls; toy figures," in International Class 28.2 In her second amended notice of opposition ("NOO"), Opposer alleges that RAPUNZEL is "synonymous with the name of a well-known childhood fairytale character," and that consumers will recognize it as such. 14 TTABVUE 2, 3 (NOO ¶¶ 2, 6). As grounds for opposition, Opposer alleges that RAPUNZEL not only fails to function as a trademark, but also is generic for and merely descriptive of the identified goods, and that Applicant committed fraud. *Id.* at 3, 5, 8 (NOO ¶¶ 8, 13, 20-24).³ In its answer, Applicant denies the

² Application Serial No. 87690863, filed November 20, 2017 under Section 1(a) of the Act, based on first use dates of August 2017.

³ Opposer also alleges that Applicant's mark is "functional under section 2(e)(5) of the Trademark Act," even though this claim was previously dismissed. 14 TTABVUE 5 (NOO 15); 12 TTABVUE 10; 13 TTABVUE 10 n.1. Opposer claims that she reasserted this

salient allegations in the second amended notice of opposition, and asserts "affirmative defenses" that merely amplify its denials.

At this initial stage of this bifurcated case, we need not address the ultimate merits of Opposer's claims, except to the extent those claims may bear on Opposer's entitlement to oppose the involved mark. We thus turn to Opposer's allegations in the second amended notice of opposition intended to support her claim of entitlement to a statutory cause of action.

Opposer alleges that she "is a professor of law teaching trademark law, and is also a consumer who participates amongst other consumers in the marketplace for dolls and toy figures of fairytale characters. including Rapunzel." 14 TTABVUE 6 (NOO ¶ 16). She claims that she and "other consumers will be denied access to healthy marketplace competition" for "products that represent" Rapunzel if private companies are allowed "to trademark the name of a famous fairy tale character in the public domain." Id. Opposer further alleges that she "and. other consumers will also likely face an increased cost of goods associated with Rapunzel merchandise, given the lack of competition." Id. According to Opposer, "more than 171 petition signatures" support her claims of damage. *Id.* (NOO ¶ 17). To determine whether Opposer proved these allegations of entitlement, we turn to the evidentiary record.⁴

dismissed claim "to preserve the right to appeal at a later date the dismissal." 13 TTABVUE 10 n.1.

⁴ Over four years ago, in the pleading phase of this case, the Board issued a decision denying Applicant's motion to dismiss, stating that Opposer "sufficiently alleged that she has a direct and personal stake in the outcome of the proceeding and that her

II. The Record

The record consists of the pleadings and, by operation of Trademark Rule 2.122(b), 37 C.F.R. § 2.122(b), the file of Applicant's involved application. In addition, Opposer introduced her own declaration, with exhibits ("Curtin Dec."). 53 TTABVUE. Applicant chose to not introduce any testimony or other evidence. 54 TTABVUE.

III. Entitlement-Related Facts of Record

Since 2015 Opposer has purchased "dolls, doll fashions, toys, books, e-books, and other fairytale themed items" for her daughter, "including Rapunzel dolls and toys." 53 TTABVUE 2-3, 11-59, 84 (Curtin Dec. ¶¶ 3-6 and Exs. 1-35, 37). Opposer often purchases these products online, finding them by typing "Rapunzel' into the online search box." *Id.* at 3 (Curtin Dec. ¶ 9). Similarly, "[w]hen shopping in person [Opposer looks] for the Rapunzel name or image to locate products," or asks for "Rapunzel" dolls. *Id.* (Curtin Dec. ¶¶ 10, 11).

belief of damage has a reasonable basis in fact." 12 TTABVUE 7. The order was based in large part, 12 TTABVUE 9, on *Ritchie v. Simpson*, 170 F.3d 1092, 50 USPQ2d 1023 (Fed. Cir. 1999), a case that addressed a section of the Trademark Act barring registration of "immoral" or "scandalous" matter. 15 U.S.C. § 1052(a). Six months after the Board's decision on the motion to dismiss issued, the Supreme Court found the bar on registration of "immoral" or "scandalous" matter unconstitutional. *Iancu v. Brunetti*, 139 S.Ct. 2294, 2019 USPQ2d 232043 (2019). Two years after *Brunetti* was decided, and following updates to the "standard for determining whether a party is eligible to bring a statutory cause of action," the Board denied Opposer's motion for summary judgment on her entitlement to bring a statutory cause of action, and bifurcated this case requiring that Opposer's entitlement be tried first, before the merits. 49 TTABVUE 5-7.

Opposer "believes" that if Applicant registers RAPUNZEL she "and other consumers will be denied access to healthy marketplace competition for products that represent the well-known fictional character." *Id.* at 8 (Curtin Dec. ¶ 48). She also contends that she and "other consumers" will "also likely face an increased cost of goods associated with Rapunzel merchandise, given the lack of competition." *Id.* (Curtin Dec. ¶ 49).

Furthermore, Opposer "believes" that registration of Applicant's mark "could chill the creation of new dolls and toys by fans of the Rapunzel fairytale, crowding out the substantial social benefit of having diverse interpreters of the fairy tale's legacy," and deny Opposer and "other consumers" of "access to classic, already existing, Rapunzel merchandise." *Id.* at 9 (Curtin Dec. ¶¶ 50, 51). Opposer introduced a petition with 432 signatures from people who share Opposer's "belief that registration of [Applicant's proposed mark] would adversely impact a consumer's ability to find dolls depicting the Rapunzel character, and would also harm marketplace competition for dolls personifying the Rapunzel character." *Id.* at 9, 61-83 (Curtin Dec. ¶ 52 and Ex. 36).

IV. Is Opposer Entitled to a Statutory Cause of Action?

Entitlement to the statutory cause of action invoked (e.g., opposition or cancellation) is a requirement in every inter partes case. Australian Therapeutic Supplies Pty. Ltd. u. Naked TM, LLC, 965 F.3d 1370, 2020 USPQ2d 10837, at *3 (Fed. Cir. 2020), cert. denied, 142 S.Ct. 82 (2021) (citing Lexmark Ina, Inc. v. Static Control Components, Inc., 572 U.S. 118, 125-26, 109 USPQ2d 2061 (2014)). A plaintiff may oppose

registration of a mark when doing so is within the zone of interests protected by the statute and she has a reasonable belief in damage that would be proximately caused by registration of the mark. Corcamore, LLC v. SFM, LLC, 978 F.3d 1298, 2020 USPQ2d 11277, at * 6-7 (Fed. Cir. 2020), cert. denied, 141 S.Ct. 2671 (2021) (holding that the test in *Lexmark* is met by demonstrating a real interest in opposing or cancelling a registration of a mark, which satisfies the zone-of-interests requirement, and a reasonable belief in damage by the registration of a mark, which demonstrates damage proximately caused by registration of the mark). Meenaxi Enter., Inc. u. Coca-Cola Co., 38 F.4th 1067, 2022 USPQ2d 602, at *3-4 (Fed. Cir. 2022) ("While the zone-of-interest test is not especially demanding . . . it nonetheless imposes a critical requirement.") (cleaned up).

Here, Opposer has failed to prove she is entitled to the statutory cause of action she invoked — opposing registration of Applicant's mark. The essential problem is that mere consumers such as Opposer are generally not statutorily entitled to oppose registration under 15 U.S.C. § 1063.

A. The Statute Does Not Entitle Opposer to Oppose Registration Unless Her "Real Interest" Is Commercial

In *Lexmark*, the Supreme Court pointed out that "[w]hether a plaintiff comes within the 'zone of interests' is an issue that requires us to determine, using traditional tools of statutory interpretation, whether a legislatively conferred cause of action encompasses a particular plaintiffs claim." *Lexmark*, 109 USPQ2d at 2067. Thus we turn, as *Lexmark* did, to the statute

conferring the cause of action in question, in our case 15 U.S.C. § 1063, which entitles "[a]ny person who believes that [she] would be damaged by the registration of a mark" to oppose it.⁵

While that language is quite broad, and might seemingly apply to "all factually injured plaintiffs," it does not, and 15 U.S.C. § 1063 "should not get such an expansive reading." See Lexmark, 109 USPQ2d at 2067 (addressing similar language in 15 U.S.C. § 1125(a)(1) and quoting Holmes v. Securities Investor Protection Corp., 503 U.S. 258, 266 (1992)). Rather, "a statutory cause of action extends only to plaintiffs whose interests 'fall within the zone of interests protected by the law invoked," in this case, as in Lexmark, the Trademark Act. Lexmark, 109 USPQ2d at 2068 (quoting Allen v. Wright, 468 U.S. 737, 751 (1984)).

"Identifying the interests protected by" the Trademark Act "requires no guesswork," *Lexmark*, 109 USPQ2d at 2068, because the Act itself identifies those interests in Section 45, which states the Act's purpose:

The intent of this chapter is to regulate commerce within the control of Congress by making actionable the deceptive and misleading use of marks in such commerce; to protect registered marks used in such commerce from interference by State, or territorial legislation; to protect persons engaged

⁵ Lexmark involved a false advertising counterclaim under 15 U.S.C. § 1125(a), pursuant to which "any person who believes that he or she is or is likely to be damaged" is entitled to the cause of action.

in such commerce against unfair competition; to prevent fraud and deception in such commerce by the use of reproductions, copies, counterfeits, or colorable imitations of registered marks; and to provide rights and remedies stipulated by treaties and conventions respecting trademarks, trade names, and unfair competition entered into between the United States and foreign nations.

15 U.S.C. § 1127 (emphasis added). Thus, the Trademark Act regulates commerce and protects plaintiffs with commercial interests.⁶

The Supreme Court's review of this statement of purpose led it to hold, in *Lexmark*, that "to come within the zone of interests in a suit" under Section 43(a)(1) of the Trademark Act, 15 U.S.C. § 1125(a)(1) — which, similar to Section 13, may be invoked only by a. plaintiff "who believes that he or she is or is likely to be damaged" by the challenged act — "a plaintiff must allege an injury to a commercial interest in reputation or sales." *Lexmark*, 109 USPQ2d at 2069 (emphasis added). The Court specifically stated that while consumers "may well have an injury-in-fact" caused by violations of the Trademark Act, they "cannot invoke the protection" of the statute based solely on injuries suffered as consumers, "a conclusion

⁶ Unlike the plaintiffs ground for opposition in *Ritchie*, 50 USPQ2d at 1023, Opposer's grounds for opposition in this case arise out of the Trademark Act's "intent" to "protect persons engaged in . . . commerce against unfair competition." 15 U.S.C. § 1127. *See generally In re Abcor Dev. Corp.*, 588 F.2d 811, 200 USPQ 215, 217 (CCPA 1978) (a "major reason" for not protecting merely descriptive marks is "to prevent the owner of a [merely descriptive] mark from inhibiting competition").

reached by every Circuit to consider the question." Id. ("Even a business misled by a supplier into purchasing an inferior product is, like consumers generally, not under the Act's aegis."). The See also Meenaxi, 2022 USPQ2d 602, at *7 ("Coca-Cola failed to explain how its supposed reputational injury adversely affected its commercial interests other than to speculate that a consumer dissatisfied with Meenaxi's products might blame Coca-Cola."); Corcamore, 2020 USPQ2d 11277, at * 7 (a plaintiff "can satisfy the real-interest test by demonstrating a commercial interest"); Empresa Cubana Del Tabaco v. Gen. Cigar Co., 753 F.3d 1270, 111 USPQ2d 1058, 1062 (Fed. Cir. 2014) (finding entitlement to the statutory cause of action of cancellation because "Cubatabaco has a legitimate commercial interest in the COHIBA mark"). Cf. POM Wonderful LLC v. Coca-Cola Co., 573 U.S. 102, 110 USPQ2d 1877, 1880 (2014) (stating, in the context of a false advertising claim, that "[t]hough in the end consumers also benefit from the Act's proper enforcement, the cause of action [for unfair competition through misleading advertising or labeling] is for competitors, not consumers"). Over 40 years ago, the Board foreshadowed these holdings, finding it "evident that a petitioner must establish a viable commercial

⁷ Lexmark cites the following circuit court decisions under 15 U.S.C. § 1125(a) that reveal unanimity among "every Circuit to consider the question": Phoenix of Broward, Inc. v. McDonald's Corp., 489 F.3d 1156, 1170 (11th Cir. 2007); Made in the USA Foundation v. Phillips Foods, Inc., 365 F. 3d 278, 281 (4th Cir. 2004); Procter & Gamble Co. v. Amway Corp., 242 F. 3d 539, 563-564 (5th Cir. 2001); Barrus v. Sylvania, 55 F. 3d 468, 470 (9th Cir. 1995); Serbin v. Ziebart Int'l Corp., 11 F. 3d 1163, 1177 (3rd Cir. 1993); Colligan v. Activities Club of N Y., Ltd., 442 F. 2d 686, 691-692 (2nd Cir. 1971).

interest in the subject matter of cancellation." *Miller* v. B & H Foods, Inc., 209 USPQ 357, 360 (TTAB 1981) (emphasis added). Scf. Ahal Al-Sara Grp. for Trading v. American Flash, Inc., 2023 USPQ2d 79, at *7-9 (TTAB 2023) ("a foreign plaintiff cannot establish entitlement to an abandonment or fraud

⁸ Throughout her Trial Brief, Opposer analogizes entitlement to a Trademark Act cause of action to "standing" under the Clayton Antitrust Act, arguing that consumers have standing under the Clayton Act, and should therefore also be entitled to Trademark Act causes of action. 55 TTABVUE 13, 15, 17. We are not persuaded by the analogy or the argument. The analogy is untenable because even if we found the statutes similar or analogous, which we do not, in Lexmark the Supreme Court instructs us to focus on the Trademark Act, including 15 U.S.C. §§ 1063 and 1127, in assessing entitlement to a Trademark Act cause of action. Moreover, Opposer's argument is at best overstated, and it is not clear that Opposer would be entitled to a Clayton Act cause of action. In fact, in Associated Gen. Contractors of Cal.. Inc. v. Cal. State Council of Carpenters, 459 U.S. 519, 529 (1983), the Supreme Court recognized that Section 4 of the Clayton Act, read literally, is "broad enough to encompass every harm that can be attributed directly or indirectly to the consequences of an antitrust violation." Nonetheless, the Court went on to analyze whether the claimed injury "was of a type that Congress sought to address." Id. at 538; see also Philanthropist.com, Inc. v. The General Conference Corp. of Seventh-Day Adventists, 2021 USPQ2d 643, at *16 (TTAB 2021) (considering whether it can be "assumed Congress intended to authorize a party in Petitioner's circumstances to bring and maintain these cancellation proceedings") (citing Corcamore, 2020 USPQ2d 11277, at *7), aff'd, 2022 WL 3147202 (Fed. Cir. 2022). To answer this question, the Supreme Court in Associated Gen. Contractors specifically considered, inter alia, "the directness or indirectness of the asserted injury," 459 U.S. at 540, and whether the claimed damages were "highly speculative." Id. at 542. Here, as explained below, even if Opposer's alleged injury is "direct" (despite being merely anticipated, rather than existing), her specific claims of harm are "highly speculative" and unsupported by evidence.

claim based solely on its foreign rights, without any claim or interest related to U.S. commerce") (emphasis added).

There is no question that Lexmark's holdings on entitlement to a statutory (Trademark Act) cause of action apply to opposition proceedings such as this one. Indeed, not only was Lexmark based on the Trademark Act's statement of purpose, but the Federal Circuit recently found "no principled reason why the analytical framework articulated by the Court in Lexmark should not apply to [15 U.S.C.] § 1064," Corcamore, 2020 USPQ2d 11277, at *6, a statute which concerns cancellation proceedings and, like opposition proceedings under 15 U.S.C. § 1063, is limited to persons "who believe[] that he is or will be damaged" by registration. See also Spanishtown Ent., Inc. u. Transcend Resources, Inc., 2020 USPQ2d 11388, at *1-2 (TTAB 2020).

B. Opposer Has Not Established a Commercial Interest or Injury Merely By Virtue of Being a Consumer of RAPUNZEL Goods

All of the facts Opposer alleged, and all of the evidence she submitted, relate to her being a consumer of fairytale-themed products. Nowhere has Opposer alleged or established the requisite commercial interest or injury. Rather, Opposer has only alleged and proved that she is a purchaser of goods related to the Rapunzel fairytale. *Lexmark* makes clear, however, that "[Wen a business" that buys goods or services "is, like consumers generally, not under the Act's aegis." *Lexmark*, 109 USPQ2d at 2069. A fortiori, a mere consumer that buys goods or services is not under the Trademark Act's aegis.

Put simply, the Trademark Act does not provide "consumer standing." That is, it does not entitle mere consumers to a statutory cause of action: a statutory cause of action is reserved for those with commercial interests. Id. at 2071. See also Conte Bros. Auto, Inc. u. Quaker State-Slick 50, Inc., 165 F.3d 221, 49 USPQ2d 1321, 1327 (3d Cir. 1998) (Alito, J.) (Section 45 of the Trademark Act "makes clear that the focus of the statute is on anti-competitive conduct in a commercial context. Conferring standing to the full extent implied by the text of § 43(a) would give standing to parties, such as consumers, having no competitive or commercial interests affected by the conduct at issue. This would not only ignore the purpose of the Lanham Act as expressed by § 45, but would run contrary to our precedent ").9

⁹ Opposer attempts to rely on two non-precedential decisions by a single interlocutory attorney in Flanders v. DiMarzio, Inc., Cancellation No. 92064181, but appears to have cited the wrong interlocutory decision in two places in her Trial Brief. 55 TTABVUE 11, 18. In any event, to the extent any non-precedential interlocutory decisions in Cancellation No. 92064181 conflict with current Supreme Court or Federal Circuit caselaw, we decline to follow them. We are bound by Supreme Court and Federal Circuit authority, but not by nonprecedential interlocutory decisions. Cf. TRADEMARK TRIAL AND APPEAL BOARD MANUAL OF PROCEDURE ("TBMP") § 518 (2022) (citing AS Holdings, Inc. v. H & C Milcor, Inc., 107 USPQ2d 1829, 1832 (TTAB 2013) and Harley-Davidson Motor Co. v. Pierce Foods Corp., 231 USPQ 857, 859 n.13 (TTAB 1986)). See also Domino's Pizza Inc. v. Little Caesar Enters. Inc., 7 USPQ2d 1359, 1363 n.9 (TTAB 1988) ("Th[e] statement [that evidence of third-party uses were relevantl, made over the signature of a single interlocutory Attorney-Examiner of the Board, is not binding on this threemember panel, and we find ourselves in disagreement with the statement.").

C. Opposer's Alleged Damage is Too Speculative and Remote to Invoke an Opposition Proceeding

It is not enough for Opposer to have alleged her belief in damage in her notice of opposition. Rather, Opposer "must show economic or reputational injury flowing directly from" Applicant's registration of RAP-UNZEL. *Lexmark*, 109 USPQ2d at 2069. However, "[t]hat showing is generally not made when" a defendant's conduct "produces injuries to a fellow commercial actor that in turn affect the plaintiff. For example, while a competitor who is forced out of business by a defendant's false advertising generally will be able to sue for its losses, the same is not true of the competitor's landlord, its electric company, and other commercial parties " *Id.* at 2069-70.

Here, Opposer's limited evidence shows that the damage she believes she will suffer is too remote from registration and is entirely speculative.

For example, Opposer merely assumes that registration of RAPUNZEL will harm "healthy market-place competition," leading to an "increased cost of goods." 53 TTABVUE 8 (Curtin Dec. ¶¶ 48, 49). Even if this assumption was an attempt to apply an accepted economic theory, there is no evidence of record about any specific economic theory, and even if there was, there is no evidence that particular markets, much less the market for the fairytale-related products at issue, always perform according to general economic theories.

Perhaps more importantly, Opposer merely assumes that, notwithstanding 15 U.S.C. § 1115(b)(4) and other defenses and protections available to sellers

of the fairytale-related products at issue, Applicant will be so successful in enforcing its asserted rights that it will reduce "marketplace competition," "chill the creation of new dolls and toys" and prevent "access to classic, already existing, Rapunzel merchandise." Id. at 9 (Curtin Dec. ¶¶ 50, 51). This type of speculation, unsupported by any evidence, is not a basis upon which we can find that Opposer is entitled to a statutory cause of action. 10 Cai v. Diamond Hong. Inc., 901 F.3d 1367, 127 USPQ2d 1797, 1799 (Fed. Cir. 2018) ("Attorney argument is no substitute for evidence.") (quoting Enzo Biochem, Inc. u. Gen-Probe Inc., 424 F.3d 1276, 1284, 76 USPQ2d 1616, 1622 (Fed. Cir. 2005)); In re U.S. Tsubaki, Inc., 109 USPQ2d 2002, 2006 (TTAB 2014) (finding that there was no proof to support the statements in the record by counsel). See also TransUnion LLC v. Ramirez, 141 S.Ct. 2190, 2210-12 (2021) (in context of assessing standing under Article III of the U.S. Constitution, noting problems with seeking relief for the risk of potential "future harm"); Meenaxi, 2022 USPQ2d 602 at *7 ("Coca-Cola did present statements regarding future plans to market Thums Up and Limca beverages more broadly in the United States, but nebulous future plans for U.S. sales cannot be

¹⁰ Registration would not necessarily prevent competitors from manufacturing or selling competing dolls based on Rapunzel, a character from an 1812 Brothers Grimm fairy tale, because a trademark registration has no direct effect on what types of products are available in the marketplace. Rather, it would at most preclude others from using RAPUNZEL as their own source indicator for such products, subject to defenses such as 15 U.S.C. § 1115(b)(4) (creating a defense to infringement where the "term or device . . . is descriptive of and used fairly and in good faith only to describe the goods and services of such party").

the basis for a Lanham Act claim."). Opposer's allegations of damage are also too remote, because the alleged damage to Opposer depends first on the alleged effect of registration on other commercial doll makers or sellers.

V. Conclusion

Opposer has not met her burden of proving that she is entitled to invoke the statute authorizing opposition proceedings.

Decision: The opposition is dismissed.