No. 21-___

IN THE

Supreme Court of the United States

CITY OF OAKLAND,

Petitioner,

v.

OAKLAND RAIDERS, ET AL.,

Respondents.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

In *Lexmark International, Inc. v. Static Control Components, Inc.*, 572 U.S. 118, 126 (2014), this Court considered a multifactor balancing test of prudential standing that the lower courts had been applying to deny a cause of action to injured plaintiffs under the Lanham Act. The lower courts had purported to draw this multifactor test from this Court's decisions regarding statutory standing under the antitrust laws—particularly *Associated General Contractors of California, Inc. v. California State Council of Carpenters* (*AGC*), 459 U.S. 519 (1983). But in *Lexmark*, this Court unanimously held that the lower courts had misunderstood *AGC*, rejected the multifactor test that they were applying, and clarified that federal courts have no power to deny injured plaintiffs a cause of action merely because "'prudence' dictates." 572 U.S. at 128. Instead, this Court made it very clear that—on a proper understanding of *AGC*—the only appropriate limits on statutory standing for a plaintiff with actual injury were (1) the zone-of-interests test and (2) the requirement that a plaintiff show proximate cause.

In the near decade since *Lexmark*, however, the lower courts have continued applying the very same test this Court invalidated in the Lanham Act context to claims under the antitrust laws—refusing to acknowledge either the reading of *AGC* or the limits on judge-made prudential "standing" rules that *Lexmark* laid out. The question presented is:

May a court deny a plaintiff with an antitrust injury proximately caused by a defendant's antitrust violation a Clayton Act cause of action based on a multifactor, prudential balancing test of "antitrust standing"?

PARTIES TO THE PROCEEDING

Petitioner is the City of Oakland, California.

Respondents are the Oakland Raiders, a California Limited Partnership; Arizona Cardinals Football Club LLC; Atlanta Falcons Football Club, LLC; Baltimore Ravens Limited Partnership; Buccaneers Team LLC; Buffalo Bills, LLC; Chargers Football Company, LLC; the Chicago Bears Football Club, Inc.; Cincinnati Bengals, Inc.; Cleveland Browns Football Company LLC; Dallas Cowboys Football Club, Ltd.; the Detroit Lions, Inc.; Football Northwest LLC; Forty Niners Football Company LLC; Green Bay Packers, Inc.; Houston NFL Holdings, LP; Indianapolis Colts, Inc.; Jacksonville Jaguars, LLC; Kansas City Chiefs Football Club, Inc.; Miami Dolphins, Ltd.; Minnesota Vikings Football, LLC; National Football League; New England Patriots LLC; New Orleans Louisiana Saints, LLC; New York Football Giants, Inc.; New York Jets LLC; Panthers Football, LLC; PDB Sports, Ltd.; Philadelphia Eagles, LLC; Pittsburgh Steelers LLC; Pro-Football, Inc.; the Rams Football Company, LLC; and Tennessee Football, Inc.

RELATED CASES

City of Oakland v. Oakland Raiders, No. 20-16075 (9th Cir. Dec. 2, 2021)

City of Oakland v. Oakland Raiders, No. 3:18-cv-07444-JCS (N.D. Cal. Apr. 30, 2020)

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INTRODUCTION

Although sports leagues create some unique doctrinal issues, from an antitrust perspective, the National Football League (the "NFL" or the "League") is an unambiguous cartel. Under the League's rules, existing competitors (*i.e.*, the current teams) explicitly restrict the supply of new teams to prospective cities by taking votes among themselves on when teams can move or join the league. As with all cartels, this allows them to extract supra-competitive prices—here, in the form of outsized contributions from cities that want to host a team, including increasingly exorbitant amounts of public financing for luxurious stadiums. Petitioner City of Oakland is an obvious victim of that scheme: When it was unable to meet the cartel's demands, the NFL moved the Raiders to Las Vegas. That left Oakland with an empty stadium and millions of dollars in financial losses. So Oakland sued the NFL, alleging violations of the Sherman Act.

That suit was dismissed, however, not because Oakland's claim was insufficient on the merits, but based instead on an outdated doctrine about who can sue for antitrust violations that is inconsistent with this Court's precedents. Below, the Ninth Circuit agreed that Oakland had a viable cartelization claim and had suffered substantial, actual injuries of the kind the antitrust laws exist to prevent. But it nonetheless held that Oakland lacked "antitrust standing" based on a multifactor prudential balancing test, as well as a generalized view that—at least in cartel cases—the plaintiff should be someone who bought a price-fixed good rather than someone who was priced out of the market by the cartel's supply restriction.

Accordingly, without denying that the restricted supply of teams and concomitant higher prices to keep them had caused Oakland's loss of the Raiders, the Ninth Circuit denied Oakland the cause of action Congress created to redress that loss. And in doing so, the court placed particular weight on the existence of other potential plaintiffs, such as Las Vegas, whose injuries were "*more* direct" without denying that Oakland itself suffered an injury proximately caused by the NFL's anticompetitive conduct (and without explaining why Las Vegas, having won the contest for the team, would have any incentive to sue the NFL). *See* Pet. App. 33a (emphasis added).

This approach to denying injured antitrust plaintiffs their day in court is emblematic of a widespread refusal among the courts of appeals to acknowledge this Court's modern approach to statutory standing. Like many other circuits, the Ninth Circuit claims that the prudential balancing test it uses to deny plaintiffs "antitrust standing" is rooted in this Court's decision in *Associated General Contractors of California, Inc. v. California State Council of Carpenters* (*AGC*), 459 U.S. 519, 535 (1983). But the lower courts' reading of *AGC* is nearly a decade out of date. In *Lexmark International, Inc. v. Static Control Components, Inc.*, 572 U.S. 118, 126 (2014), this Court confronted a virtually identical prudential standing test that the lower courts had derived from *AGC* for a textually indistinguishable statute (the Lanham Act). And this Court made quite clear there that: (1) courts are not free to deny congressionally granted causes of action on prudential grounds; (2) any "prudential standing" doctrine must be limited to the conventional requirements of the

zone-of-interests test and proximate cause; and (3) *AGC* was accordingly a case about proximate cause that did *not* sanction giving independent weight to various prudential "factors" in deciding who can sue. Certiorari should be granted because, despite that clarity, the courts of appeals have gone right on applying their multifactor, ad hoc balancing tests for antitrust standing as though *Lexmark* never happened.

This case provides the Court an opportunity to end that persistent disregard for this Court's precedents. Indeed, the Ninth Circuit applied the *exact same* five-factor balancing test this Court explicitly rejected in *Lexmark* to throw Oakland out of court—based largely on the panel majority's belief that it could wait for "*more* direct victims" with damages easier to calculate. Pet. App. 33a (emphasis added). That is precisely the kind of discretionary "standing" decision *Lexmark* rejected, but the circuits will continue to apply unless and until this Court intervenes. This Court should grant certiorari, bring the lower courts' antitrust standing analysis in line with its own precedent, and reverse.

PETITION FOR A WRIT OF CERTIORARI

Petitioner City of Oakland respectfully petitions this Court for a writ of certiorari to review the judgment of the U.S. Court of Appeals for the Ninth Circuit.

OPINIONS BELOW

The Ninth Circuit's opinion (Pet. App. 1a-42a) is reported at 20 F.4th 441. The district court's opinion (Pet. App. 43a-79a) is reported at 445 F. Supp. 3d 587.

JURISDICTION

The court of appeals entered judgment on December 2, 2021. Pet. App. 2a. On February 17, 2022, Justice Kagan extended the deadline for a petition for a writ of certiorari until April 1, 2022. No. 21A438. This Court has jurisdiction under 28 U.S.C. § 1254(1).

RELEVANT STATUTORY PROVISION

15 U.S.C. § 15 provides in relevant part:

§ 15. Suits by persons injured

(a) Amount of recovery; prejudgment interest

Except as provided in subsection (b), any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee. The court may award under this section, pursuant to a motion by such person promptly made, simple interest on actual damages for the period beginning on the date of service of such person's pleading setting forth a claim under the antitrust laws and ending on the date of judgment, or for any shorter period therein, if the court finds that the award of such interest for such period is just in the circumstances. In determining whether an award of interest under this section for any period is just in the circumstances, the court shall consider only—

(1) whether such person or the opposing party, or either party's representative, made motions or

asserted claims or defenses so lacking in merit as to show that such party or representative acted intentionally for delay, or otherwise acted in bad faith;

(2) whether, in the course of the action involved, such person or the opposing party, or either party's representative, violated any applicable rule, statute, or court order providing for sanctions for dilatory behavior or otherwise providing for expeditious proceedings; and

(3) whether such person or the opposing party, or either party's representative, engaged in conduct primarily for the purpose of delaying the litigation or increasing the cost thereof.

* * *

STATEMENT OF THE CASE

I. Legal Background

1. Section 4 of the Clayton Act grants a private right of action to "any person … injured in his business or property by reason of anything forbidden in the antitrust laws." 15 U.S.C. § 15(a). As this Court has frequently confirmed, that language is both intentionally broad and remedial in nature. *See, e.g.*, *Blue Shield of Va. v. McCready*, 457 U.S. 465, 472 (1982). Nonetheless, because of the "unlikelihood that Congress meant to allow all factually injured plaintiffs to recover," this Court has recognized that the cause of action is not unlimited. *Holmes v. Sec. Inv. Prot. Corp.*, 503 U.S. 258, 266 (1992).

As this Court explained in *AGC*, 459 U.S. at 535, the limit lies at those plaintiffs whose injuries are *proximately* caused by an antitrust violation. In *AGC*,

a union brought an antitrust suit against an association of contractors, alleging a conspiracy to pressure businesses not to use union workers. The direct victims of the alleged conspiracy were the businesses that suffered the pressure: *i.e.*, landowners and general contractors, who were allegedly induced "to give some of their business—but not necessarily all of it—to nonunion firms," *id.* at 527-28. The plaintiff, however, was not one of these directly victimized parties, or even a competing unionized firm, but rather the union itself, which claimed that the pressure campaign led to "unspecified injuries in its 'business activities.'" *Id.* at 541. This Court held that this injury was too remote from the violation for the union to have "antitrust standing," an inquiry that it explained paralleled the inquiry into "proximate cause." *Id.* at 535-36 & n.31.

AGC then distinguished the union from plaintiffs in other cases with "direct" injuries, who *would* "have a right to maintain their own treble-damages action." 459 U.S. at 541. And in so doing, it naturally identified certain "factors that circumscribe and guide … whether the law affords a remedy in specific circumstances." *Id.* at 537. For example, *AGC* explained that it was reasonable to deny standing to plaintiffs with indirect injuries because, among other things, the "damages claim is also highly speculative," *id*. at 542; denying relief "is not likely to leave a significant antitrust violation undetected or unremedied" because the direct victims may sue, *ibid*.; and the case may undermine "the strong interest ... in keeping the scope of complex antitrust trials within judicially manageable limits," *id*. at 543. But *AGC* never suggested that judges allow suit by some

plaintiffs and deny claims by others by comparing whose damages were easier to calculate or whose injury was the *most* immediate, particularly if every plaintiff's injury flowed directly from the antitrust violation and not from the injury to some upstream victim.

2. When *AGC* was decided, however, the law was considerably more comfortable with courts creating their own "prudential" standing limitations on congressionally granted causes of action. *See, e.g.*, *Allen v. Wright*, 468 U.S. 737, 751 (1984) (discussing a "prudential component" to standing consisting of "judicially self-imposed limits"). Perhaps for this reason, the discussion of proximate cause in *AGC* quickly congealed in the lower courts into a free-floating, multifactor inquiry into whether a given plaintiff was an "efficient enforcer" of the antitrust laws. The circuits then began applying this ad hoc balancing test even when the plaintiff was a direct victim of the relevant antitrust injury—unlike the indirectly victimized union in *AGC* itself. *See, e.g.*, *Crimpers Promotions Inc. v. Home Box Off., Inc.*, 724 F.2d 290, 296-97 (2d Cir. 1983) (basing five-factor test on *AGC*); *McDonald v. Johnson & Johnson*, 722 F.2d 1370, 1374 (8th Cir. 1983) (deriving six-factor test from *AGC*). Eventually, nearly every court of appeals adopted some variation on this multifactor standard.

From there, the prudential balancing conception of *AGC* steadily metastasized to other areas of the law, including, for example, the Lanham Act (15 U.S.C. § 1051 *et seq.*). *See, e.g.*, *Conte Bros. Auto., Inc. v. Quaker State-Slick 50, Inc.*, 165 F.3d 221, 233 (3d Cir. 1998).

Meanwhile, this Court's precedents became increasingly critical of "prudential standing" tests and emphatic about the "'virtually unflagging'" "'obligation'" of a federal court "to hear and decide a case" within its jurisdiction. *Sprint Commc'ns, Inc. v. Jacobs*, 571 U.S. 69, 77 (2013) (citation omitted). And this led to *Lexmark*, 572 U.S. 118, where this Court unanimously rejected the "prudential" reading of *AGC* in the Lanham Act context.

There, this Court explained that who is "authorized to sue" is not a question of prudence but a question "of statutory interpretation." 572 U.S. at 128. The Lanham Act, like the antitrust laws, authorizes suit by "any person" injured by a violation, which "might suggest that an action is available to anyone who can satisfy the minimum requirements of Article III." *Id*. at 129. But recognizing that courts have long presumed that Congress legislates against "two relevant background principles," namely "zone of interests and proximate causality," this Court extended those limitations to the Lanham Act as well. *See ibid*.; *see also, e.g.*, *Bank of Am. Corp. v. City of Miami*, 137 S. Ct. 1296, 1302, 1305 (2017) (applying zone of interests and proximate cause to the Fair Housing Act); *Holmes*, 503 U.S. at 264-65, 268 (requiring proximate cause under RICO). This Court emphasized, however, that beyond enforcing these two traditional limitations, courts "cannot limit a cause of action that Congress has created merely because 'prudence' dictates." 572 U.S. at 128. And it did so by describing *AGC itself* as limited to those criteria, and explicitly rejecting the lower courts' multifactor balancing version of *AGC*. *See id.* at 126-27, 134-36.

3. *Lexmark* put an end to prudential balancing tests for statutory standing under the Lanham Act. But as this case illustrates, the lower courts have refused to read *Lexmark* to abrogate the use of their preexisting prudential balancing tests for *antitrust* standing. For example, while the Eleventh Circuit has recognized that *Lexmark* "casts doubt on the future of prudential standing doctrines such as antitrust standing," it has continued to treat its pre-*Lexmark* precedents as binding absent further instruction from this Court, viewing *Lexmark*'s implications for antitrust standing as non-binding dicta. *Duty Free Ams., Inc. v. Estee Lauder Cos.*, 797 F.3d 1248, 1273 n.6 (11th Cir. 2015). Other courts are in accord, continuing to use their outdated balancing tests of prudential "antitrust standing" to refuse their "'virtually unflagging'" "'obligation'" "to hear and decide a case" within their jurisdiction. *Sprint*, 571 U.S. at 77 (citation omitted); *see, e.g.*, Pet. App. 20a-21a; *McGarry & McGarry, LLC v. Bankr. Mgmt. Sols., Inc.*, 937 F.3d 1056, 1065 (7th Cir. 2019) (applying six-factor balancing test).

II. Factual And Procedural Background

This case arises from the recent relocation of the Raiders, one of the NFL's thirty-two professional football teams, from Oakland, California to Las Vegas, Nevada. In short, petitioner Oakland alleges that the League's relocation and franchise rules—which are set in concert by existing competitors—violate federal antitrust law's prohibition on cartelization and horizontal price-fixing and that those rules led to Oakland's loss of the Raiders when Oakland could not pay the exorbitant price those rules allow the League to demand.

A. The NFL's Relocation Policies

The NFL is a consortium of professional football teams. *See, e.g.*, *Am. Needle v. NFL*, 560 U.S. 183, 187, 201 (2010) (citing *L.A. Mem'l Coliseum Comm'n v. NFL*, 726 F.2d 1381, 1389 (9th Cir. 1984)). This "combination" has numerous collective policies aimed at the "restraint of trade" in professional football, *see* 15 U.S.C. § 1, including express controls on the supply of franchises. This creates artificial scarcity that forces up the price for a prospective host city to retain or attract a team.

Most notably, the NFL has a league rule—known as the "three-fourths rule"—which forbids franchises from entering or relocating without the approval of three-fourths of the League's existing teams. Pet. App. 9a.[1] Moreover, to receive approval for a relocation, a team must pay a League-determined "relocation fee" split amongst the other teams, which is determined *before* League owners vote on any relocation. This fee—which has recently run in the hundreds of millions of dollars—allows all cartel members to share in the "rents" generated by the tight controls on expansion and relocation, which relocating teams accrue in the form of exorbitant public financing for new stadiums and the like.

Since 2010, nearly every new NFL stadium project has cost more than $1 billion dollars, and nearly every stadium has received at least 40%—and in some cases upwards of 85%—of the cost in public

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[1] This rule has received sustained antitrust criticism, and the Ninth Circuit previously held that a substantially similar rule violated the prohibition against cartelization. *See L.A. Mem'l Coliseum*, 726 F.2d at 1397-98.

funding from the host city or locality. C.A. E.R. 201. Since 2013, the NFL's owners have received more than $1.4 billion in relocation fees as their share of this anticompetitive bonanza, including nearly $400 million from the Raiders' move to Las Vegas. *Id*. at 182-83. Meanwhile, the NFL hasn't added to its thirty-two franchises in twenty years—even as research suggests that fan demand would support up to ten more teams. *Id*. at 191-92, 226-27.

B. The Raiders Leave Oakland For Las Vegas

The Raiders were founded in Oakland in 1960 and played there from 1960-1981 and 1995-2019. C.A. E.R. 215-16. The team was successful in Oakland on and off the field, cultivating one of the League's most loyal fan-bases: "Raider Nation." When the team returned to Oakland in 1995, it signed a preferential lease to play at the Oakland-Alameda County Coliseum. That deal included more than $100 million in financial commitments from the City. Pet. App. 6a-7a.

Oakland—the country's sixth-largest media market—is a prime location for an NFL franchise. Indeed, a recent economic analysis found that, based on its total population, real income, percentage of NFL "super fans," and existing stadia support, Oakland is the most favorable franchise location not currently hosting an NFL team. Pet. App. 10a.

Beginning in December 2008, however, NFL Commissioner Roger Goodell announced that the League wanted the Raiders to receive a new stadium. C.A. E.R. 218. Unsatisfied with Oakland's progress on this demand, in 2012, the League included the Raiders

in discussions—along with the then-San Diego Chargers and then-St. Louis Rams—about relocating to Los Angeles. *Ibid*.

In 2014, the Raiders signed a new lease to continue playing at the Coliseum, and the City offered to donate public land to build a new Raiders stadium. C.A. E.R. 218-19. In 2015, the City alternatively offered to commit substantially towards a half-billion-dollar Coliseum renovation. *Id*. at 219. And in 2016, the City presented the NFL with a fully funded proposal for a new $1.3 billion stadium for the Raiders in Oakland, pledging more than $350 million in public funding and securing $400 million in commitments from a private investment consortium led by former NFL star Ronnie Lott. *Id*. at 221.

Around the same time, however, the League also had several conversations with Raiders owner Mark Davis about relocating the team to Las Vegas. C.A. E.R. 218-20. By 2016, Davis began secret discussions with casino magnate Sheldon Adelson about funding a mega-stadium in Las Vegas. *Id*. at 220.

By early March 2017, the Raiders had requested a relocation vote, and the owners met to set the Raiders' relocation fee. C.A. E.R. 222-23. The NFL's share of the spoils: $378 million. Oakland submitted a final version of its plans for a $1.3 billion state-of-the-art stadium in Oakland, but by the end of the month, the League owners had voted 31-1 to approve the team's relocation to Las Vegas. *Id*. at 222-25.

As an immediate result of the new luxury stadium and Nevada's $750 million public subsidy, the Raiders' enterprise value doubled to more than $3 billion. C.A. E.R. 176, 202. The League shared directly and

indirectly in this windfall. The other owners split the Raiders' $378 million relocation fee, but they also benefitted as the market price for NFL stadiums inched upwards for existing franchises in stadium negotiations, as well as for stadium and team reassessments. Oakland was not so lucky: the City was left owning an empty stadium and has suffered tens of millions of dollars in lost economic value and revenue. *Id*. at 245-50.

C. Proceedings Below

1. In December 2018, Oakland filed suit under the Sherman Act (15 U.S.C. § 1 *et seq.*) and the Clayton Act (15 U.S.C. § 12 *et seq.*), alleging that the Raiders and NFL violated several federal antitrust provisions. As most relevant here, Oakland alleged that the Raiders acted in concert with the other League owners as part of a horizontal price-fixing cartel, collectively leveraging the League's artificial restrictions on the supply and movement of NFL teams to demand supra-competitive prices from cities that currently host or are vying to host football franchises. Pet. App. 8a-9a. The City sought damages under the Clayton Act, as well as equitable disgorgement, declaratory relief, and other appropriate relief. *Id.* at 11a-12a. But the district court dismissed Oakland's claims, finding that it had not adequately shown antitrust standing for its cartelization claim. *Id.* at 56a-77a.

2. The Ninth Circuit affirmed. The court first found Oakland's claims sufficient to establish standing under Article III of the Constitution, concluding that "[t]his is not a case in which the plaintiff's theory of standing is either 'counterintuitive' or premised on "a 'highly attenuated

chain of possibilities.'" Pet. App. 15a (citation omitted). The court explained that Oakland "credibly allege[d] that Oakland is a prime location for an NFL team, that there would be more NFL teams in a market driven by consumer demand, and that—in a competitive market—teams like the Raiders would not be able to use a threat of relocation to demand supracompetitive concessions from host cities." *Id.* at 14a. Noting the special importance of the fact that "Oakland is an incumbent host city," the court explained that Oakland's pleading sufficiently established a "substantial probability" that the Raiders would have stayed but for the NFL's unlawful cartelization, and that "in a competitive market, the Raiders would have stayed in Oakland or Oakland would have landed another team." *Id.* at 14a-15a.

Nonetheless, the panel majority dismissed Oakland's horizontal conspiracy claims for lack of antitrust "standing." Pet. App. 20a. The majority first explained that, to determine antitrust standing, the Ninth Circuit balances a set of factors enunciated in *American Ad Management, Inc. v. General Telephone Co. of California*, 190 F.3d 1051 (9th Cir. 1999). Pet. App. 20a-21a. In that pre-*Lexmark* case, the Ninth Circuit interpreted *AGC* to establish five factors relevant to antitrust standing: "(1) the nature of the plaintiff's alleged injury; that is, whether it was the type the antitrust laws were intended to forestall; (2) the directness of the injury; (3) the speculative measure of the harm; (4) the risk of duplicative recovery; and (5) the complexity in apportioning damages." *Am. Ad Mgmt.*, 190 F.3d at 1054.

The panel explained that the first factor—often called "antitrust injury"—is "mandatory," no other

factor is independently dispositive, and that, "[i]nstead, we balance the factors." Pet. App. 22a (citing *Am. Ad. Mgmt.*, 190 F.3d at 1055) (quotation marks omitted).

The panel then acknowledged that the City had suffered an "antitrust injury" because "in a competitive market with more teams, the Raiders would not have had the leverage to demand supracompetitive concessions from the City," and "but for Defendants['] restrictions on output, the Raiders would have stayed in Oakland, or another NFL team would have located there." Pet. App. 23a-24a. The panel further concluded that the League "reduced output and increased prices[,] precisely the kinds of harms to competition that the antitrust laws were intended to prevent." *Id*. at 25a. The court thus found that Oakland's injuries were caused by the NFL's price-fixing and fell within the relevant zone of interests. *See Lexmark*, 572 U.S. at 135.

Nonetheless, the panel decided that, on balance, Oakland lacked antitrust standing "in light of the indirectness of the City's injuries, the existence of more direct victims, the speculative measure of harm, and the difficulty in calculating damages." Pet. App. 33a. For each factor, the panel placed considerable weight on the fact that Oakland was a "nonpurchaser." Citing a pre-*AGC* Tenth Circuit case, the panel opined that the injuries of those who purchase price-fixed items at inflated prices are "*more* direct and *more* proximately caused" than the injuries of those priced out of the market altogether. *Id.* at 27a (emphasis added).

Applying this principle to Oakland's claims, the panel concluded that the City's injuries were "*less*

direct than those of actual purchasers, such as … Las Vegas" because it was less certain whether removing the NFL's cartelization rules would redress Oakland's injuries. Pet. App. 28a (emphasis added). The court questioned, for example, "whether there are additional potential owners willing to establish new teams if the NFL allowed them to do so." *Id*. at 29a (citation omitted). The panel acknowledged that such proof ordinarily is not required of antitrust plaintiffs. *Id*. at 30a-31a (citing *United States v. Microsoft Corp.*, 253 F.3d 34, 79 (D.C. Cir. 2001) (per curiam)). But the court imposed that obligation on Oakland here because "[n]onpurchasers who are priced out of the market … present a special problem" requiring a greater "level of certainty" about the dynamics of the counterfactual competitive market. *Id*. at 31a. Applying that stricter standard, the panel found Oakland's injuries "indirect" and "speculative" because the City could not show "with sufficient certainty that it would have purchased the product … and under what terms, in a hypothetical competitive market." *Id*. at 33a.

The panel also relied on its view that the City's "damages are highly speculative and would be exceedingly difficult to calculate." Pet. App. 32a (not addressing Oakland's separate claims for disgorgement, declaratory, and other equitable relief).

Taking all of this into account, the court deemed Oakland an "unsuitable" plaintiff to challenge the NFL's relocation policies and dismissed its claims. Pet. App. 33a (citation omitted).

Judge Bumatay concurred. Pet. App. 34a-42a. He would have held that Oakland failed to satisfy Article III standing. *Id.* at 41a. At the same time, however,

he found the majority's reliance on Oakland's status as a nonpurchaser "suspect," given that "Oakland, the Raiders, and the NFL have a long course of dealing." *Id*. at 41a n.1. He further noted that the majority decision "further complicate[d] an already complicated area of law." *Ibid.*

REASONS FOR GRANTING THE PETITION

I. The Circuits' Treatment Of Antitrust Standing Is Inconsistent With This Court's Decision In *Lexmark*.

For several decades, the lower courts have been erecting prudential barriers to antitrust suits based on a misunderstanding of this Court's decision in *AGC*. Although this Court corrected that misimpression in 2014, the courts of appeals have thus far steadfastly refused to reconsider their precedents, either ignoring *Lexmark* altogether or treating its unambiguous instruction as non-binding dicta. At this point, only this Court can remedy the situation, and it should take this opportunity to do so.

A. *Lexmark* Rejected An "Open-Ended Balancing Test" That Goes Beyond Zone-of-Interests And Proximate Cause.

In *Lexmark*, this Court rejected the prudential "open-ended balancing test[]" courts had derived from *AGC* in the context of the Lanham Act. 572 U.S. at 136. That test "identified five relevant considerations" that are materially identical to those the Ninth Circuit applied in this case:

(1) The nature of the plaintiff's alleged injury: Is the injury of a type that Congress sought to redress in providing a

> private remedy for violations of the [Lanham Act]?
>
> (2) The directness or indirectness of the asserted injury.
>
> (3) The proximity or remoteness of the party to the alleged injurious conduct.
>
> (4) The speculativeness of the damages claim.
>
> (5) The risk of duplicative damages or complexity in apportioning damages.

Id. at 135 (citation omitted); *compare* Pet. App. 21a.

The Court began by rejecting wholesale the notion that statutory standing is a prudential question. As Justice Scalia put it for the unanimous Court: Who is "authorized to sue" is not a question of prudence but a question "of statutory interpretation." 572 U.S. at 128. Consequently, "[w]e do not ask whether in our judgment Congress *should* have authorized [the plaintiff's] suit, but whether Congress in fact did so." *Ibid*. The point was founded in separation-of-powers concerns: "Just as a court cannot apply its independent policy judgment to recognize a cause of action that Congress has denied, it cannot limit a cause of action that Congress has created merely because 'prudence' dictates." *Ibid.* (internal citation omitted).

Next, this Court held that when a statute broadly authorizes suit by "any person" injured by a violation—as the Lanham and Clayton Acts do—the only appropriate limitations on standing beyond Article III are two "background principles" against which Congress presumptively legislates: the

requirements that the plaintiff's injuries fall within the statute's zone of interests and be proximately caused by the defendant's illegal conduct. 572 U.S. at 129.

The Court then explained that the five-factor balancing tests applied by the lower courts in *Lexmark* (and by the Ninth Circuit here) were inappropriate in several respects. First, although some of the "factors" could be viewed as *related* to the zone-of-interest test or proximate cause, it was "not correct to treat those requirements, which must be met in every case, as mere factors to be weighed in a balance." 572 U.S. at 135. Meanwhile, other "factors"—such as the "speculativeness of the damages claim" and the "complexity in apportioning damages"—wrongly elevated the "'motivating principle' behind the proximate-cause requirement" into an "*independent* basis for denying standing where it is adequately alleged that a defendant's conduct has proximately injured an interest of the plaintiff's that the statute protects." *Ibid*. In other words, this Court made clear that the lower courts had erroneously transformed what *AGC* gave as *reasons* why a proximate-cause limitation is prudent into prudential standing *requirements* in and of themselves.

Then, observing that "experience has shown" that "open-ended balancing tests[] can yield unpredictable and at times arbitrary results," 572 U.S. at 136, this Court held "instead that a direct application of the zone-of-interests test and the proximate-cause requirement supplies the relevant limits on who may sue." *Id*. at 134. It accordingly held that "where it is adequately alleged that a defendant's conduct has proximately injured an interest of the plaintiff's that

the statute protects," a court cannot "decline to adjudicate" a claim "on grounds that are prudential." *Id.* at 125-26, 135.

B. The Circuits Are Ignoring This Court's Decision In *Lexmark*.

Lexmark's language and reasoning are pellucid, and it thus should have been a path-marking decision for the lower courts in assessing antitrust standing. Although *Lexmark* was a Lanham Act case, it necessarily rejected balancing tests for prudential standing in general—and the specific five-factor test the Ninth Circuit applies in particular—for antitrust cases as well. The Court carefully explained that the test it was rejecting had been "derived from *Associated General Contractors*," 572 U.S. at 134, and it thus took pains to explain that the Lanham Act cases had misconstrued *AGC* as adopting a "prudential standing" test for antitrust cases, rather than treating it as a case about proximate cause. *Id*. at 126. In other cases, this Court has also made clear that *Lexmark*'s teachings were not limited to the Lanham Act but, instead, mark the path to the proper interpretation of all federal causes of action. *See, e.g.*, *Bank of Am.*, 137 S. Ct. at 1302 (statutory standing under the Fair Housing Act requires only proof that the plaintiff "satisfied the FHA's zone-of-interests and proximate-cause requirements").

Nonetheless, the Second, Third, Fifth, Seventh, Ninth, Eleventh, and D.C. Circuits continue to apply antitrust standing tests that treat zone-of-interest and proximate cause as mere factors to be balanced against other prudential considerations, such as "the potential for duplicative recovery or complex

apportionment of damages." *Hanover 3201 Realty, LLC v. Vill. Supermarkets, Inc.*, 806 F.3d 162, 171 (3d Cir. 2015); *accord* Pet. App. 20a-33a; *Gelboim v. Bank of Am. Corp.*, 823 F.3d 759, 772 (2d Cir. 2016); *McGarry*, 937 F.3d at 1064-65; *Duty Free Ams.*, 797 F.3d at 1273-74; *Sanger Ins. Agency v. HUB Int'l, Ltd.*, 802 F.3d 732, 737 (5th Cir. 2015); *Klein v. Am. Land Title Ass'n*, 560 F. App'x 1, 1-2 (D.C. Cir. 2015).

For example, the Second Circuit recently held that, when a cartel of banks manipulated a well-known financial benchmark (called LIBOR), plaintiffs who held LIBOR-denominated bonds would *not* have antitrust standing to sue those banks based on the foreseeable (and in fact inevitable) injury they suffered when the banks suppressed those bonds' interest rates. *Schwab Short-Term Bond Mkt. Fund v. Lloyds Banking Grp. PLC*, 22 F.4th 103, 114-16 (2d Cir. 2021). Instead, the Second Circuit held that plaintiffs could sue defendants only if they bought their bonds from one of the cartel members, not if they bought them from someone else. This, even though the Second Circuit had *itself* previously said that these two classes of plaintiffs would be injured to the exact same extent through the exact same causal mechanism. *See Gelboim*, 823 F.3d at 772-77. It is impossible to take *Lexmark* seriously and yet hold that two plaintiffs injured in the same way by the same causal mechanism can have different statutory standing.

Instead, the Second Circuit was plainly motivated by the view that plaintiffs who dealt directly with the defendants were "better" plaintiffs and that extending a cause of action to all plaintiffs injured in the same causal manner would lead to excessive liability—a

concern utterly absent from the statutory text. *Schwab*, 22 F.4th at 117. Such holdings would not be possible if the lower courts applied *Lexmark* according to its terms.

Likewise, the Third, Seventh, and Eleventh Circuits have, after *Lexmark*, continued to include considerations related to calculating damages as factors in their balancing tests for standing. *See Hanover 3201 Realty*, 806 F.3d at 171; *McGarry*, 937 F.3d at 1064-66; *Duty Free Ams.*, 797 F.3d at 1273-74. Yet *Lexmark* explicitly says not to give such a consideration any independent weight. 572 U.S. at 135. The lower courts are simply refusing to take this Court's precedent seriously.

Indeed, these circuits consider the wrong "factors" because they are asking the wrong question. Rather than abiding by *Lexmark*'s direction to determine only whether the plaintiff has satisfied the zone-of-interest and proximate-cause tests, the lower courts are instead asking whether each plaintiff before them is a "proper" or "efficient" enforcer of the antitrust laws. For example, the Second and Eleventh Circuits maintain that courts are "obliged" to consider whether a plaintiff is "an efficient enforcer of the antitrust laws," even when the plaintiff can demonstrate an "antitrust injury" as well as the defendant's "causal responsibility." *Duty Free Ams.*, 797 F.3d at 1273; *accord Gelboim*, 823 F.3d at 772-80 (finding that the plaintiffs had sufficiently alleged an "injury of the type the antitrust laws were intended to prevent and that flows from that which makes defendants' acts unlawful," but remanding for the district court to independently consider whether the plaintiff was an "efficient enforcer" or "a proper party" to bring an

antitrust claim). In fact, the Second Circuit has nicknamed this set of considerations the "efficient enforcer" factors, demonstrating its wholesale replacement of the only two factors *Lexmark* allows with that court's own judicially crafted intuitions about which plaintiffs are "efficient" enough to be allowed through the courthouse door. *See, e.g.*, *Gelboim*, 823 F.3d at 772.

Recent Seventh Circuit precedent is also illustrative in this regard. In *McGarry*, for instance, the Seventh Circuit found that regardless of whether the plaintiff had sufficiently alleged a "causal connection" and that its "injury was of a type that Congress sought to redress with the antitrust laws," the plaintiff "must also demonstrate that it can 'efficiently vindicate the purposes of the antitrust laws.'" 937 F.3d at 1064-66 (citation omitted).

Similarly, the Fifth Circuit weighs whether the plaintiff has suffered an "antitrust injury" that was "proximately caused by the defendant's conduct" against "proper plaintiff status, which assures that other parties are not *better* situated to bring suit." *Sanger*, 802 F.3d at 737 (emphasis added). And the D.C. Circuit weighs the "directness" of a plaintiff's injury against "the existence of *more* direct victims." *Klein*, 560 F. App'x at 1-2 (emphasis added). Both of these tests are, again, explicitly off-kilter: A plaintiff with a proximately caused antitrust injury is *necessarily* proper under *Lexmark*, and "the existence of *more* direct victims" says nothing at all about whether *this* plaintiff has an antitrust injury that was proximately caused by the relevant violation.

As the decision below well demonstrates, the Ninth Circuit has gone astray in the exact same ways.

It did not deny that defendants had proximately caused Oakland's injury, but instead found that other potential plaintiffs (like Las Vegas) had suffered injuries that were "*more* direct and *more* proximately caused" than Oakland's. Pet. App. 27a (emphasis added; citation omitted).

The Ninth Circuit further placed improper weight on its conclusion that Oakland's damages claim was "speculative," because it "would be exceedingly difficult to calculate." Pet. App. 32a. This again recreated an error *Lexmark* explicitly identified. *Lexmark* had faulted lower courts for emphasizing problems in calculating damages in their balancing tests in part because a "standing" bar also forecloses claims for equitable relief. *See* 572 U.S. at 135 ("Even when a plaintiff [alleging trademark infringement] cannot quantify its losses with sufficient certainty to recover damages, it may still be entitled to injunctive relief … or disgorgement[.]"). And yet, here, the Ninth Circuit ignored that Oakland was also seeking equitable and declaratory relief, *see* C.A. E.R. 255-56, while elevating the calculation of damages into an independent "factor" to be weighed against that court's finding that Oakland suffered a direct injury of the kind the antitrust laws are meant to prevent. *See* Pet. App. 32a.

Finally, the court of appeals engaged in exactly the kind of open-ended balancing test that *Lexmark* said experience had proven too arbitrary and unpredictable. In fact, the Ninth Circuit applied a virtually identical test to the one *Lexmark* criticized. It considered the exact same factors, explicitly referred to its analysis as "balanc[ing]," and noted that future panels might consider other "factors" as well.

Pet. App. 21a-22a & n.10 (citation omitted). This is, of course, nothing more than the ad hoc judicial balancing of prudential factors that this Court condemned in *Lexmark*.

II. Absent This Court's Intervention, There Is No Prospect That The Circuits Will Abandon Prudential Balancing And Conform To *Lexmark*.

In the decade since *Lexmark*, no circuit has revised its precedents. This is not for lack of opportunity. In several cases, plaintiffs have specifically requested that the circuits conform their analysis to the limited inquiry *Lexmark* requires.[2] Yet in case after case, those courts have either expressly rejected these arguments or simply ignored them in favor of their own pre-*Lexmark* precedents.

The most striking example is the Eleventh Circuit, which has explicitly recognized the tension between its precedents and *Lexmark* and yet declined to follow this Court's approach. While the Eleventh Circuit recognized that *Lexmark* "casts doubt on the future of prudential standing doctrines such as antitrust standing," it reasoned that *Lexmark* was not closely connected enough to *antitrust* standing (as opposed to *Lanham Act* standing) to call for reconsidering the circuit's own precedents. *Duty Free Ams.*, 797 F.3d at 1273 n.6. That reasoning makes little sense: The relevant text in the Lanham and

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[2] *See, e.g.*, Appellant's Brief at 29-30, *Hanover 3201 Realty*, 806 F.3d 162 (No. 14-4183); Brief for 18 Professors of Antitrust Law as Amici Curiae Supporting Appellants at 3-5, *In re Am. Express Anti-Steering Rules Antitrust Litig.*, 19 F.4th 127 (2d Cir. 2021) (No. 20-1766).

Clayton Acts is indistinguishable, and *Lexmark* explicitly recharacterized the *antitrust* standing analysis in *AGC* in reaching its holding. But that only demonstrates more clearly that the courts of appeals are set in their approach, and that only this Court's intervention can bring them into compliance with *Lexmark*'s clear command. And the same was true below, where the Ninth Circuit panel was precluded from revisiting its balancing test by its prior precedent. *See* Pet. App. 20a-22a (citing *Am. Ad Mgmt.*, 190 F.3d at 1055).

III. This Case Is An Excellent Vehicle To Address The Question Presented.

This case presents an ideal vehicle for this Court to make clear that *Lexmark* applies to antitrust standing no less than any other context. That is so because Oakland's claims clearly satisfy the two statutory requirements that *Lexmark* made exclusive: the zone-of-interest test and proximate cause. Nonetheless, the Ninth Circuit withheld standing based entirely on its ad hoc judicial balancing of the prudential factors *Lexmark* rejected, in an analysis structured to answer the fundamentally different question of whether Oakland was the best or most efficient enforcer of the antitrust laws.

1. As this Court explained in *Lexmark*, "[p]roximate-cause analysis is controlled by the nature of the statutory cause of action," and asks "whether the harm alleged has a sufficiently close connection to the conduct the statute prohibits." 572 U.S. at 133; *see also Bank of Am.*, 137 S. Ct. at 1306 (noting that proximate cause requires "some direct relation between the injury asserted and the injurious conduct

alleged") (citation omitted). The proximate-cause requirement thus "bars suits for alleged harm that are 'too remote' from the defendant's unlawful conduct," particularly if the harm alleged is purely derivative of "misfortunes visited upon a third person." *Lexmark*, 572 U.S. at 133 (citation omitted).

Applying the basic axioms of antitrust law and economics, Oakland's injuries plainly follow directly from the NFL's illegal cartelization. The League is a combination of competitors that uses its three-fourths rule to expressly restrain the supply of teams, forcing cities to meet supra-competitive demands to maintain or secure a local franchise. When Oakland could not meet those demands, the NFL collectively decided to move the Raiders to Las Vegas and refused to deal with Oakland. Losing any chance at an NFL team caused the City clear and direct economic harm, and that harm is not at all speculative given that Oakland already *had* a team, had made significant investments to support that team, and derived significant economic benefits from the team's presence, which were plainly lost when the Raiders left the Coliseum empty. This kind of concrete and identifiable harm tied directly to a defendant's anticompetitive supply restriction is the very archetype of an antitrust injury proximately caused by a defendant's antitrust violation.

Oakland's claims do not rely on the actions of third parties or intervening actors or arise downstream from the injuries of others—the classic question asked in the proximate-cause inquiry. Here, Oakland dealt directly with the League and its member Clubs, including the Raiders, and Oakland's injuries flow from the loss of an existing team that resided in the City for decades pursuant to bilateral

agreements between the NFL and the City. The City also participated directly in the rigged NFL process to retain the Raiders, making it very clear that the proximate cause of the City's loss was the artificially high-priced and supply-restricted nature of that process and not any intervening failure of Oakland itself to participate or to do what would be necessary to retain a team in a competitive market. These facts add up, quite obviously, to the minimum requirement of proximate cause—particularly at the *pleading* stage.

2. The Ninth Circuit's decision helpfully frames these basic points. First, it explicitly concluded that Oakland had established antitrust injury—effectively, a finding that Oakland's claim fell with the antitrust laws' zone of interests. Accordingly, the only remaining question after *Lexmark* should have been whether Oakland's injuries were proximately caused by the relevant antitrust violations. And, here, the court never disputed that they were: It explicitly concluded that Oakland's injuries were *not* too speculative to satisfy the Article III standard and acknowledged that those non-speculative injuries could be traced to the anticompetitive League rules at issue, Pet. App. 14a-15a. In any context outside of antitrust, this would have created a question of proximate cause that at least sufficed to get past a motion to dismiss.

In a vivid demonstration of why *Lexmark* matters, however, the Ninth Circuit rejected Oakland's claim by indulging in a form of analysis that purports to assess "antitrust standing" while having little to do with proximate cause as such. The court asked whether the injuries suffered by "direct" purchasers of

the cartelized good (here, Las Vegas) were somehow "*more* direct and *more* proximately caused" by the relevant price-fixing. Pet. App. 27a (emphasis added). This sounds like the kind of consideration that matters to antitrust law because of the familiar rule from *Hanover Shoe* and *Illinois Brick* that a defendant cannot defend a price-fixing claim by arguing that overcharges have been "passed on" to downstream purchasers and that the claim for money damages is thus concentrated entirely in the *first* purchaser. *See Ill. Brick Co. v. Illinois*, 431 U.S. 720 (1977); *Hanover Shoe, Inc. v. United Shoe Mach. Corp*., 392 U.S. 481 (1968). But that rule is specific to money damages and has *no* effect on antitrust standing generally (including where, as here, injunctive or equitable relief is at stake), *see Loeb Indus., Inc. v. Sumitomo Corp.*, 306 F.3d 469, 480-84 (7th Cir. 2002), and is utterly inapplicable where (as here) there is no upstream-downstream relationship between different direct victims of the anticompetitive scheme, *see, e.g.*, *Apple Inc. v. Pepper*, 139 S. Ct. 1514, 1524-25 (2019).

In reality, the relative injury suffered by other, purely hypothetical plaintiffs has no analytical relationship to the question of whether *Oakland's* injuries were proximately caused by the relevant unlawful conduct. That is just as true in antitrust as it is in any other context. When the driver of a semi-trailer overturns his truck on the highway, he may be liable for damages caused to other drivers on the roadway, to the owner of the rig, to the shipper of his lost cargo, and—if the harm is foreseeable enough—for consequential business losses to the intended recipient of that cargo. Critically, however, the causal connection of each claim to the driver's negligence is

evaluated *on its own*, and it is plainly irrelevant whether that connection is stronger for the shipper (who had a direct contractual connection with the driver) or the other motorists (who just happened to be in the wrong place when they were struck directly by the overturned truck). Put otherwise, the proximate-cause inquiry has never created or turned upon a "best" or "better" plaintiff rule. And certainly, after *Lexmark*, there is no justification for imposing that judge-made prudential inquiry in the realm of antitrust alone.

There is a difference, of course, when *derivative* injuries are at stake. For example, a football team whose season collapsed when its star quarterback was injured in the highway accident described above would have a much weaker claim of proximate cause than would the quarterback himself because the former's injury follows entirely from the latter's, and the law of proximate cause tends not to go beyond the "first step" in that circumstance. *See AGC*, 459 U.S. at 534. But as the decision below clearly demonstrates, courts applying the *AGC* "factors" to decide questions of antitrust standing routinely lose sight of this critical distinction and suppose that the existence of one injured victim with a good claim should somehow eliminate the claim of another victim with an entirely different and non-derivative injury of her own.

As noted above, this aspect of the Ninth Circuit's decision closely parallels the error that other courts of appeals have made in other recent, high-profile antitrust cases. Take, for example, the Second Circuit's holding that owners of LIBOR-denominated bonds cannot sue the banks who inevitably injured them by suppressing LIBOR unless they purchased

their instruments directly from the defendant banks because the latter class of plaintiffs would be "better" or "more direct" victims. *See supra* pp. 21-22. Like the Ninth Circuit's inquiry in this case, this question matters only if the antitrust laws ask who the "best" plaintiff is to litigate a cause of action, and not who was "injured in his business or property" by reason of a violation. 15 U.S.C. § 15.

The Ninth Circuit's decision also points up the errors and intolerable consequences caused by this kind of prudential, ad hoc judicial plaintiff picking. Note, for example, that even assuming it is right to ask the Ninth Circuit's extra-statutory "best enforcer" question, Las Vegas is almost certainly *not* a better enforcer of the antitrust laws than Oakland in this case because it has little incentive to attack a system that has just rewarded it with an NFL franchise. Accordingly, a rule that relies *only* on the successful buyers of teams to sue the NFL for restricting the supply of those teams virtually guarantees a circumstance in which *no* willing plaintiff can or will ever sue to redress the NFL's unlawful cartelization.

3. The Ninth Circuit's decision below also parallels *Lexmark*—and represents a good vehicle for the question presented—by isolating the kind of inappropriate sub-rules that often emerge from courts relying inappropriately on prudential standing "factors" and balancing tests to bar some plaintiffs from court in favor of others. In *Lexmark*, this Court granted review in part because some courts of appeals had settled on a sub-rule that only competitors (and not customers) could bring suit under the Lanham Act, and this Court ultimately rejected any such rule in favor of a "direct application of the zone-of-interests

test and the proximate-cause requirement." *See* 527 U.S. at 134. Similarly, the panel here held that Las Vegas was a superior plaintiff based on a sub-rule that "purchasers" should be generally preferred to "nonpurchasers" as antitrust plaintiffs in cartelization cases. Pet. App. 30a-31a, 33a. That rule may or may not make sense in certain cases, but the whole point of *Lexmark* is that such rules can never supplant a direct application of the proximate-cause requirement. And as Judge Bumatay explained, it makes particularly little sense in a case like this one, where the NFL, Oakland, and the Raiders have a longstanding relationship, and Oakland is only a "nonpurchaser" because the very supply restriction at issue excluded it from the market.[3] *See id.* at 41a n.1 (Bumatay, J., concurring).

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[3] In this regard, it is critical to note that the Ninth Circuit's principal rationale for rejecting Oakland's claim here can be broadly applied to any antitrust plaintiff at all. The court's core premise was that Oakland's "contention that, in the absence of Defendants' challenged practices, it would have retained the Raiders (or acquired another team)" was "too speculative to establish antitrust standing." Pet. App. 28a. But it is always impossible to know for certain how much of a product a purchaser would have been able to acquire, and at what price, in the counterfactual world freed from defendants' cartelization. Any plaintiff complaining about cartel pricing must necessarily show that, absent the anticompetitive conduct, cartel members or other producers would have ramped up supply and driven prices lower; even Las Vegas's hypothetical claim would rely on a showing that more teams would have been available at lower prices absent the same challenged restraints. Antitrust law generally acknowledges that this analysis is difficult so as to prevent defendants from using the complexities caused by their own violations to escape liability. *See, e.g.*, *Microsoft Corp*., 253 F.3d

Nor is there any reason to substitute rote prudential categories like "purchaser" and "nonpurchaser" for a direct application of the zone-of-interests and proximate-cause requirements when the latter are far more sensitive to the relevant facts of individual cases. The Ninth Circuit's basic concern about "nonpurchasers" was that a party that does not ultimately consummate a transaction might misrepresent its willingness to purchase the relevant product in a conjectural competitive market, or that it could be difficult to objectively ascertain the price such a party would have paid had it become a purchaser given at a lower, competitive price. But while those worries might perhaps be valid in other contexts, they are plainly inappropriate with respect to Oakland's claims. As the Tenth Circuit has stressed, any general presumption against "nonpurchaser" standing would be inapplicable vis-à-vis plaintiffs, like Oakland, with "a regular course of dealing with the conspirators." *Montreal Trading Ltd. v. Amax Inc.*, 661 F.2d 864, 868 (10th Cir. 1981). Oakland hosted the Raiders for nearly twenty-five years immediately prior to the team's exit for Las Vegas. The fact that Oakland was willing to retain the Raiders—and the terms on which it would have done so—are thus far from hypothetical here.

4. The Ninth Circuit's other concerns—namely, that Oakland's "'*damages* are only speculative'" and

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at 79 (citing 3 Phillip E. Areeda & Herbert Hovenkamp, *Antitrust Law* ¶ 651c, at 78 (1996)) (noting that courts generally do not require plaintiffs to "reconstruct the hypothetical marketplace absent a defendant's anticompetitive conduct," and instead "infer causation" from anticompetitive conduct).

would be "exceedingly difficult to *calculate*"—are similarly judge-invented and irreconcilable with *Lexmark*. Pet. App. 32a (emphasis added; citation omitted). The Clayton Act grants a cause of action for those with the relevant "*injury*," not those with "money damages." And (as in *Lexmark*) Oakland sued here not just for money damages but also for equitable and declaratory relief. As *Lexmark* clearly instructed, judicial concern about the potential administrability of a hypothetical damages award is entirely prudential at this stage in litigation and cannot form an "*independent* basis for denying standing" where proximate cause is satisfied. 572 U.S. at 135. And that rule is critical in part because, "[e]ven when a plaintiff cannot … recover damages, it may still be entitled to injunctive relief … or disgorgement of the defendant's ill-gotten gains." *Id.* at 135-36. This case presents exactly that circumstance, and yet the confusion in its prudential-standing doctrine led the Ninth Circuit to *fully* terminate Oakland's claim based on concerns applicable only to its claims for money damages.

IV. The Proper Scope Of Antitrust Standing Doctrine Is An Important And Recurring Issue.

1. Clarifying the appropriate scope of antitrust standing doctrine is an important and recurring issue which affects a significant number of cases, as well as the broader effectiveness of federal antitrust law. By petitioner's count, since *Lexmark* was decided, the lower federal courts have decided nearly 200 published decisions determining whether plaintiffs have antitrust standing and either citing, or applying,

prudential considerations in tension with *Lexmark*'s basic axiom that proximate cause is determinative.

2. As this case demonstrates, ad hoc prudential limitations on antitrust standing and a judge-driven inquiry into the "best" or most "efficient" antitrust enforcer are not only inconsistent with the text of the Clayton Act but are also un-administrable and undermine the basic function of antitrust law. Even if some perfect antitrust plaintiff did exist, that party may not always have the necessary incentive to sue. And so courts that take it upon themselves to deprive some plaintiffs of Congress's cause of action may not only leave those injured plaintiffs without a remedy, but leave the antitrust laws unenforced altogether. For example, the Ninth Circuit's rejection of Oakland's antitrust claims here in favor of a hypothetical claim by a "purchaser" like Las Vegas that has no incentive to sue will have the practical effect of conferring upon the NFL a form of de facto antitrust immunity for its anticompetitive franchise and relocation practices. And the losers from that judge-made and ill-conferred immunity are not only empty host cities like Oakland, but also the hundreds of millions of NFL fans who pay higher prices to watch fewer football teams than a more competitive market would produce.

3. Moreover, as this Court has long recognized, the specter of judges dismissing disfavored cases for prudential reasons engenders significant separation of powers concerns. A "federal court's obligation to hear and decide cases within its jurisdiction is virtually unflagging." *Lexmark*, 572 U.S. at 126 (quoting *Sprint*, 571 U.S. at 77) (cleaned up). Our Constitution allocates to the legislature the power to grant, and determine the scope of, private causes of action under

federal law; judges "cannot limit a cause of action that Congress has created merely because 'prudence dictates.'" *Id.* at 128. Courts have "no more right to decline the exercise of jurisdiction which is given, than to usurp that which is not given"; to do so "would be treason to the constitution." *Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264, 404 (1821). Nowhere is that concern more omnipresent than when courts balance murky and indefinite prudential factors to deny parties access to legislatively conferred causes of action.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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March 10, 2022

APPENDIX

APPENDIX A

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 20-16075

D.C. No. 3:18-cv-07444-JCS

CITY OF OAKLAND,
Plaintiff-Appellant,

v.

OAKLAND RAIDERS, a California Limited Partnership; ARIZONA CARDINALS FOOTBALL CLUB, LLC; ATLANTA FALCONS FOOTBALL CLUB LLC; BALTIMORE RAVENS, LP; BUFFALO BILLS, LLC; PANTHERS FOOTBALL, LLC; CHICAGO BEARS FOOTBALL CLUB, INC.; CINCINNATI BENGALS, INC.; CLEVELAND BROWNS FOOTBALL COMPANY, LLC; DALLAS COWBOYS FOOTBALL CLUB, LTD.; PDB SPORTS LTD.; DETROIT LIONS, INC.; GREEN BAY PACKERS, INC.; HOUSTON NFL HOLDINGS, LP; INDIANAPOLIS COLTS, INC.; JACKSONVILLE JAGUARS LLC; KANSAS CITY CHIEFS FOOTBALL CLUB, INC.; CHARGERS FOOTBALL COMPANY LLC; THE RAMS FOOTBALL COMPANY, LLC; MIAMI DOLPHINS, LTD.; MINNESOTA VIKINGS FOOTBALL LLC; NEW YORK FOOTBALL GIANTS, INC.; NEW YORK JETS, LLC; PHILADELPHIA EAGLES LLC; PITTSBURGH STEELERS LLC; FORTY NINERS FOOTBALL COMPANY LLC; FOOTBALL NORTHWEST LLC; BUCCANEERS TEAM LLC;

TENNESSEE FOOTBALL, INC.; PRO-FOOTBALL, INC.; NATIONAL FOOTBALL LEAGUE; NEW ENGLAND PATRIOTS LLC; NEW ORLEANS LOUISIANA SAINTS, LLC,
Defendants-Appellees

Appeal from the United States District Court for the Northern District of California
Joseph C. Spero, Magistrate Judge, Presiding

Argued and Submitted June 14, 2021
San Francisco, California

Filed December 2. 2021

Before: A. Wallace Tashima and Patrick J. Bumatay, Circuit Judges, and Douglas L. Rayes,[*] District Judge.

Opinion by Judge A. Wallace Tashima;
Concurrence by Judge Bumatay

SUMMARY[**]

Antitrust

The panel affirmed the district court's dismissal, for failure to state a claim, of an antitrust action

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[*] The Honorable Douglas L. Rayes, United States District Judge for the District of Arizona, sitting by designation.

[**] This summary constitutes no part of the opinion of the court. It has been prepared by court staff for the convenience of the reader.

brought by the City of Oakland against the National Football League and its member teams.

The City alleged that defendants created artificial scarcity in their product of NFL teams, and then used that scarcity to demand supra-competitive prices from host cities. The City alleged that when it could not pay those prices, defendants punished it by allowing the Raiders to move to Las Vegas.

The panel held that the City had Article III standing because it plausibly alleged that, but for defendants' conduct, it would have retained the Raiders, and thus made the required showing that its injury was likely caused by defendants.

Affirming the district court's dismissal, the panel held that defendants' conduct did not amount to an unreasonable restraint of trade in violation of § 1 of the Sherman Act. The panel held that the City failed sufficiently to allege a group boycott, which occurs when multiple producers refuse to sell goods or services to a particular customer. Here, the City alleged only that a single producer, the Raiders, refused to deal with it. The panel held that the City also failed sufficiently to allege statutory standing on a theory that defendants' conduct constituted an unlawful horizontal price-fixing scheme. The panel held that a finding of antitrust standing requires a balancing of the nature of the plaintiff's alleged injury, the directness of the injury, the speculative measure of the harm, the risk of duplicative recovery, and the complexity in apportioning damages. The panel reasoned that here, the City was priced out of the market and therefore was a nonpurchaser. In addition, the City's damages were highly speculative and would be exceedingly difficult to calculate.

Concurring, Judge Bumatay wrote that he would hold that the price-fixing claim was too speculative to satisfy the threshold of constitutional standing. He wrote that the City did not show that its injury was fairly traceable to defendants' challenged conduct, but rather relied on speculation upon speculation to connect its injury of the Raiders leaving for Las Vegas to the NFL's entry rule. Judge Bumatay thus concurred in the court's judgment and joined Parts I, II, and III.B of the majority opinion.

* * *

OPINION

TASHIMA, Circuit Judge:

Plaintiff City of Oakland (the "City") alleges that the National Football League ("NFL") and its thirty-two member teams (collectively, "Defendants") have "created artificial scarcity in their product (NFL teams), and then used that scarcity . . . to demand supra-competitive prices from host cities." First Am. Compl. ("FAC" or "complaint") FAC ¶ 1.[1] It further alleges that, "[w]hen Oakland could not pay those prices, Defendants punished the city: they voted to allow the Raiders to move to Las Vegas, which left Oakland without an NFL team and caused significant losses to Oakland." FAC ¶ 2. The City contends that Defendants' conduct amounts to an unreasonable restraint of trade in violation of § 1 of the Sherman Act, 15 U.S.C. § 1, on two independent bases: First, because it constitutes an unlawful group boycott, and second, because it constitutes an unlawful horizontal price-fixing scheme. The district court dismissed the City's Sherman Act claim for failure to state a claim upon which relief may be granted. *See City of Oakland v. Oakland Raiders*, 445 F. Supp. 3d 587, 606 (N.D. Cal. 2020); Fed. R. Civ. P. 12(b)(6). We affirm.

We agree with the district court that the City has failed to allege a group boycott. A group boycott occurs when *multiple* producers refuse to sell goods or services to a particular consumer. Although the City

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[1] The NFL is "an association of 'separately owned professional football teams.'" *In re Nat'l Football League's Sunday Ticket Antitrust Litig.*, 933 F.3d 1136, 1144 (9th Cir. 2019) (quoting *Am. Needle, Inc. v. Nat'l Football League*, 560 U.S. 183, 187 (2010)).

alleges collective action (*i.e.*, that the other NFL teams supported the Raiders' boycott), it has not alleged a *group* boycott. The City has alleged only that a single producer—the Raiders—refused to deal with the City.

The City's horizontal price fixing theory fails as well. To plead a Sherman Act claim, a private plaintiff must show that it is a proper party to pursue the claim—a requirement known as antitrust standing. Although buyers who pay collusive overcharges (direct purchasers) ordinarily have antitrust standing to challenge a horizontal price-fixing scheme, buyers, like the City, who are priced out the market—and hence do not purchase the product or pay the overcharge—ordinarily do not. A nonpurchaser's injury is less direct than the injuries of actual purchasers and highly speculative: we cannot know whether, in the absence of Defendants' restrictions on output, the nonpurchaser would have made a purchase and, if so, under what terms. In addition, the City's damages are highly speculative and would be exceedingly difficult to calculate. We therefore agree with the district court that the City has failed to allege antitrust standing on its horizontal price fixing theory of liability.

I.[2]

In 1995, the Oakland Raiders professional football team signed an agreement to play in the Oakland-

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[2] Because the district court dismissed the City's Sherman Act claim under Rule 12(b)(6) of the Federal Rules of Civil Procedure, we recite the facts as they appear in the City's complaint. *See Padilla v. Yoo*, 678 F.3d 748, 751 n.1 (9th Cir. 2012) ("We emphasize that this factual background is based only on the

Alameda County Coliseum ("Coliseum"). FAC ¶ 102. Under the terms of the agreement, the Raiders leased the Coliseum for a period of sixteen years, with an annual rent of $50,000; the City offered the Raiders a $31.9 million relocation and operating loan; the City committed up to $10 million toward the construction of a new training facility; the City offered up to $85 million toward stadium modernization efforts; and the Raiders agreed to a $1 surcharge on ticket sales, with the proceeds to benefit Oakland public schools and other public services. FAC ¶ 102. The Raiders extended the lease in 2009 and again in 2014. FAC ¶¶ 107, 112.

In the years that followed, the City negotiated with the Raiders in an unsuccessful attempt to keep the team in Oakland. In 2014, the City proposed donating land to the Raiders for a new stadium. FAC ¶ 113. In 2015, the City proposed a $500 million renovation of the Coliseum, to which the City would have contributed significantly. FAC ¶ 113. In 2016, the City supported a proposal to build a new $1.3 billion stadium in Oakland, financed by $350 million in public funds, $400 million from an investment group led by former NFL players Ronnie Lott and Rodney Peete, and $500 million from the Raiders. FAC ¶ 121. The City alleges that the Raiders and the NFL engaged in these negotiations in bad faith. According to the complaint, "[t]he Raiders, the NFL, and ultimately, the vast majority of NFL Clubs, were just

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allegations of the plaintiffs' complaint. Whether the plaintiffs' allegations are in fact true has not been decided in this litigation, and nothing we say in this opinion should be understood otherwise.").

stringing Oakland along as part of their collusive scheme to relocate the Raiders." FAC ¶ 23.

In 2017, the Raiders filed an application with the NFL to relocate the team to Las Vegas. FAC ¶ 124. The NFL teams voted thirty-one to one to approve the relocation. FAC ¶ 132. The complaint alleges that the move benefitted the Raiders and the other NFL teams alike. The Raiders moved to a new, $1.9 billion stadium in Las Vegas, financed by $750 million in public funds, FAC ¶¶ 5, 149, and the team's enterprise value more than doubled to $3 billion, FAC ¶¶ 5, 63. The other teams, meanwhile, divided a $378 million relocation fee paid by the Raiders, FAC ¶ 66, and, due to revenue sharing among NFL teams, stand to share in "new television rights in a new geographic territory, new merchandising, new intellectual property and game receipts from an ultra-luxury $1.9 billion stadium," FAC ¶¶ 4, 66.

In 2018, the City commenced this action against the NFL, the Raiders, and the other thirty-one NFL teams, alleging an antitrust violation under § 1 of the Sherman Act, 15 U.S.C. § 1, as well as breach of contract and unjust enrichment claims under California law. FAC ¶¶ 218–42. The complaint seeks declaratory and monetary relief, including treble damages under § 4 of the Clayton Act, 15 U.S.C. § 15(a).

With respect to the Sherman Act claim, which is the focus of this appeal, the complaint alleges that

> [t]he relevant market in this action is the market for hosting NFL teams. The consumers in this market are all Host Cities offering, and all cities and communities that are willing to

> offer (*i.e.*, potential Host Cities), home stadia and other support to major league professional football teams in the geographic United States. The product in this market is the NFL team, as a hosted entity.

FAC ¶ 189. The City alleges that this market is anticompetitive because the NFL limits both the number of teams and the freedom of teams to relocate: NFL rules permit neither league expansion nor team relocation without the approval of three-fourths of the NFL's teams. FAC ¶ 66. The complaint further alleges that these policies and practices artificially restrict the number of teams, driving up the prices demanded of and paid by host cities. As incumbent and aspiring host cities compete with one another, they are forced to pay supracompetitive prices to retain or acquire teams, usually in the form of publicly financed stadia. The complaint alleges that in a competitive market—with more teams and fewer restrictions on relocation—teams would instead compete for host cities, driving down prices: "Because all viable locations would have a team, team owners would not be able to make threats about leaving their current Host Cities. In fact, the tables would take a dramatic turn: teams actually would compete for financially viable locations." FAC ¶ 47 (quoting R. Fort, *Market Power in Pro Sports: Problems and Solutions*, 13–14, *in The Economics of Sports* (W. Kern ed., 2000)). The complaint maintains that, "[i]n a competitive market, demanding a new stadium would be a risky move for any team owner: the Host City could reject the demand and seek out a new team willing to play in the existing stadium." FAC ¶ 145.

The City's contention that, in a competitive market, the Raiders would have stayed in Oakland rests on three premises. First, the City alleges that there would be more NFL teams in a competitive market. According to the complaint, Defendants "artificially restrict the supply of its product (NFL teams) even though consumer demand in the market could support greater output (more teams)." FAC ¶ 9. "[F]ocusing on factors of wealth and population," the City contends that "the current NFL could support as many as 42 teams in the United States." FAC ¶ 43. Second, the City asserts that Oakland is a highly attractive market:

> A recent economic analysis conducted by Dr. Daniel Rascher, Professor and Director of Academic Programs for the Sport Management Program at the University of San Francisco, commissioned by Oakland focused on which U.S. cities, currently without an NFL team, best reflect the demographic and financial conditions of existing Host Cities and are the best prospects for new NFL franchises. The winner? ***Oakland***. Focusing on total population, real income, percentage of NFL "super fans," and existing stadia support, Oakland was the highest rated city for NFL expansion.

FAC ¶ 138. Third, the City alleges that "without the NFL's cartel structure and rigid control over output (league expansion), the Raiders would have had virtually no relocation 'extortion' threat to exercise." FAC ¶ 92.

The City contends that Defendants' conduct violates the Sherman Act on horizontal price-fixing

and group boycott theories. First, the City contends that Defendants have engaged in a group boycott, also known in antitrust law as a concerted refusal to deal. The complaint alleges that "[t]he decision to remove a team from a Host City, combined with the decision to deny that same City a new expansion franchise, constitutes a collective refusal to deal with, or a group boycott of, the City." FAC ¶ 140. Second, the City contends that Defendants, as a cartel, have engaged in a classic horizontal price-fixing scheme. FAC ¶ 146. By "constrain[ing] the supply of NFL teams," the NFL "is driving up the price of hosting an NFL team far beyond the marginal costs of operating an NFL team and far beyond the price that would be found in a competitive marketplace." FAC ¶¶ 145–46.

The complaint asserts that the City lost the Raiders for two reasons. First, the City alleges that it was priced out of the market: "Because it could not pay Defendants' supra-competitive prices, Oakland lost the Raiders and any chance to host an NFL team." FAC ¶ 51. Second, because Defendants believed moving the Raiders to Las Vegas was in their economic interest, they refused to negotiate with the City in good faith.

The complaint alleges that Defendants' conduct—and the loss of the Raiders—has injured the City in several ways: lost investment value arising from the tens of millions of dollars the City borrowed to improve the Coliseum and build a training facility, FAC ¶¶ 201–03; lost income, including the $1 ticket surcharge dedicated to public education and the rental monies the Raiders paid for use of the Coliseum, FAC ¶¶ 204–05; lost tax revenues from ticket sales, concessions, stadium parking, player compensation,

and merchandising associated with Raiders games, FAC ¶¶ 206–10; and devaluation of the Coliseum property, which the City and Alameda County jointly own, FAC ¶¶ 211–17.

The district court dismissed the City's Sherman Act claim with prejudice under Rule 12(b)(6) and declined to exercise supplemental jurisdiction over the state-law claims. The court concluded that the City's alleged injuries were too speculative to confer antitrust standing because the City "had not plausibly alleged that, but for the limited number of teams, Oakland would still have an NFL team." *City of Oakland*, 445 F. Supp. 3d at 601. The court also rejected the City's group boycott theory on the ground that the City had "not alleged that any NFL team besides the Raiders has refused to deal with Oakland, or that the NFL has prohibited any team from dealing with Oakland." *Id.* at 605–06. Following the entry of judgment, the City timely appealed.

II.

"Dismissal for failure to state a claim is reviewed *de novo*." *Barrett v. Belleque*, 544 F.3d 1060, 1061 (9th Cir. 2008) (per curiam). "To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id.* "Antitrust standing is a question of law

reviewed de novo." *Am. Ad Mgmt., Inc. v. Gen. Tel. Co. of Cal.*, 190 F.3d 1051, 1054 (9th Cir. 1999).

III.

A. Article III Standing

We begin by addressing Defendants' argument that the City lacks Article III standing.[3] To establish constitutional standing, "a plaintiff must show (i) that he suffered an injury in fact that is concrete, particularized, and actual or imminent; (ii) that the injury was likely caused by the defendant; and (iii) that the injury would likely be redressed by judicial relief." *TransUnion LLC v. Ramirez*, 141 S. Ct. 2190, 2203 (2021) (citing *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560–61 (1992)).

Defendants focus on the second requirement, contending that the City's "purported injury cannot 'fairly . . . be traced' to the NFL's rules requiring existing teams to approve league expansion," because the City relies on "a long and speculative chain of causation." Specifically, Defendants emphasize that the City does not "allege that any team sought to play in the NFL and was denied admission," "that if there were an additional team, it would have played in Las Vegas thereby foreclosing the Raiders' move there," "that if there were additional teams and one of them might have played in Las Vegas, the Raiders would have stayed in Oakland rather than move to another

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[3] Although Defendants did not challenge the City's constitutional standing in the district court, the issue "may be raised at any time, even for the first time on appeal." *DBSI/TRI IV Ltd. P'ship v. United States*, 465 F.3d 1031, 1038 (9th Cir. 2006).

city with a more attractive stadium or better economics," or "that it made any effort to attract an existing franchise or new expansion team to replace the Raiders in Oakland since learning in 2016 of the Raiders' plans to leave."

We agree with Defendants that the City relies on a somewhat speculative chain of causation. As we explain in Part III.C, *infra*, this fact plays a significant role in our analysis of the City's *statutory* standing. To establish constitutional standing, however, the City need not establish to a certainty that, but for Defendants' challenged conduct, it would have retained the Raiders or acquired another team. It need only plausibly allege that, but for that conduct, there is a "substantial probability" that it would have done so. *See Warth v. Seldin*, 422 U.S. 490, 504 (1975); *Nat'l Fam. Farm Coal. v. U.S. Env't Prot. Agency*, 966 F.3d 893, 908 (9th Cir. 2020); *Legal Aid Soc'y of Alameda Cnty. v. Brennan*, 608 F.2d 1319, 1334–35 (9th Cir. 1979). That standard is satisfied here. The City credibly alleges that Oakland is a prime location for an NFL team, that there would be more NFL teams in a market driven by consumer demand, and that—in a competitive market—teams like the Raiders would not be able to use a threat of relocation to demand supracompetitive concessions from host cities. Specifically, Oakland is an incumbent host city. FAC ¶ 1. The City further alleges that in the absence of Defendants' challenged actions (*i.e.*, in a competitive market), there would be more teams in the NFL FAC ¶¶ 1, 9, 39, 43–44, 67, 69, 197, 199; that in the absence of Defendants' challenged actions, Defendants would not be able to threaten relocation, FAC ¶¶ 16, 145, or demand supracompetitive prices from host cities, FAC

¶¶ 5, 10, 14, 47, 49, 57, 149, 198; that Oakland was willing and able to pay competitive prices to retain the Raiders, FAC ¶¶ 4, 65, 121–22, 128–31; that Oakland is a highly desirable host city for an NFL team, FAC ¶¶ 5, 26. 127,138; that NFL relocation policies favor a team's home territory over relocation, FAC ¶¶ 21, 89–90, 167; that the Raiders were financially successful in Oakland, received significant financial support from the City, and had one of the most loyal fan bases in the NFL, FAC ¶ 22; that Oakland lost the Raiders solely because it was unable to pay supracompetitive prices, FAC ¶¶ 51, 133, 150–51; and that, in a competitive market, the Raiders would have stayed in Oakland or Oakland would have landed another team, FAC ¶¶ 16, 92.

These allegations are sufficiently plausible to allege that there is a "substantial probability" that the Raiders would have stayed in Oakland if not for Defendants' challenged conduct. This is not a case in which the plaintiff's theory of standing is either "counterintuitive" or premised on "a 'highly attenuated chain of possibilities.'" *California v. Texas*, 141 S. Ct. 2104, 2119 (2021) (quoting *Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 410 (2013)).[4]

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[4] Defendants' reliance on *City of Rohnert Park v. Harris*, 601 F.2d 1040 (9th Cir. 1979), is misplaced. There, the city's assertion that a regional shopping center would have been developed in the city absent the defendants' challenged conduct was "entirely speculative." *Id.* at 1045. That is not the case here.

B. Group Boycott[5]

As stated above, the complaint alleges a violation of the Sherman Act on two alternative theories—horizontal price fixing and group boycott. The district court rejected the group boycott theory on the ground that the City "has not alleged that any NFL team besides the Raiders has refused to deal with Oakland, or that the NFL has prohibited any team from dealing with Oakland or set any 'agreed terms' that Oakland must meet to attract a new or different team." *City of Oakland*, 445 F. Supp. 3d at 605–06. The City

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[5] "The classic 'group boycott' is a concerted attempt by a group of competitors at one level to protect themselves from competition from non-group members who seek to compete at that level"—something that is not alleged here. *Phil Tolkan Datsun, Inc. v. Greater Milwaukee Datsun Dealers' Advert. Ass'n*, 672 F.2d 1280, 1284 (7th Cir. 1982) (quoting *Smith v. Pro Football, Inc.*, 593 F.2d 1173, 1178 (D.C. Cir. 1978)); *see also* Phillip E. Areeda & Herbert Hovenkamp, *Antitrust Law: An Analysis of Antitrust Principles and Their Application* ¶¶ 2003i, 2200a (4th and 5th eds. 2013–2020) ("Areeda & Hovenkamp"). "The term group boycott," however, "is in reality a very broad label for divergent types of concerted activity," *Phil Tolkan Datsun*, 672 F.2d at 1285 (quoting *Mackey v. Nat'l Football League*, 543 F.2d 606, 619 (8th Cir. 1976), *overruled on other grounds as stated in Eller v. Nat'l Football League Players Ass'n*, 731 F.3d 752, 755 (8th Cir. 2013)), and the Supreme Court has recognized group boycotts aimed directly at consumers, *e.g.*, *St. Paul Fire & Marine Ins. Co. v. Barry*, 438 U.S. 533, 544 ("[T]he Sherman Act makes it an offense for [businessmen] to agree among themselves to stop selling to particular customers." (alteration in original) (quoting *Kiefer-Stewart Co. v. Joseph E. Seagram & Sons*, 340 U.S. 211, 214 (1951), *overruled on other grounds by Copperweld Corp. v. Indep. Tube Corp.*, 467 U.S. 752 (1984))). For purposes of our analysis, therefore, we assume that a concerted refusal to deal with a consumer or consumers states a cognizable "group boycott" claim under § 1 of the Sherman Act.

contends that the complaint adequately states a claim on a group boycott theory because it alleges that "it is the NFL owners *acting collectively* (not individual teams) who decide whether and where a particular team may relocate and . . . Defendants made a '*collective* decision to move the Raiders to Las Vegas.'" We disagree.

Collective action in support of an individual boycott is not the same as a group boycott. The City's allegations, taken as true, show only that *the Raiders* boycotted the City and that the other Defendants supported the Raiders' boycott. The other teams did not "boycott" the City. The FAC does not allege that they, or any of them, refused to "sell" to the City.

The group boycott cases upon which the City relies involve circumstances in which *multiple* producers refused to sell their goods or services to consumers. In *FTC v. Superior Court Trial Lawyers Ass'n.*, 492 U.S. 414 (1990), the Supreme Court recognized a viable group boycott claim where "*a group of lawyers* agreed not to represent indigent criminal defendants in the District of Columbia Superior Court until the District of Columbia government increased the lawyers' compensation." *Id.* at 422–23 (emphasis added). The Supreme Court explained that these lawyers, as a group, had engaged in "a concerted refusal to serve an important customer in the market for legal services." *Id.* at 423. And in *St. Paul Fire & Marine Insurance Co.*, 438 U.S. at 543–45, the Court recognized a group boycott claim where *three medical malpractice insurers* refused to offer coverage to the policyholders of a fourth insurer in order to force the policyholders into agreeing to coverage by the fourth insurer on the fourth insurer's terms. As these cases reflect, a group

boycott occurs when "*two or more competitors* . . . refuse to do business with one firm." *Group boycott*, Black's Law Dictionary (11th ed. 2019) (emphasis added); *see Seagood Trading Corp. v. Jerrico, Inc.*, 924 F.2d 1555, 1568 (11th Cir. 1991) ("[T]he distinguishing feature of such cases is a plurality of refusals to deal by different parties."); *Constr. Aggregate Transp., Inc. v. Fla. Rock Indus., Inc.*, 710 F.2d 752, 773 (11th Cir. 1983) ("[I]t is important to remember that a concerted refusal to deal essentially is an agreement among two or more parties that each will engage in an individual refusal to deal with a particular customer or customers. In the case before us, however, we have only one business entity refusing to deal with the plaintiff . . . . That [a second business entity] may have instigated [the first entity's] refusal to deal does not create the plurality of 'refusals' necessary for the arrangement to be called a group boycott."). Here, the other NFL teams simply supported the Raiders' refusal to deal with the City, but did not themselves refuse to do business with the City. The City, therefore, although it has alleged an individual boycott, has not alleged a group boycott.[6]

The City alternatively contends that it has alleged a group boycott because the other teams supported the Raiders' relocation threat by agreeing among themselves that they would neither relocate to Oakland nor allow an expansion team to locate there if the City refused to accede to the Raiders' demands

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[6] We do not decide whether the collective action of which the City complains could be actionable under § 1 of the Sherman Act on any other theory. We hold only that the conduct of which the City complains does not allege a group boycott.

for a new stadium. FAC ¶ 140. A law review article upon which the City relies describes this group boycott theory as follows:

> [G]iven the artificial scarcity of teams and the difficulty of new entry, threats to relocate are more than the action of an individual economic entity; rather, every threat to relocate is also an implicit threat of a concerted boycott. A group boycott exists when individual economic actors agree to refrain from dealing with another entity in order to gain some competitive advantage, in this case the advantage of favorable subsidies to build or renovate new stadiums. . . . Translation: If Houston does not pay the price demanded by the Oilers, no other NFL team will deal with the city.

David Haddock, Tonga Jacobi & Matthew Sag, *League Structure & Stadium Rent-Seeking—the Role of Antitrust Revisited*, 65 Fla. L. Rev. 1, 50–51 (2013). This may be a viable theory of group boycott (a question we need not reach), but it fails here because the City has not proffered any specific allegations to suggest that such an agreement in fact existed in this case. As the district court explained, "[c]ertain commentators' view that 'a threat by an individual team to relocate *may* comprise an *implicit* threat of concerted boycott' does not, without more, show that such a boycott in fact occurred." *City of Oakland*, 445 F. Supp. 3d at 606. The City's allegation is therefore too speculative to cross the plausibility threshold.

C. Horizontal Price Fixing: Antitrust Standing

Because the City's group boycott theory fails to state a claim, the viability of the City's Sherman Act claim turns on its horizontal price-fixing theory. As set forth below, we hold that the City's price-fixing theory fails as well, for lack of antitrust standing.[7]

Section 1 of the Sherman Act prohibits unreasonable restraints of trade. *In re NFL's Sunday Ticket Antitrust Litig.*, 933 F.3d at 1149.[8] Actions for damages, like this one, are authorized by § 4 of the Clayton Act.[9] "Despite the apparent breadth of the phrase 'any person,' the Supreme Court has held that Congress did not intend to afford a remedy to everyone injured by an antitrust violation simply on a showing of causation." *Knevelbaard Dairies v. Kraft Foods, Inc.*, 232 F.3d 979, 987 (9th Cir. 2000). Instead, the plaintiff must have "antitrust standing." *Id*.

We have "identified certain factors for determining whether a plaintiff who has borne an injury has antitrust standing":

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[7] Because we affirm the dismissal of the City's group boycott theory on other grounds, we need not address whether our analysis of antitrust standing with respect to the City's price-fixing theory applies as well to the City's group boycott theory.

[8] The City does not contend that the challenged practices are per se unlawful.

[9] Section 4(a) provides:

> [A]ny person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor . . . and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee.

15 U.S.C. § 15(a).

> (1) the nature of the plaintiff's alleged injury; that is, whether it was the type the antitrust laws were intended to forestall;
>
> (2) the directness of the injury;
>
> (3) the speculative measure of the harm;
>
> (4) the risk of duplicative recovery; and
>
> (5) the complexity in apportioning damages.

Am. Ad Mgmt., 190 F.3d at 1054.[10]

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[10] These five factors are illustrative rather than exhaustive. In *R.C. Dick Geothermal Corp. v. Thermogenics, Inc.*, 890 F.2d 139, 146 (9th Cir. 1989) (en banc), for example, we articulated five different factors that, although largely overlapping with those identified in *American Ad Management*, included two factors that we did not specifically mention in *American Ad Management*: "[t]he specific intent of the alleged conspirators" and "[t]he existence of other, more appropriate plaintiffs." We nevertheless rely on the *American Ad Management* factors to frame our analysis. Among other virtues, they adhere closely to the factors identified by Areeda and Hovenkamp in their influential treatise on antitrust law:

> Unlike the United States government, which is authorized to sue anyone who violates the antitrust laws, a private antitrust plaintiff must show "standing" to sue. In addition to proving everything that would entitle the government to relief, the private plaintiff must also show (1) that the acts violating the antitrust laws caused—or, in an equity case, threatened to cause—it injury-in-fact to its "business or property;" (2) that this injury is not too remote or duplicative of the recovery of a more directly injured person; (3) that such injury is "antitrust injury," which is defined as the kind of injury that the antitrust laws were intended to prevent and "flows from that which makes defendants' acts unlawful"; and, in a damage case, (4) that the

"To conclude that there is antitrust standing, a court need not find in favor of the plaintiff on each factor." *Id.* at 1055. "Instead, we balance the factors," *id.*, recognizing that "[a]ntitrust standing involves a case-by-case analysis," *Amarel v. Connell*, 102 F.3d 1494, 1507 (9th Cir. 1996) (as amended). "Most cases will find some factors tending in favor of standing (to a greater or lesser degree), and some against (also in varying degrees), and a court may find standing if the balance of factors so instructs." *L.A. Mem'l Coliseum Comm'n v. Nat'l Football League*, 791 F.2d 1356, 1363 (9th Cir. 1986). Nevertheless, the first factor—antitrust injury—is mandatory. *See Am. Ad Mgmt.*, 190 F.3d at 1055 ("[T]he Supreme Court has noted that '[a] showing of antitrust injury is necessary, but not always sufficient, to establish standing under § 4.'" (second alteration in original) (quoting *Cargill, Inc. v. Monfort of Colo., Inc.*, 479 U.S. 104, 110 n.5 (1986))); *see also Big Bear Lodging Ass'n v. Snow Summit, Inc.*, 182 F.3d 1096, 1102 (9th Cir. 1999) ("To have standing to bring an antitrust case, a plaintiff must demonstrate that the harm the plaintiff has suffered or might suffer from the practice is an 'antitrust injury,' that is, an 'injury of the type the antitrust laws were intended to prevent and that flows from that

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> damages claimed or awarded measure such injury in a reasonably quantifiable way.

Areeda & Hovenkamp ¶ 335 (footnotes omitted). Although *American Ad Management* did not mention the requirement that a plaintiff show injury to its "business or property," that is indisputably an additional requirement for antitrust standing under § 4 of the Clayton Act. *See* 15 U.S.C. § 15(a); *Hawaii v. Standard Oil Co. of Cal.*, 405 U.S. 251, 260–61 (1972).

which makes defendants' acts unlawful.'" (quoting *Atl. Richfield Co. v. USA Petroleum Co.*, 495 U.S. 328, 334 (1990))). Applying these principles here, we conclude that, although the City has alleged antitrust injury, it has not alleged antitrust standing generally.

1. Antitrust Injury

We have identified "four requirements for antitrust injury: (1) unlawful conduct, (2) causing an injury to the plaintiff, (3) that flows from that which makes the conduct unlawful, and (4) that is of the type the antitrust laws were intended to prevent." *Am. Ad Mgmt.*, 190 F.3d at 1055.

The City has adequately alleged the first requirement—unlawful conduct. The City alleges that Defendants, operating as a cartel, have restricted the number of NFL teams and demanded supra-competitive prices from host cities. These allegations are sufficient. *See, e.g.*, *NCAA v. Bd. of Regents of Univ. of Okla.*, 468 U.S. 85, 107–08 (1984) ("Restrictions on price and output are the paradigmatic examples of restraints of trade that the Sherman Act was intended to prohibit."); *Rebel Oil Co. v. Atl. Richfield Co.*, 51 F.3d 1421, 1434 (9th Cir. 1995) ("If the plaintiff puts forth evidence of restricted output and supracompetitive prices, that is direct proof of . . . injury to competition . . . .").

The City has adequately alleged the second requirement—injury—as well. This requirement is satisfied where the plaintiff shows that it "stands to suffer, not gain," from the defendant's unlawful conduct. *Am. Ad Mgmt.*, 190 F.3d at 1056. That is the case here. The City plausibly alleges that, but for Defendants restrictions on output, the Raiders would

have stayed in Oakland, or another NFL team would have located there. The City alleges, moreover, that the loss of the Raiders has caused the City economic loss, including reduced tax revenues.

Under the third requirement, "[i]t is not enough that the plaintiff's claimed injury flows from the unlawful conduct. An antitrust injury must 'flow[ ] from that which makes defendants' acts unlawful.'" *Id.* (second alteration in original). The complaint again satisfies this requirement here. The City's alleged injuries stem from the loss of the Raiders, and the City plausibly alleges that the Raiders left Oakland because of Defendants' allegedly unlawful restriction on output. The City also credibly asserts that, in a world with more teams, there might have already been a team in Las Vegas, blocking the Raiders' move there, and that, in a competitive market with more teams, the Raiders would not have had the leverage to demand supracompetitive concessions from the City. The City's alleged injuries, therefore, flow from that which allegedly makes Defendants' conduct unlawful: limiting output below levels dictated by consumer demand.

"Finally, the plaintiff's injury must be 'of the type the antitrust laws were intended to prevent.'" *Id.* at 1057. "The Supreme Court has made clear that injuries which result from *increased* competition or lower (but non-predatory) prices are not encompassed by the antitrust laws." *Id.* Thus, "[i]f the injury flows from aspects of a defendant's conduct that are beneficial or neutral to competition, there is no antitrust injury, even if the defendant's conduct is illegal." *Theme Promotions, Inc. v. News Am. Mktg. FSI*, 546 F.3d 991, 1003 (9th Cir. 2008). Here,

Defendants argue that the complaint fails this test because the City lost the Raiders "through the process of competition . . . . Loss of the Raiders to a city that made a better offer is not injury arising from a *reduction* in competition."

Defendants' argument stands antitrust law on its head. "[T]he principal objective of antitrust policy is to maximize *consumer* welfare by encouraging *firms* to behave competitively," Areeda & Hovenkamp ¶ 100, not, as Defendants suggest, to maximize producers' welfare by increasing competition among consumers. As the Supreme Court recently reminded us, "[t]he goal [of the Sherman Act] is to distinguish between restraints with anticompetitive effect that are harmful *to the consumer* and restraints stimulating competition that are in *the consumer's* best interest." *NCAA v. Alston*, 141 S. Ct. at 2151 (first alteration in original) (emphasis added) (quoting *Ohio v. Am. Express Co.*, 138 S. Ct. 2274, 2284 (2018)). Thus, the fact that the City lost the Raiders as a result of enhanced competition among *consumers* does not negate the City's antitrust injury.

On the contrary, the proper focus is on whether the City's injuries flow from a decrease in competition among *producers*. They do. The City alleges that it was injured because Defendants reduced output and increased prices. These are precisely the kinds of harms to competition that the antitrust laws were intended to prevent. *See Pool Water Prod. v. Olin Corp.*, 258 F.3d 1024, 1034 (9th Cir. 2001) ("Antitrust injury 'means injury from higher prices or lower output, the principal vices proscribed by the antitrust laws.'" (quoting *Nelson v. Monroe Reg'l Med. Ctr.*, 925

F.2d 1555, 1564 (7th Cir. 1991))). Thus, the City has alleged antitrust injury.

2. The Directness of the Injury

The second factor in the antitrust standing inquiry "looks to whether [the plaintiff's] alleged injury was the direct result of [the defendant's] allegedly anticompetitive conduct." *Am. Ad Mgmt.*, 190 F.3d at 1058. This factor focuses on "the chain of causation between [the plaintiff's] injury and the alleged restraint" of trade. *Id.* "The harm may not be 'derivative and indirect' or 'secondary, consequential, or remote.'" *Theme Promotions*, 546 F.3d at 1004 (first quoting *Amarel*, 102 F.3d at 1511, and then quoting *Kolling v. Dow Jones & Co.*, 187 Cal. Rptr. 797, 808 (Ct. App. 1982)).

This factor cuts against the City's antitrust standing. In a horizontal price-fixing scheme like the one the City alleges here, members of a cartel "collude on price and output in an effort to maximize their profits." Areeda & Hovenkamp ¶ 391b1. Producers restrict output and raise prices, and consumers—direct purchasers from the cartel—pay an overcharge (a supracompetitive price) to purchase the producers' goods or services. These direct purchasers plainly have "standing to recover any collusive overcharges." *Id.* Their injuries are direct and certain. The same cannot be said, however, of consumers, like the City, that "were priced out of the market." *Id.* As Areeda & Hovenkamp explain:

> The difficulty lies in identifying those who are injured by the deadweight welfare loss. Anyone could claim that he or she would have purchased at the competitive price but was

> priced out of the market as a result of the anticompetitive pricing. Thus, courts are likely to find that the claims of those who refused to purchase at the cartel price are *speculative*.

Id.

The Tenth Circuit confronted this situation in *Montreal Trading Ltd. v. Amax Inc.*, 661 F.2d 864 (10th Cir. 1981). There, the plaintiff alleged that the defendants unlawfully limited potash production to drive up prices. *Id.* at 865. The plaintiff brought an antitrust action against the producers, arguing that as a result of the defendants' actions it was unable to buy potash that it could have resold at a profit. *Id.* at 867. The Tenth Circuit held that the plaintiff lacked antitrust standing. *Id.* at 868. First, the court noted that "[a] price fixing conspiracy is certainly 'aimed' at those who purchase the product at the inflated price; their injury is more direct and more proximately caused than those who are unable to purchase due to product scarcity." *Id.* Second, the plaintiff's injury was too speculative:

> [W]hen, as here, the nonpurchaser has no prior course of dealing with any defendant, we will remain unsure about many things, including: whether the purchase would have been made from one of the conspirators or from one of their competitors; what quantity would have been purchased; what price would have been paid; and at what price resale would have occurred. In the instant case we would also be uncertain whether the potash producers would have inquired about the identity of [the plaintiff's] customers before making the sale;

> whether, if asked, [the plaintiff] could have truthfully replied that part of the purchase was allocated to customers outside North Korea; whether [the plaintiff] would have had the funds needed to make the purchase; and whether an alleged shortage of railroad cars would have aborted the transaction.

Id. at 868.[11]

The same concerns exist here too. First, the City's injuries are less direct than those of actual purchasers, such as the cities of Las Vegas and Los Angeles, each of which recently acquired NFL teams, presumably by agreeing to supracompetitive prices. Indeed, the existence of these more direct victims is an additional factor counseling against the City's standing. *See Ass'n of Wash. Pub. Hosp. Dists. v. Philip Morris Inc.*, 241 F.3d 696, 701 (9th Cir. 2001); *R.C. Dick Geothermal Corp.*, 890 F.2d at 146; *Montreal Trading*, 661 F.2d at 868.[12]

Second, the City's contention that, in the absence of Defendants' challenged practices, it would have retained the Raiders (or acquired another team) is too speculative to establish antitrust standing. As the district court explained:

> The Court . . . previously held that Oakland had not plausibly alleged that, but for the limited number of teams, Oakland would still

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[11] The Tenth Circuit did not adopt a bright-line rule precluding nonpurchasers who have been priced out of a market from establishing antitrust standing. *See Montreal Trading*, 661 F.2d at 868. We agree.

[12] The City's injuries would also be less direct than those of NFL expansion teams denied entry into the league.

have an NFL team. The Court identified the following "incomplete list of issues that might be relevant" but were not addressed in Oakland's original complaint:

> (1) whether there are additional potential owners willing to establish new teams if the NFL allowed them to do so; (2) whether such potential owners would have based a team in Las Vegas before the Raiders decided to relocate there; (3) whether the Raiders would still have left Oakland for another city if the NFL allowed additional teams; (4) if the Raiders might still have left, whether an additional team would have been established in Oakland to replace the Raiders; or (5) whether Oakland has made any effort to attract an existing team other than the Raiders or to establish a new expansion team to replace the Raiders.

Oakland's first amended complaint alleges none of those things. Instead, it repeats an allegation from the original complaint that entrepreneur and basketball-team-owner Mark Cuban believes Oakland is a better site for the Raiders than Las Vegas, and adds an allegation that an economic analysis commissioned by Oakland determined that, of U.S. cities without NFL teams, Oakland "best reflect[s] the demographic and financial conditions of existing Host Cities" and has "the best prospects for new NFL franchises." But Oakland still has not plausibly alleged what the playing field would look like if the NFL

> allowed more than thirty-two teams. In that hypothetical world, what would prevent Las Vegas from offering a more attractive deal, as in fact occurred? Would another team have already existed in Las Vegas? Would the Raiders have gone elsewhere if Las Vegas already had a team? If the Raiders left, would a different team play in Oakland? The first amended complaint answers none of those questions.

City of Oakland, 445 F. Supp. 3d at 601 (second alteration in original) (citations omitted).

We agree. The City has not alleged—and there is no way of knowing—what would have occurred in a more competitive marketplace. Would new teams have joined the NFL? Would they have found Oakland attractive? Would the Raiders have left Oakland in any event? Would the Raiders have stayed in the Bay Area, but not in Oakland? What price would the City have paid to retain the Raiders or acquire another team? Would the City have been willing and able to pay a competitive price? There are too many speculative links in the chain of causation between Defendants' alleged restrictions on output and the City's alleged injuries. *Cf. Associated Gen. Contractors of Cal., Inc. v. Cal. State Council of Carpenters*, 459 U.S. 519, 540 (1983) ("In this case, the chain of causation between the Union's injury and the alleged restraint in the market for construction subcontracts contains several somewhat vaguely defined links.").

The City complains that it should not be required "to reconstruct the hypothetical marketplace absent a defendant's anticompetitive conduct." (Quoting *United States v. Microsoft Corp.*, 253 F.3d 34, 79 (D.C. Cir.

2001).)[13] Nonpurchasers who are priced out of the market, however, present a special problem, due to the speculative nature of the harm. We require a reasonable level of certainty before we will confer antitrust standing on such consumers. *See Montreal Trading*, 661 F.2d at 868; Areeda & Hovenkamp ¶ 391b1.

The City alternatively contends that it has standing under *Montreal Trading* because it can show "a regular course of dealing with the conspirators." 661 F.2d at 868. The City's past dealings with the Raiders, however, do not establish a *regular* course of dealing. And, under *Montreal Trading*, a "regular course of dealing" exception makes sense only if that course of dealing occurred in a competitive market. But that is not what the FAC alleges. The City alleges that its course of dealing with the Raiders occurred in an anticompetitive market, which does not resolve the many uncertain links in the chain of causation. Thus, even assuming that *Montreal Trading* is the law of the Circuit, an issue we need not decide, the City would still lack standing.

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[13] In *Microsoft*, 253 F.3d 34, the plaintiffs were required to prove that Microsoft's anticompetitive practices (*i.e.*, foreclosing Netscape's and Java's distribution channels) caused Microsoft to maintain its monopoly power in the operating system market. In that context, and relying on Areeda & Hovenkamp, the D.C. Circuit reasoned that courts could infer causation from the fact that a defendant has engaged in anticompetitive conduct that reasonably appears capable of making a significant contribution to maintaining monopoly power. *Id.* at 79. The court did not address the question presented here.

In sum, this factor—the directness of the injury—supports the conclusion that the City has not alleged antitrust standing.

3. The Speculative Measure of Harm

So too does the third factor, which considers whether the City's "damages are only speculative." *Am. Ad Mgmt.*, 190 F.3d at 1059. For the reasons just discussed, we do not know whether the City would have retained an NFL team, whether that team would have been the Raiders or another team, where that team would have played, or what price the City would have paid for the privilege of having an NFL team. Because we do not know whether the City would have retained the Raiders, we cannot know whether it would have avoided the harm it alleges.

Furthermore, even if the City could demonstrate that it would have retained the Raiders (or acquired another team), its damages—"lost investment value," "tax revenues associated with Raiders games," and "devaluation of the Coliseum property"—would be exceedingly difficult to calculate. *Cf. id.* at 1060 ("[W]e do not find the calculation of damages in this case to be exceedingly complicated."); Areeda & Hovenkamp ¶ 335c5 ("Once it becomes clear—especially early in the litigation—that damage measurements will be unduly speculative, the courts generally dismiss the damage suit."). In this respect too, this case is far afield from the conventional horizontal price-fixing case in which an actual purchaser seeks to recover collusive overcharges.

In sum, like the second factor, the third factor supports that the City has not adequately alleged antitrust standing.

4. Remaining Factors

The remaining factors do not undermine the City's claim of antitrust standing. This case does not appear to present a risk of duplicative recoveries. Nor does it appear that this case would require an apportionment of damages. Nevertheless, in light of the indirectness of the City's injuries, the existence of more direct victims, the speculative measure of harm, and the difficulty in calculating damages, we are persuaded that the City lacks antitrust standing to pursue its horizontal price-fixing theory. As the district court observed, the circumstances presented here "render[] this case particularly unsuitable as a novel expansion of antitrust liability to non-purchaser plaintiffs." *City of Oakland*, 445 F. Supp. 3d at 603.

IV.

We hold that the district court properly dismissed the City's Sherman Act claim for failure to state a claim upon which relief may be granted. The City's group boycott theory fails to state a claim because the City has not alleged that more than one team refused to deal with the City. The City's horizontal price-fixing theory fails because the City has not adequately alleged antitrust standing. Although the City has alleged antitrust injury, it has not alleged with sufficient certainty that it would have purchased the product (*i.e.*, that the Raiders would have stayed in Oakland), and under what terms, in a hypothetical competitive market.

The judgment of the district court, therefore, is **AFFIRMED**.

BUMATAY, Circuit Judge, concurring:

The City of Oakland brings two theories of antitrust liability against the NFL, the Raiders, and the NFL's other 31 teams. We've called one theory the "group boycott" claim and the other a "price-fixing" claim. As the majority correctly holds, both theories come up short. In their view, Oakland gets to suit up and take the field of Article III standing but can't run the claims into the endzone of antitrust liability. Upon further review, however, I think, the majority fumbles the standing analysis on the price-fixing claim. I would hold that this claim is too speculative to satisfy the threshold of constitutional standing and so must be benched even before kickoff. On the group boycott claim, I fully agree with the majority that Oakland stays on the field but ultimately fails to score on the merits. In short, we should have dismissed Oakland's price-fixing claim on Article III standing grounds and denied the group boycott claim on legal sufficiency grounds. I thus concur in the court's judgment and join Parts I, II and III.B of the majority opinion.

I.

Rigorous enforcement of the Article III standing requirements ensures that federal courts stay in their lanes. *See Spokeo, Inc. v. Robins*, 578 U.S. 330, 338 (2016). By disclaiming jurisdiction to resolve certain disputes, we confine ourselves to "a proper[] judicial role." *Id.* (simplified). To meet Article III standing, a party must establish (1) an injury in fact; (2) traceability; and (3) redressability. *Id.* And meeting standing on one claim doesn't mean standing on other claims. *See DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 352–53 (2006). Thus, courts must look to see if a party has standing for each claim brought—

regardless of standing on another claim. *Id.* The party seeking access to federal court bears the burden of showing standing. *Spokeo*, 578 U.S. at 338.

Here, Oakland asserts two independent theories of antitrust liability under § 1 of the Sherman Act, 15 U.S.C. § 1.

First, the "price-fixing" claim. Oakland alleges that the NFL has created a horizontal price-fixing scheme with its entry requirements for new teams. An NFL rule dictates that ¾ of NFL owners must vote to approve a new football team's entry into the league. Such a rule, says Oakland, inflates the price of hosting teams for cities by artificially restricting the supply of teams.

Second, we have the "group boycott" claim. Oakland contends that the NFL and its teams have started an anticompetitive boycott against the City by collectively refusing to deal with it. In the City's view, the NFL's franchises are punishing Oakland for declining to pay the high costs and benefits to keep the Raiders in the Bay Area.

Oakland fails to meet its burden of establishing Article III standing for the price-fixing claim, while the group boycott claim fails on the merits.

A.

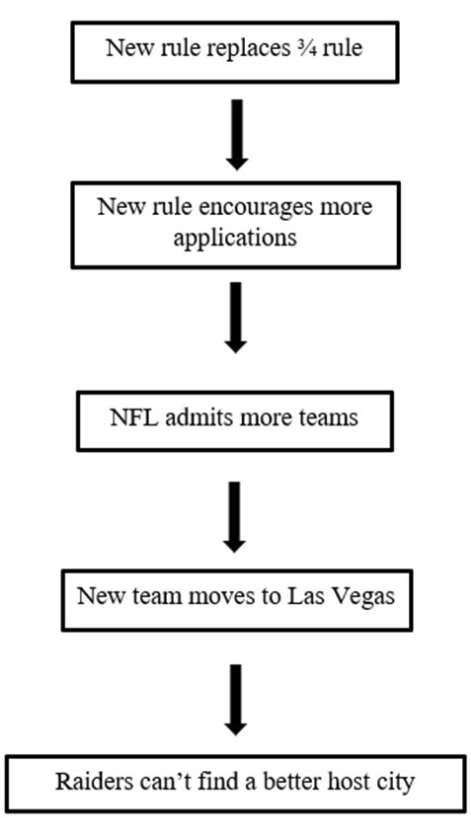
Oakland's price-fixing claim drops the ball on the second element—traceability. A party satisfies this element by showing that its injury "is fairly traceable to the challenged conduct of the defendant." *Spokeo*, 578 U.S. at 338. Traceability requires "a causal connection between the injury and the conduct complained of." *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560 (1992). So with traceability, we ask: "Is the line of

causation between the illegal conduct and injury too attenuated?" *Allen v. Wright*, 468 U.S. 737, 752 (1984).

Our court has held that "a causal chain does not fail simply because it has several links, provided those links are not hypothetical or tenuous." *Nw. Requirements Utils. v. FERC*, 798 F.3d 796, 806 (9th Cir. 2015) (simplified). Traceability then can't "rely on conjecture about the behavior of other parties." *Ecological Rts. Found. v. Pac. Lumber Co.*, 230 F.3d 1141, 1152 (9th Cir. 2000). And when a standing theory "rests on a highly attenuated chain of possibilities," "far stronger evidence" is required to establish traceability. *California v. Texas*, 141 S. Ct. 2104, 2119 (2021) (simplified).

Oakland's price-fixing claim relies on speculation upon speculation to connect its injury to the NFL's entry rule. Basically, Oakland tries to connect its injury—the Raiders leaving for Las Vegas—to the NFL's ¾ approval rule for new franchises. Specifically, Oakland argues that the entry rule allows NFL teams to demand excessive payments from host cities, causing the Raiders to move to Las Vegas and costing Oakland an NFL home team. As a result, Oakland argues it would not have been injured under more

lenient rules for entry into the NFL. Essentially, Oakland's causal chain looks like this:



But Oakland relies on speculation every step of the way. Start with Step One. Under Oakland's theory, in a procompetitive hypothetical world, the NFL would replace its current ¾ approval rule with a more competitive approach, which would allow for easier admission. We aren't told what this new rule might be or how it might meet the threshold of improved competition. Instead, we must imagine a hypothetical rule that would somehow accomplish what Oakland seeks.

Step Two—engage in more speculation about hypothetical teams. To get to the next step in the chain of traceability, we need to speculate that this new rule would entice new football franchises to apply to the NFL. Here, it's unclear how potential football franchises would react to this hypothetical new rule. Oakland assumes that more franchises would apply, given a more lenient admission rule. But there is no evidence that these imaginary franchises would have a significant incentive to apply under, say, a ½ owner approval rule rather than the existing ¾ rule. As the NFL accurately notes, Oakland cannot point to a single instance of a team being denied entry into the NFL under the existing rule. And under either regime, a potential franchise would have to convince a significant portion of NFL owners that its admission would not hurt the sport or the quality of competition. In fact, the only evidence Oakland can muster on this point is a 2004 estimate that the NFL could support up to 42 teams in the United States. But such evidence comes well short of showing that more franchises would be likely to apply simply because the NFL could hypothetically support more of them. Article III requires "far stronger evidence" here. *California v. Texas*, 141 S. Ct. at 2119.

Step Three—consider a hypothetical world where the NFL admits new teams from the crop of applicants. The problem at this step is that the composition of sports leagues is inherently difficult to predict. Sports leagues can't have an infinite number of teams. For example, a sports league has to weigh increasing the number of teams in its roster against other factors such as scheduling constraints, the quality of competition, and existing contracts and

commitments with players. *See* Phillip E. Areeda & Herbert Hovenkamp, *Antitrust Law: An Analysis of Antitrust Principles and Their Application*, ¶ 2214(b) (5th ed. 2021) ("Areeda & Hovenkamp") ("[A] sports league requires limits on the number of teams in order that scheduling and ranking can be coordinated."). Oakland would have us overlook these realities and speculate that the NFL would admit more teams if it had a more permissive entry rule and received more applications.

Step Four—calculate the probabilities that a new imaginary NFL team would play in Las Vegas. Only if another NFL team played at Allegiant Stadium would the Raiders be blocked from leaving Oakland—the precise injury alleged here. But as Oakland acknowledges, it can't provide any evidence that Las Vegas would have hosted an NFL team prior to the Raiders under supposedly pro-competitive rules. As a result, Oakland again asks this court to make another speculative leap—this time that a hypothetical franchise admitted under hypothetical rules would have chosen Las Vegas as its home. But we generally do not "endorse standing theories that rest on speculation about the decisions of independent actors." *Clapper v. Amnesty Int'l, USA*, 568 U.S. 398, 414 (2013); *see also Ecological Rts. Found.*, 230 F.3d at 1152 ("The issue in the causation inquiry is whether the alleged injury can be traced to the defendant's challenged conduct, rather than to that of some other actor not before the court.").

Finally, Step Five—assume there would be enough new franchises admitted by the NFL to prevent other host cities from attracting the Raiders away from Oakland. At this final step, we must

speculate whether another city would have still attracted the Raiders with a more appealing stadium or better economics. Oakland does put forward evidence from an economic expert stating that Oakland is an attractive location for an NFL franchise. But ultimately, Oakland asks us to conjecture about how hypothetical franchises would have weighed hypothetical proposals from hypothetical host cities. So Oakland's expert can't save the speculative house of cards from tumbling down.

In sum, Oakland's price-fixing theory requires us to make layers of speculative judgments to connect the allegedly unlawful conduct (the NFL's entry rule) to the alleged injury (the Raiders' decision to leave Oakland). But Article III standing requires more than an elaborate string of speculations. It requires the alleged injury to be fairly traceable to the unlawful conduct. *Spokeo*, 578 U.S. at 338. Oakland's loss of the Raiders is too remote and too conjectural to be traceable to the NFL's entry process. I would hold that Oakland failed to establish Article III standing on its price-fixing claim.

The majority looks past these speculations by determining that Oakland has shown a "substantial probability" of standing. Maj. Op. 16. The majority argues that, despite a "somewhat speculative chain of causation," there is a substantial probability that the Raiders would have stayed in Oakland but for the NFL's entry rule. Maj. Op. 15. But our court has made clear that causation cannot "be too speculative, or rely on conjecture about the behavior of other parties." *Ecological Rts. Found.*, 230 F.3d at 1152. That is precisely what Oakland's price-fixing claim does. It speculates about events at every step of the causal

chain—relying on inferences about what unknown, independent parties would do under hypothetical circumstances. As a result, I would dismiss Oakland's price-fixing claim for failure to establish Article III standing.[1]

B.

Oakland, however, does establish Article III standing for its group boycott claim. Oakland satisfies the standing requirements for the group boycott claim because it directly connects the unlawful conduct to the alleged injury. Unlike the price-fixing claim, the premise of the group boycott claim is that the NFL franchises themselves colluded to keep Oakland from hosting an NFL team. The football teams sought to punish Oakland, the theory goes, after the City refused to make new payments or improvements to its stadium to keep the Raiders. Thus, the injury of a lack of an NFL franchise is closely tied to the alleged unlawful conduct of group boycotting. In other words, there is a direct handoff from the anticompetitive

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[1] In reaching the merits of the price-fixing claim, the majority imports a Tenth Circuit case into our court—*Montreal Trading Ltd. v. Amax Inc.*, 661 F.2d 864 (10th Cir. 1981). In *Montreal Trading*, the Tenth Circuit denied antitrust standing to non-purchasers on the theory that their injuries were too uncertain. *Id.* at 868. I question, however, whether *Montreal Trading* is relevant here. *Montreal Trading* explained that nonpurchasers should be denied standing to sue "when they lack a past course of dealing with the conspirators." *Id*. But Oakland, the Raiders, and the NFL have a long course of dealing, making the applicability of the *Montreal Trading* rule suspect. Moreover, the majority applies *Montreal Trading* without claiming to adopt it as a "bright-line rule" for our circuit. Maj. Op. 29 n.11. But doing so just further complicates an already complicated area of law. The majority should have punted on this issue.

action to the alleged injury. As a result, Oakland establishes Article III standing on its group boycott claim.

Looking at the merits, I agree with the majority that Oakland fails to demonstrate an antitrust violation on this claim. In short, Oakland can only show that the Raiders refused to deal with the City—not that the other franchises joined the Oakland boycott. Moreover, since Oakland failed to plead a Sherman Act violation, I do not reach whether Oakland has sufficiently shown antitrust standing. Antitrust standing is distinct from Article III standing. *See Associated Gen. Contractors of Cal., Inc. v. Cal. State Council of Carpenters*, 459 U.S. 519, 535 n.31 (1983). Unlike Article III standing, courts have discretion to skip antitrust standing and go right to the merits. *See* Areeda & Hovenkamp, ¶ 335f ("When a court concludes that no violation has occurred, it has no occasion to consider [antitrust] standing."). So there's no need to address Oakland's antitrust standing on this claim, but that doesn't mean the City has it. *See* Maj. Op. 21 n.7.

II.

So, after further review, we must affirm the district court's dismissal of Oakland's suit. While Oakland doesn't need to provide indisputable evidence of traceability to win access to federal courts, the City can't rely on a Hail Mary of speculation to satisfy standing. In my view, we should have blown the whistle on jurisdiction rather than letting that claim play out on the merits.

APPENDIX B

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

No. 18-cv-07444-JCS

CITY OF OAKLAND,
Plaintiff,

v.

OAKLAND RAIDERS, et al.,
Defendants.

ORDER REGARDING MOTION TO DISMISS FIRST AMENDED COMPLAINT

Re: Dkt. No. 73

I. INTRODUCTION

Plaintiff the City of Oakland ("Oakland") brings this action against the Defendants the Oakland Raiders (the "Raiders"), the National Football League (the "NFL"), and all thirty-one other teams in the NFL,[1] asserting that the Raiders' decision to leave

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[1] The other teams are the Arizona Cardinals, Atlanta Falcons, Baltimore Ravens, Buffalo Bills, Carolina Panthers, Chicago Bears, Cincinnati Bengals, Cleveland Browns, Dallas Cowboys, Denver Broncos, Detroit Lions, Green Bay Packers, Houston Texans, Indianapolis Colts, Jacksonville Jaguars, Kansas City Chiefs, Los Angeles Chargers, Los Angeles Rams, Miami Dolphins, Minnesota Vikings, New England Patriots, New

Oakland, and the NFL's approval of that decision, violate the antitrust laws and the NFL's own governing documents, among other claims. On a motion by Defendants, the Court previously dismissed Oakland's complaint with leave to amend. Oakland has now filed a first amended complaint, and Defendants move to dismiss once again under Rule 12(b)(6) of the Federal Rule of Civil Procedure. The Court held a public hearing by videoconference on April 17, 2020. For the reasons discussed below, Defendants' motion is GRANTED, Oakland's claim under the Sherman Act is DISMISSED with prejudice, and its remaining claims under state law are DISMISSED for lack of subject matter jurisdiction, without prejudice to pursuing those claims in a court of competent jurisdiction.[2]

II. BACKGROUND

A. Factual Overview and Previous Order

This case concerns the Raiders' decision, formalized in a January 2017 request to the NFL, to relocate from Oakland, California—where the Raiders had played in a stadium known as the Coliseum for many years—to Las Vegas, Nevada, despite efforts by Oakland to entice the Raiders to stay. Under the

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Orleans Saints, New York Giants, New York Jets, Philadelphia Eagles, Pittsburgh Steelers, San Francisco 49ers, Seattle Seahawks, Tampa Bay Buccaneers, Tennessee Titans, and Washington Redskins. The full names of the entities controlling those teams and named as defendants can be found at paragraph 31 of Oakland's amended complaint.

[2] The parties have consented to the undersigned magistrate judge presiding over the case for all purposes pursuant to 28 U.S.C. § 636(c).

NFL's bylaws, any team's relocation must be approved by a three-quarters majority of all thirty-two NFL teams, and such decisions often require the relocating team to pay a fee to the other teams. In March of 2017, the team owners voted to approve the Raiders' relocation with a $378 million fee. Oakland brings claims for violation of § 1 of the Sherman Act, breach of contract (i.e., the NFL relocation policy), and unjust enrichment. The factual allegations of the case are summarized in more detail in the Court's previous order dismissing Oakland's original complaint with leave to amend. Order Granting Mot. to Dismiss ("July 2019 Order," dkt. 64)[3] at 2–8. New allegations of the first amended complaint are addressed where relevant in the analysis section of this order.

The Court previously dismissed Oakland's Sherman Act claims for failure to allege antitrust injury. *Id.* at 15–18. To the extent that Oakland's claims were based on the NFL's imposition of a $378 million fee as part of its approval of the Raiders' request to relocate, the Court held that requiring such a fee would *discourage* teams like the Raiders from seeking to relocate, and thus would tend to help rather than harm existing host cities like Oakland. *Id.* at 15–16. Once a team has applied to relocate, a mechanism that encourages the NFL to approve that request moves the process closer to an unrestricted market (where teams would be free to relocate without seeking approval), and the Court therefore held that any harm

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[3] *City of Oakland v. Oakland Raiders*, No. 18-cv-07444-JCS, 2019 WL 3344624 (N.D. Cal. July 25, 2019). Citations herein to the Court's previous order refer to page numbers of the version filed in the Court's ECF docket.

caused by that incentive for approval is not "'of the type the antitrust laws were intended to prevent.'" *Id.* at 16–17 (quoting *Somers v. Apple, Inc.*, 729 F.3d 953, 963 (9th Cir. 2013)). To the extent that Oakland instead based its claim on the NFL's restriction to thirty-two teams, the Court held that Oakland had not sufficiently alleged antitrust injury because it neither alleged that the Raiders would have remained (or some other team would have played in Oakland) if more teams were allowed in the NFL, nor addressed what structure it believed would be permissible if the current thirty-two teams structure were not. *Id.* at 17–18.

While those issues of antitrust injury were sufficient for dismissal, the Court also briefly addressed some of Defendants' arguments concerning damages. *Id.* at 19–24. The Court held that Oakland's status as a "landlord" did not inherently bar it from recovering antitrust claims, *id.* at 19–20 (distinguishing *R.C. Dick Geothermal Corp. v. Thermogenics, Inc.*, 890 F.2d 139 (9th Cir. 1989) (en banc)), but that the Ninth Circuit's decision in *City of Rohnert Park v. Harris*, 601 F.2d 1040, 1044 (9th Cir. 1979), foreclosed a theory of damages based on "lost municipal investment" that Oakland might have made based on its expectation that the Raiders would remain, July 2019 Order at 20–21. The Court also held that "lost tax revenue based broadly on 'the presence of the Raiders and the economic activity their presence generates,'" *id.* at 22 (quoting Compl. (dkt. 1) ¶ 96), was not the type of injury redressable under the antitrust laws, but the Court did not rule out the possibility that a more narrowly tailored category of tax revenue, negotiated as part of an agreement between a local government and a private entity,

might "take on a 'commercial' instead of—or as well as—'sovereign' character" such that it could support antitrust damages. *Id.* at 21–22. The Court did not address in detail Oakland's claim for damages based on diminution in value of the Coliseum, but noted that it "would require Oakland to plausibly allege not only that the Raiders would have remained in Oakland but for Defendants' purported antitrust violation, but also that the Raiders would have remained at the Coliseum, rather than a new stadium" in Oakland as some of the negotiations between the parties had contemplated. *Id.* at 22–23.

Without reaching a firm conclusion on the subject of Oakland's alleged relevant market, the Court addressed that issue as follows:

> Oakland's theory of the relevant market—cities offering or willing to offer "home stadia and other support to major league professional football teams in the geographic United States," Compl. ¶ 88—is somewhat unorthodox. Although *L.A. Memorial Coliseum* considered a somewhat similar market for "[f]ootball stadia," 791 F.2d at 1365, Oakland cites no case recognizing a market comprised of cities seeking to attract professional sports franchises. Failure to plead a relevant market for a rule of reason antitrust claim warrants dismissal, *Hicks v. PGA Tour, Inc.*, 897 F.3d 1109, 1120 (9th Cir. 2018), and as Defendants note, markets defined by their consumers rather than the products at issue are not generally cognizable, *Newcal Indus., Inc. v. Ikon Office Sol.*, 513 F.3d 1038, 1045 (9th Cir. 2008). Oakland's reference to "support to

> major league professional football teams" raises issues with respect to that rule, although Oakland may be able to amend to allege specific forms of "support" that happen to be unique to NFL teams. As Defendants also note, Oakland's complaint includes only conclusory assertions that other professional sports franchises do not complete with NFL teams for stadiums. *See* Compl. ¶ 89 ("Not only is the entire Host City tied up in the NFL process, a professional baseball team is not a substitute for a professional football team."). Oakland's complaint does not address the test of "whether a hypothetical monopolist could impose a 'small but significant nontransitory increase in price' ('SSNIP') in the proposed market," or whether potential host cities would respond to such an increase by substituting other "products." *See Saint Alphonsus Med. Ctr.-Nampa Inc. v. St. Luke's Health Sys., Ltd.*, 778 F.3d 775, 784 (9th Cir. 2015). On the other hand, the massive public subsidies of NFL stadiums and the competition among cities alleged in the complaint tend to suggest a market at least similar to Oakland's proposed definition. While the Court declines to resolve whether Oakland's current allegations support a cognizable relevant market, if Oakland chooses to amend its complaint, it should consider Defendants' arguments regarding this issue.

Id. at 23–24.

The Court assumed for the sake of argument that the NFL's relocation policy was enforceable as a contract, but held that Oakland had not alleged facts sufficient to show that it was a third-party beneficiary of that policy with standing to enforce it under California law. *Id.* at 24–28. Although the Court declined to reach Defendants' other arguments regarding Oakland's claim for breach of contract, the Court noted that "the issues of whether the relocation policy's statement that teams' 'business judgments may be informed through consideration of the factors listed below, as well as other appropriate factors' is a sufficiently definite promise to be enforceable and whether Oakland has plausibly alleged a breach of that provision would likely also support dismissal of Oakland's contract claim." *Id.* at 28. Finally, the Court dismissed Oakland's claims for quantum meruit and unjust enrich because those claims do not lie where parties have an enforceable written contract, and Oakland's relationship with the Raiders was governed by the Raiders' lease agreement at the Coliseum. *Id.* at 29.

B. Parties' Arguments

1. Arguments Regarding Oakland's Sherman Act Claim

Defendants argue that Oakland has not cured the defects identified in the Court's previous order. *See generally* Mot. (dkt. 73). According to Defendants, Oakland has not added any factual allegations to indicate that the Raiders would have remained in Oakland or a different NFL team would have played in Oakland if the NFL permitted more than thirty-two

teams in the league. *Id.* at 7–8.[4] In response, Oakland argues its allegations that the Raiders have historically played at the Coliseum and that a recent economic analysis ranked Oakland as the top city for an NFL team, as well as allegations regarding the NFL's barriers to entry, are sufficient to show damage as a result of the limited number of teams. Opp'n (dkt. 74) at 7–10.

Defendants also argue that Oakland lacks antitrust standing because it is not a participant in the same market as Defendants, with Oakland neither competing against Defendants nor consuming their product. Mot. at 9–10. Defendants contend that courts do not allow plaintiffs who declined to purchase a product at issue to bring antitrust claims, even if the plaintiffs allege that they would have purchased the product but for the price increase caused by purportedly anticompetitive product, and that the same principle would apply regardless of whether Oakland were viewed as a potential "buyer" or potential "supplier" in the relationship between "host cities" and NFL teams. *Id.* & 9–10 & n.4 (citing *Montreal Trading Ltd. v. Amax Inc.*, 661 F.2d 864 (10th Cir. 1981)). Oakland argues that the rule of *Montreal Trading* only applies to plaintiffs with no prior course of dealing with the defendants, and that the Ninth Circuit has recognized that a plaintiff can sue for being forced out of business by anticompetitive conduct, as Oakland claims it was here with respect to

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[4] Defendants note that the NFL's bylaws do not restrict the league to thirty-two teams per se, but required approval by the existing teams to admit any new teams beyond the existing thirty-two teams. Mot. at 7.

its "business" as a host city. Opp'n at 11–13 (citing, *e.g.*, *Oltz v. St. Peter's Cmty. Hosp.*, 19 F.3d 1312, 1314 (9th Cir. 1994)). Defendants' reply brief does not address this theory of a plaintiff with a previous course of dealing being "forced out of business" as an exception to *Montreal Trading*. *See generally* Reply (dkt. 76).

Defendants contend that any injury suffered by Oakland is indirect, because Oakland neither owns a football team excluded from the NFL nor directly entered a lease with the Raiders for the use of the Coliseum, which Oakland and co-owner Alameda County instead leased to the Oakland-Alameda County Coliseum Financing Corporation, which assigned its rights under the lease to the Oakland-Alameda County Coliseum Authority ("OACCA"), which in turn leased the stadium to the Raiders. Mot. at 10–11. Defendants briefly renew their argument (rejected in the Court's previous order) that the Ninth Circuit's decision in *R.C. Dick* forecloses any antitrust claim based on a party's interest as a landlord, and also argue that Oakland has not alleged the sort of price fixing directly affecting a rental market that the Court previously held might survive *R.C. Dick*. *Id.* at 11–12. Oakland contends that it is an appropriate plaintiff because Defendants' arguments raise factual issues inappropriate for resolution on the pleadings and because it alleges that "'[a]lthough [the OACCA] manages the Coliseum site for Oakland, Oakland is the entity with the economic interest in that site and, accordingly, is the entity that suffers from losses related to that site.'" Opp'n at 13–14 & n.4 (quoting 1st Am. Compl. ("FAC," dkt. 68) ¶ 217).

In a somewhat overlapping argument, Defendants contend that Oakland's alleged injuries are not of a type cognizable under the antitrust laws, because the Ninth Circuit held in *Rohnert Park* that lost municipal investment is not recoverable, because lost tax revenue is a sovereign interest that does not fall within the commercial damages redressable under the Clayton Act, because Oakland does not allege that the Raiders paid rent to Oakland, and because any diminution of value of the Coliseum would occur even if the Raiders remained in Oakland but played at a new stadium, which was one of the options contemplated in the parties' negotiations. Mot. at 12–14. Oakland argues that its injury is sufficient, based on the Supreme Court's holding that governments may sue under the Clayton Act in their "'proprietary capacity,'" and based on general principles against requiring specificity in allegations of damages. Opp'n at 14–16 (citing, *e.g.*, *Hawaii v. Standard Oil Co. of Cal.*, 405 U.S. 251, 264 (1972)).

Defendants argue that Oakland has not alleged a cognizable market, contending that because "Defendants do not compete with each other in the alleged relevant market of 'hosting NFL team,'" but instead cities and stadiums compete to attract teams, a more appropriate framework would view the cities as suppliers and the NFL teams as consumers of the cities' stadiums. *See* Mot. at 14–15. Because the Ninth Circuit has held that a market cannot be defined merely by the identity of its consumers, Defendants argue that viewing host cities as suppliers and the teams as consumers would require the market to encompass other forms of stadium entertainment or other ways in which cities can generate tax revenue

and economic activity, which Oakland's complaint does not consider. *Id.* at 15–16. Oakland contends that the Ninth Circuit has more than once recognized that NFL football is a unique product, that a jury so found in litigation regarding the Raiders' 1982 move to Los Angeles, and that it has addressed the appropriate economic test for determining a relevant market in the context of alleging that the United States is the relevant geographic market. Opp'n at 17–18.

Defendants also contend that Oakland has not stated a claim based on the NFL's limited thirty-two structure because courts have generally recognized that sports leagues may limit their membership, and because Oakland has not—despite the invitation of the Court's previous order—addressed what alternative structure might be permissible if the NFL's current structure is not. Mot. at 16–17. Oakland argues that this case differs from those cited by Defendants because the teams and athletes seeking to join leagues in those cases had not alleged a broader harm to competition beyond their own exclusion. Opp'n at 18–20. Finally, Defendants argue that Oakland has not stated a claim based on a "group boycott" because it has not alleged that it sought to attract any NFL team besides the Raiders (or a new expansion team) nor alleged that the NFL prevented any other team from playing in Oakland, Mot. at 17–18, while Oakland argues that it has alleged a boycott because the decision to relocate the Raiders required joint approval by the other NFL teams and because commentators have suggested that, in closed sports leagues, " ' "a threat by an individual team to relocate may comprise an implicit threat of a concerted

boycott," ' " Opp'n at 20 (quoting FAC ¶ 140 (in turn quoting a law review article)).

2. Arguments Regarding Breach of Contract and Unjust Enrichment

Defendants argue that Oakland's claim for breach of contract fails for the same reason it was previously dismissed—Oakland is not an intended third-party beneficiary capable of enforcing the NFL's relocation policy under California law. Mot. at 20–24. Oakland contends that new allegations regarding the development of factors eventually incorporated into the relocation policy—in response to a Senate bill intended to "protect[] . . . cities" and in the creation of a "Statement of Principles" with the Mayors' Conference—are sufficient, along with provisions of the policy addressing interests of "communities," to show that Oakland should have standing to enforce the policy. Opp'n at 22–24. The parties also dispute whether the relocation policy's requirement that teams "consider" certain factors in determining their business interests is enforceable as a contract, and whether Oakland has alleged a breach. Mot. at 19–20; Opp'n at 20–21, 25.

With respect to Oakland's final claim for "unjust enrichment,"[5] Defendants argue that Oakland has not cured the defect for which the Court previously dismissed the claim—that such a claim cannot lie where the Raiders' tenancy at the Coliseum was

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[5] As noted in the Court's previous order, California law does not recognize a claim for "unjust enrichment" under that name, but courts generally construe claims so captioned as asserting an implied contract. July 2019 Order at 29.

governed by a written and enforceable lease agreement—while Oakland contends that it should be allowed to assert a claim for unjust enrichment in the alternative to its claim for breach of contract. Mot. at 25; Opp'n at 25.

III. ANALYSIS

A. Legal Standard

A complaint may be dismissed for failure to state a claim on which relief can be granted under Rule 12(b)(6) of the Federal Rules of Civil Procedure. "The purpose of a motion to dismiss under Rule 12(b)(6) is to test the legal sufficiency of the complaint." *N. Star Int'l v. Ariz. Corp. Comm'n*, 720 F.2d 578, 581 (9th Cir. 1983). Generally, a claimant's burden at the pleading stage is relatively light. Rule 8(a) of the Federal Rules of Civil Procedure states that a "pleading which sets forth a claim for relief . . . shall contain . . . a short and plain statement of the claim showing that the pleader is entitled to relief." Fed. R. Civ. P. 8(a).

In ruling on a motion to dismiss under Rule 12(b)(6), the court generally takes "all allegations of material fact as true and construe[s] them in the light most favorable to the nonmoving party." *Parks Sch. of Bus. v. Symington*, 51 F.3d 1480, 1484 (9th Cir. 1995). Dismissal may be based on a lack of a cognizable legal theory or on the absence of facts that would support a valid theory. *Balistreri v. Pacifica Police Dep't*, 901 F.2d 696, 699 (9th Cir. 1990). A pleading must "contain either direct or inferential allegations respecting all the material elements necessary to sustain recovery under some viable legal theory." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 562 (2007) (citing *Car Carriers, Inc. v. Ford Motor Co.*, 745 F.2d 1101,

1106 (7th Cir. 1984)). "A pleading that offers 'labels and conclusions' or 'a formulaic recitation of the elements of a cause of action will not do.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Twombly*, 550 U.S. at 555). "[C]ourts 'are not bound to accept as true a legal conclusion couched as a factual allegation.'" *Twombly*, 550 U.S. at 555 (quoting *Papasan v. Allain*, 478 U.S. 265, 286 (1986)). "Nor does a complaint suffice if it tenders 'naked assertion[s]' devoid of 'further factual enhancement.'" *Iqbal*, 556 U.S. at 678 (quoting *Twombly*, 550 U.S. at 557). Rather, the claim must be "'plausible on its face,'" meaning that the claimant must plead sufficient factual allegations to "allow the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id.* (quoting *Twombly*, 550 U.S. at 570).

B. Sherman Act

Section 1 of the Sherman Act prohibits any "contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade." 15 U.S.C. § 1. Courts have long held that the Sherman Act is not as broad as its literal language might suggest, and "that Congress intended to outlaw only *unreasonable* restraints." *Texaco v. Dagher*, 547 U.S. 1, 5 (2006) (quoting *State Oil Co. v. Khan*, 522 U.S. 3, 10 (1997)) (emphasis in *Texaco*). Courts "presumptively appl[y] rule of reason analysis, under which antitrust plaintiffs must demonstrate that a particular contract or combination is in fact unreasonable and anticompetitive before it will be found unlawful." *Id.* Courts consider certain forms of restraint illegal per se in other contexts, but where some "'restraints on competition are essential if the product is to be available at all'"—as in the case of

professional sports leagues—"per se rules of illegality are inapplicable, and instead the restraint must be judged according to the flexible Rule of Reason." *Am. Needle, Inc. v. Nat'l Football League*, 560 U.S. 183, 203 (2010) (quoting *NCAA v. Bd. of Regents of Univ. of Okla.*, 468 U.S. 85, 101 (1984)); *see also L.A. Mem'l Coliseum Comm'n v. Nat'l Football League*, 726 F.2d 1381, 1392 (9th Cir. 1984) ("[T]he unique structure of the NFL precludes application of the per se rule."). Under the rule of reason test, Oakland must "demonstrate that a particular contract or combination is in fact unreasonable and anti-competitive," *Texaco*, 547 U.S. at 5, or in other words, must address "whether the restraint imposed is such as merely regulates and perhaps thereby promotes competition or whether it is such as may suppress or even destroy competition," *Am. Needle*, 560 U.S. at 203 n.10 (quoting *Bd. of Trade of Chi. v. United States*, 246 U.S. 231, 238 (1918)).

Section 4 of the Clayton Act, codified as 15 U.S.C. § 15, authorizes suits for treble damages by "any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws." 15 U.S.C. § 15(a). In much the same way that the facially broad language of the Sherman Act has been construed as addressing only certain restraints on competition, however, "[t]he Supreme Court has held that Congress did not intend to afford a remedy to everyone injured by an antitrust violation." *Knevelbaard Dairies v. Kraft Foods, Inc.*, 232 F.3d 979, 987 (9th Cir. 2000) (citing *Associated Gen. Contractors of Cal., Inc. v. Cal. State Council of Carpenters*, 459 U.S. 519, 535 (1983)). In other words, it is not enough that a plaintiff has been injured; the plaintiff also

"must have 'antitrust standing.'" *Id.* That question turns on the following factors: "(1) the nature of the plaintiff's alleged injury; that is, whether it was the type the antitrust laws were intended to forestall; (2) the directness of the injury; (3) the speculative measure of the harm; (4) the risk of duplicative recovery; and (5) the complexity in apportioning damages." *Id.* (quoting *Am. Ad Mgmt., Inc. v. Gen. Tel. Co. of Cal.*, 190 F.3d 1051, 1054 (9th Cir. 1999)).

The first of those factors, "antitrust injury," is a "substantive element of an antitrust claim, and the fact of injury or damage must be alleged at the pleading stage." *Somers v. Apple, Inc.*, 729 F.3d 953, 963 (9th Cir. 2013). "'Antitrust injury' means 'injury of the type the antitrust laws were intended to prevent and that flows from that which makes defendants' acts unlawful,'" and "consists of four elements: '(1) unlawful conduct, (2) causing an injury to the plaintiff, (3) that flows from that which makes the conduct unlawful, and (4) that is of the type the antitrust laws were intended to prevent.'" *Id.* (quoting *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 489 (1977); *Am. Ad Mgmt., Inc. v. Gen. Tel. Co. of Cal.*, 190 F.3d 1051, 1055 (9th Cir. 1999)). The Ninth Circuit also requires "that 'the injured party be a participant in the same market as the alleged malefactors,' meaning 'the party alleging the injury must be either a consumer of the alleged violator's goods or services or a competitor of the alleged violator in the restrained market.'" *Id.* (quoting *Glen Holly Entm't, Inc. v. Tektronix, Inc.*, 343 F.3d 1000, 1008 (9th Cir. 2003)). In at least some circumstances, a potential market entrant thwarted from entering a market by the defendant's violations can also establish antitrust

injury. *See, e.g., In re Dual-Deck Video Cassette Recorder Antitrust Litig.*, 11 F.3d 1460, 1464 (9th Cir. 1993).

1. Relocation Fee and Joint Approval Process

The Court previously dismissed Oakland's Sherman Act claims to the extent that they were based on the NFL's relocation fee because any harm that the fee caused Oakland "neither 'flows from that which makes the conduct unlawful' nor 'is of the type the antitrust laws were intended to prevent.'" July 2019 Order at 17; *see Somers*, 729 F.3d at 963. The Court granted Oakland leave to amend despite noting that it was "not clear how Oakland could amend to cure the defects of this theory." July 2019 Order at 17. Nothing in Oakland's first amended complaint or opposition to the present motion alters that conclusion.

To the extent that the fee was relevant to the Raiders' decision to seek permission to relocate, it would have weighed against that decision—a business motivated by self-interest does not generally seek out opportunities to pay its competitors, or even its joint venturers or cartel coconspirators, hundreds of millions of dollars that it could otherwise keep for itself. At that stage of the decision-making, the relocation fee tended to protect Oakland's interests against other cities that might seek to attract the Raiders away.[6]

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[6] Oakland's allegations based on revenue sharing somewhat similarly fail to address the Raiders' self-interest. Oakland alleges that the NFL's revenue sharing policy "breeds

There is no question that *once the Raiders committed to relocate* and pay whatever fee might be imposed, the fee increased the likelihood that owners of the other teams in the NFL would vote to approve the relocation, because they stood to benefit financially from doing so. At that stage, however, such approval does not impair competition. As the Court previously held:

> Restrictions on NFL teams' ability to relocate to different cities are *themselves* restraints on competition *favoring the existing cities*, although they may in some circumstances be justified under the rule of reason. *See L.A. Mem'l Coliseum*, 726 F.2d at 1395 ("The competitive harms of Rule 4.3 are plain."). In a market entirely lacking such restraints, no approval from the NFL would have been necessary, and the Raiders' decision to relocate to Las Vegas would have been the end of the story. Oakland has not explained how the relocation fee, which makes approval more

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indifference to the home territory" and that, as a result, "it simply does not matter that Raider Nation was one of the most devoted fan bases in the NFL," thus incentivizing a move to Las Vegas. *See* FAC ¶¶ 54–56. In the same breath, however, Oakland alleges that revenue sharing allowed Defendants to collectively benefit from "the Raiders' doubled enterprise value" after the move. *Id.* ¶ 56. While Oakland also alleges that the Raiders' value would have increased with a new stadium in Oakland, *see id.*, the first amended complaint does not allege that the value of the Raiders would have been *higher* if they had remained in Oakland than if they moved to Las Vegas, nor does it explain why, if that were the case, the Raiders would have chosen to seek permission to relocate. A business moving to a new city under terms that maximize its value is not anticompetitive.

> likely—only after a team has applied to relocate—and thus brings the process closer to that which would exist in a market lacking competitive restraints, is itself an anticompetitive restraint harming existing host cities. Oakland's position on this issue would go beyond the dicta of *Los Angeles Memorial Coliseum* indicating that some restraints on team relocation may be *permissible*, and instead asks the Court to hold that such restraints are *required* under the antitrust laws.

July 2019 Order at 16–17.

Despite the relocation fee once again taking center stage in Oakland's amended complaint—Oakland seeks as relief a declaration that "redistribution of the resulting ill-gotten supra-competitive gains through artificially set relocation fees to all NFL Clubs, and the supracompetitive revenue generated by the relocation, as a quid pro quo for breaching the terms of those Policies, amount to an unreasonable restraint on trade and interstate commerce and a violation of the antitrust laws," FAC at 83 (prayer for relief)—Oakland barely discusses the fee in its opposition brief, arguing only that the ability of the Raiders to pay a $378 million fee tends to suggest that Defendants extract supracompetitive subsidies from the localities that host their teams. *See* Opp'n at 4.

To the extent that the first amended complaint pursues a claim based on the relocation fee as itself a restraint on trade, or more generally based on the NFL's approval of the Raiders' request to relocate, it is DISMISSED for the same reasons stated in the previous order. Whatever harm may result from

allowing teams to relocate to the city with the highest bid is not harm redressable under the antitrust laws.[7]

2. Limited Supply of NFL Teams

The more traditional antitrust problem presented by this case is that to the extent that NFL teams might be a unique product making up a distinct market, the NFL restricts the supply of such teams, requiring approval by three quarters of the existing thirty-two teams to expand beyond that number. *See* FAC Ex. 1 (NFL Bylaws) § 3.1. Courts have long recognized that restrictions on supply can increase prices beyond competitive levels. *See, e.g.*, *NCAA v. Bd. of Regents of Univ. of Okla.*, 468 U.S. 85, 116–17 (1984) ("The television plan protects ticket sales by limiting output—just as any monopolist increases revenues by reducing output.").

Oakland's attack on this limitation is somewhat halfhearted. At the hearing on the previous motion, Oakland's attorney stated that Oakland is "not attacking the 32-team limitation per se." July 19, 2019 Tr. (dkt. 65) at 13:14–15. Oakland's current amended complaint does not seek any equitable relief with respect to this limitation, such as a declaration that it is illegal or an injunction against its enforcement. *See* FAC at 82–83 (prayer for relief). Nevertheless, as the

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[7] Once again, this Court has no occasion to consider whether a team seeking to relocate or a city or stadium seeking to attract a team from a different location might have a valid antitrust claim based on the *impediment* to relocating caused by the NFL's policies and fee. *See* July 2019 Order at 16 n.10. The Court holds only that to the extent the NFL's policies *allow* a team to leave a city where it no longer wishes to play, that city has no recourse under the Sherman Act.

primary method of allowing the NFL to demand purportedly supracompetitive public subsidies, the limited number of teams plays a key role in Oakland's allegations. *See, e.g.*, *id.* ¶ 50 ("Of course, the NFL and its clubs want to maintain these supra-competitive prices and thus, they constrain the supply of teams and ensure the financial success of the existing 32 NFL Clubs."); *id.* ¶ 198 ("As a result of the artificially restricted supply in the market of professional football teams, Defendants have caused excess demand among actual and potential Host Cities for an NFL franchise."). Oakland alleges that the number of teams has not increased at a rate commensurate with the United States population or the number of cities capable of supporting a team, and that "it has been estimated that the current NFL could support as many as 42 teams" and that "any city with a population greater than 700,000[8] could support an NFL team." *Id.* ¶ 43 & n.4.

a. Relevant Market Definition

As a starting point, Oakland has not rigorously addressed the relevant market for its antitrust claim. Failure to plead a relevant market for a rule of reason antitrust claim warrants dismissal, *Hicks v. PGA Tour, Inc.*, 897 F.3d 1109, 1120 (9th Cir. 2018),[9] and

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[8] Although not relevant to the outcome of the present motion, the Court notes that the U.S. Census Bureau's most recent estimate of the population of the city of Oakland is 429,082 people. *See* U.S. Census Bureau, QuickFacts: Oakland city, California, https://www.census.gov/quickfacts/oaklandcitycalifornia.

[9] In some cases involving "naked restriction[s] on output," a plaintiff may "not [be] required to establish a relevant market,"

as Defendants note, markets defined by their consumers rather than the products at issue are not generally cognizable, *Newcal Indus., Inc. v. Ikon Office Sol.*, 513 F.3d 1038, 1045 (9th Cir. 2008). Oakland's first amended complaint defines the market as follows:

> The relevant market in this action is the market for hosting NFL teams. The consumers in this market are all Host Cities offering, and all cities and communities that are willing to offer (i.e., potential Host Cities), home stadia and other support to major league professional football teams in the geographic United States. The product in this market is the NFL team, as a hosted entity.

FAC ¶ 189. Oakland alleges that cities and other localities are willing to provide such support in order to "generate direct payments to local government, economic benefits to the community, media impact (effectively showcasing the community to other parts of the country and world), and provide a public consumption benefit (quality of life offerings) or psychic impact for local residents." *Id.* ¶ 188.

Despite the Court's previous note of this deficiency, Oakland still has not "address[ed] the test of 'whether a hypothetical monopolist could impose a "small but significant nontransitory increase in price"

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even under the rule of reason. *See In re Nat'l Football League's Sunday Ticket Antitrust Litig.*, 933 F.3d 1136, 1152 (9th Cir. 2019) (citing *NCAA*, 468 US. at 109), *pet. for cert. docketed*, No. 19-1098 (S. Ct. Feb. 7, 2020). Because, as discussed below, the Court assumes for the sake of argument that Oakland has sufficiently alleged a relevant market, the Court need not determine whether this is such a case.

("SSNIP") in the proposed market,' or whether potential host cities would respond to such an increase by substituting other 'products.'" July 2019 Order at 24 (quoting *Saint Alphonsus Med. Ctr.*, 778 F.3d at 784). Oakland's first amended complaint briefly discusses that test for its proposed *geographic* market—arguing only that it is inapplicable because there are no NFL football teams outside the United States—but does not address the test for the *product* market, or in other words, whether cities would respond to a "price increase" in NFL teams' demands for public support by shifting such support to other professional (or perhaps collegiate) sports teams, other forms of entertainment, or entirely different forms of public investment to develop economic activity, civic pride, and the other benefits that cities might obtain from hosting an NFL team. The Court nevertheless assumes for the sake of argument that Oakland's market definition is sufficient at the pleading stage.[10]

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[10] Defendants argue that cities must be suppliers rather than consumers in whatever market exists between cities and NFL teams, because cities compete to host NFL teams, rather than NFL teams competing for cities. *See* Mot. at 14–15. While Defendants are correct that in some markets (for example, retail markets) consumers generally do not compete with one another, other markets include competition both among sellers and among buyers. As one example, in the real estate market for single family homes, sellers compete in their list prices, but buyers also compete in their offers. Defendants' lack of competition among themselves could just as easily be explained by their agreement not to compete—which Defendants characterize as a joint venture and Oakland characterizes as a cartel—as by any inherent market dynamic.

b. Non-Speculative Antitrust Injury

The Court also previously held that Oakland had not plausibly alleged that, but for the limited number of teams, Oakland would still have an NFL team. July 2019 Order at 17–18. The Court identified the following "incomplete list of issues that might be relevant" but were not addressed in Oakland's original complaint:

> (1) whether there are additional potential owners willing to establish new teams if the NFL allowed them to do so; (2) whether such potential owners would have based a team in Las Vegas before the Raiders decided to relocate there; (3) whether the Raiders would still have left Oakland for another city if the NFL allowed additional teams; (4) if the Raiders might still have left, whether an additional team would have been established in Oakland to replace the Raiders; or (5) whether Oakland has made any effort to attract an existing team other than the Raiders or to establish a new expansion team to replace the Raiders.

Id. at 18.

Oakland's first amended complaint alleges none of those things. Instead, it repeats an allegation from the original complaint that entrepreneur and basketball-team-owner Mark Cuban believes Oakland is a better site for the Raiders than Las Vegas, FAC ¶ 127, and adds an allegation that an economic analysis commissioned by Oakland determined that, of U.S. cities without NFL teams, Oakland "best reflect[s] the demographic and financial conditions of existing Host

Cities" and has "the best prospects for new NFL franchises," *id.* ¶ 138. But Oakland still has not plausibly alleged what the playing field would look like if the NFL allowed more than thirty-two teams. In that hypothetical world, what would prevent Las Vegas from offering a more attractive deal, as in fact occurred? Would another team have already existed in Las Vegas? Would the Raiders have gone elsewhere if Las Vegas already had a team? If the Raiders left, would a different team play in Oakland? The first amended complaint answers none of those questions. Oakland also once again declines to address what sort of league structure might be permissible if the current number of teams is not. Oakland's injury remains speculative, and its claim remains subject to dismissal on that basis.

Oakland argues that the "barriers to entry" of the NFL are sufficient that "[n]o rational investor or city would put together a team or build a football stadium without Defendants' prior approval," and that Oakland therefore should not be required to attempt to create an expansion team to pursue this claim. Opp'n at 8–9. The cases that it cites for that proposition generally involve businesses excluded by their potential direct competitors. *See generally Rebel Oil Inc. v. Atl. Richfield Co.*, 51 F.3d 1421 (9th Cir. 1995); *Parks v. Watson*, 716 F.2d 646 (9th Cir. 1983) (per curiam) (considering a company's claim against a city that allegedly competed against the company in developing geothermal energy); *Meridian Project Sys., Inc. v. Hardin Const. Co.*, LLC, No. CIV.S-04-2728FCDDAD, 2005 WL 2615523, at *6 (E.D. Cal. Oct.

14, 2005).[11] One case, *Solinger v. A&M Records, Inc.*, 586 F.2d 1304 (9th Cir. 1978), involved somewhat more similar facts in that the plaintiff wished to distribute the defendants' records rather than compete directly against them. There, however, the defendants allegedly refused to deal with the plaintiff because he would not agree to the defendants' territorial allocation plan for distribution. *Solinger*, 586 F.2d at 1307. In contrast, Oakland essentially alleges here that it was outbid; it does not plausibly allege a concerted refusal to deal, or that a deal was conditioned on Oakland agreeing to an anticompetitive restraint.

Oakland cites no case where, as here, a plaintiff that was priced out of the market for a product it wished to purchase (or perhaps to sell) established antitrust injury, much less without some showing that the plaintiff would have obtained the product but for the purported anticompetitive conduct that raised the price. Courts have generally rejected such a theory. The Tenth Circuit addressed the issue in *Montreal Trading*:

> A price fixing conspiracy is certainly "aimed" at those who purchase the product at the inflated price; their injury is more direct and more proximately caused than those who are unable to purchase due to product scarcity. But a conspiracy to withhold goods from the market may also injure nonpurchasers and we must determine whether a nonpurchaser in

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[11] Some of Oakland's citations also refer to entry barriers in the context of market power rather than as a substitute for showing injury.

Montreal Trading's position should be treated as "directly injured."

The two purposes of the treble damage remedy are "to compensate victims of antitrust violations for their injuries" and to deprive violators of "the fruits of their illegality." *Illinois Brick* [*Co. v. Illinois*, 431 U.S. 720, 746 (1977)]. Here, we note that while nonpurchasers may be considered victims of the conspiracy, the alleged conspirators gained no "fruits" from nonsales except to the extent that sales volume had to decline if they were to succeed in charging inflated prices. Other factors that merit consideration are whether a grant of standing might result in "potentially disastrous recoveries by those only tenuously hurt," *Jeffrey v. Southwestern Bell*, 518 F.2d 1129, 1131 (5th Cir. 1975), and whether the fact of a party's injury, as opposed to the amount, would be inherently speculative. We find these considerations dispositive. If nonpurchasers who have never dealt with a defendant could recover, a seemingly unlimited number of plaintiffs could assert a virtually unlimited quantity of lost purchases, perhaps exceeding the potential output of the entire industry. With a treble damages entitlement, the result could be multiple recoveries and total damage awards wholly out of proportion with "the fruits of the illegality," easily bankrupting the named defendants. *See Illinois Brick*, 431 U.S. at 730, 97 S. Ct. at 2067; *Mid-West Paper*

> *Prods. Co. v. Continental Group, Inc.*, 596 F.2d 573, 586-87 (3d Cir. 1979).

Montreal Trading Ltd. v. Amax Inc., 661 F.2d 864, 867–68 (10th Cir. 1981). As a district court following *Montreal Trading* explained:

> Allowing nonpurchasers to recover would unduly broaden the spectrum of potential plaintiffs with price fixing and monopolization claims. Anyone who considered, or claimed to consider, purchasing a product or service would have standing to bring such claims. Damages would vary widely depending on the consequences of a potential consumer's inability to purchase. Courts would also be faced with complex causation issues.

Lambert v. Bd. of Comm'rs of Orleans Levee Dist., No. CIV A 05-5931, 2009 WL 152668, at *7 (E.D. La. Jan. 22, 2009).

Oakland is, of course, correct that the *Montreal Trading* court distinguished a plaintiff with a prior course of dealing as a potential exception where "injury may not be inherently speculative." 661 F.2d at 868. And as the Tenth Circuit noted in that case, the Supreme Court has suggested that direct purchaser who resells a product at higher price to account for its increased cost "may still claim injury from a reduction in the volume of its sales caused by its higher prices." *Illinois Brick*, 431 U.S. at 733 n.13. Here, however, Oakland has provided no reason to believe that it would have "purchased" the right to host an NFL team but for the thirty-two team restriction. Under the circumstances of this case, Oakland's past dealing with the NFL does not show

what would have occurred absent the limitation on the number of teams, because it occurred under substantially similar restrictions—the league was not open to more teams then than now.

At the hearing, Oakland argued that requiring plausible allegations that, but for the limited number of teams in the league, it would have retained an NFL team is incompatible with the "holistic" approach used by the Ninth Circuit in *In re National Football League's Sunday Ticket Antitrust Litigation*, 933 F.3d 1136 (9th Cir. 2019). *See* Apr. 17, 2020 Tr. (dkt. 85) at 9:18–10:10. That case did not pose any comparable question of the plaintiffs having themselves suffered antitrust injury. Each plaintiff subscribed to the "Sunday Ticket" package at issue, and thus had standing because they allegedly paid a premium to DirecTV, an alleged co-conspirator, as a result of purportedly anticompetitive collusion in licensing broadcasts of NFL games. *See Sunday Ticket*, 933 F.3d at 1148, 1156–58. The plaintiffs there did not present a theory that they were "priced out" of purchasing viewing rights, and as discussed above, Oakland has not alleged here that it in fact paid a premium to obtain or retain an NFL team, at least within the applicable statute of limitations. The Ninth Circuit's "holistic approach" in *Sunday Ticket* pertained to showing cognizable injury to *competition*, not to the individual plaintiffs. *Id.* at 1152. Both are required, and here, Oakland has not shown the latter.

Ultimately, Oakland's refusal to grapple with the question of what would be permissible if the thirty-two

structure is not,[12] much less how the distribution of teams might fall under such a structure, renders this case particularly unsuitable as a novel expansion of antitrust liability to non-purchaser plaintiffs. Reading Oakland's complaint and arguments as a whole—in particular, the lack of any suggestion as to how the NFL should be structured, and the request for equitable relief only as to the decision to permit a relocation rather than the limitation on the number of teams—it does not appear that Oakland actually objects to the limited number of teams in the NFL. Instead, it would seem that Oakland simply wishes it could have kept one of those teams for itself, and benefited from the prestige and economic windfall that derive from that scarcity, without paying the supracompetitive price that also arises from it. This Court declines to be the first to endorse that unorthodox theory of antitrust injury, and GRANTS Defendants' motion to dismiss. In light of Oakland's failure to address the concerns raised in the Court's previous order, the Court finds that further leave to amend would be futile, and dismisses Oakland's Sherman Act claim with prejudice.

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[12] At the hearing, Oakland's attorney stated that Oakland's argument is not that the NFL cannot permissibly restrict the number of teams, but that it cannot do so "in an anticompetitive way," without meaningfully explaining how the NFL might restrict the number of teams in a manner that Oakland would not consider anticompetitive, or what number of teams would be appropriate. *See* Apr. 17, 2020 Tr. at 13:20–14:13, 19:4–25.

c. Injury Compensable Under the Antitrust Laws

As a separate and sufficient reason for dismissal, none of Oakland's damages are of a type compensable under the Clayton Act. That statute provides for recovery of injury to "business or property." 15 U.S.C. § 15(a). Oakland alleges injury in the form of: (1) lost investment value, FAC ¶¶ 201–03; (2) "Lost Income" (including rental income, payments on bonds to fund Coliseum renovations, and money collected for ticket sales to fund education), *id.* ¶¶ 204–05; lost tax revenue, *id.* ¶¶ 206–20; and (4) devaluation of the Coliseum property, *id.* ¶¶ 211–17.

Beginning with lost tax revenue, the Supreme Court has held that while the Clayton Act allows a state to "seek[] damages for injuries to its commercial interests," it "does not authorize recovery for economic injuries to the sovereign interests of a State." *Hawaii v Standard Oil Co. of Cal.*, 405 U.S. 251, 264–65 (1972). This Court previously held that, based on that principle, Oakland "cannot recover damages based on lost tax revenue from the broad scope of economic activity associated with the presence of a professional football team." July 2019 Order at 21. The Court acknowledged that Oakland "has a more personal and proprietary interest in damages based on lost tax revenue than a state has in a parens patriae suit for 'injury to its general economy,'" but held that the types of tax revenue at issue here raised similar concerns and fell outside the scope of the Clayton Act. *Id.* at 21–22 (quoting *Hawaii*, 405 U.S. at 263–64). Nothing in Oakland's amended complaint or present opposition brief alters that conclusion. While the Court left the door open to a possibility that "there could perhaps be

circumstances where a tax specifically negotiated as part of an agreement between a local government and a private entity could take on a 'commercial' instead of—or as well as—'sovereign' character," July 2019 Order at 22, Oakland has provided no further allegations to show that such a tax exists in this case,[13] nor cited any authority holding that such a tax would in fact be recoverable under the Clayton Act.

Oakland's claim for lost municipal investment, including bonds used for Coliseum renovations, fails for the same reason. As noted in this Court's previous order, the Ninth Circuit has rejected an argument that a city "raising and disbursing . . . special assessment funds used to improve [a] commercial zone . . . is a sufficient proprietary interest" to bring an antitrust claim. *City of Rohnert Park v. Harris*, 601 F.2d 1040, 1045 (1979). Oakland focuses on the Ninth Circuit's separate holding that Rohnert Park's injury was too speculative with respect to property that it actually owned, Opp'n at 7–8, but ignores the holding applicable to the less concrete interest in municipal investment. (This order addresses Oakland's ownership of the Coliseum separately below.)

As for lost rent, Oakland has not specifically alleged that the Raiders paid rent to Oakland directly, and instead alleges that Oakland and co-owner (but non-party) Alameda County leased the Coliseum to the Oakland-Alameda County Coliseum Financing

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[13] Oakland provides no details, for example, with respect to funds that it "collected . . . from each Raiders ticket for the express purpose of funding education in Oakland" to suggest those funds constituted a commercial rather than sovereign interest. *See* FAC ¶ 204.

Corporation, which assigned its rights under the lease to the OACCA. FAC ¶ 29. The Ninth Circuit has rejected such indirect claims under the Sherman Act in the somewhat analogous context of corporate shareholder plaintiffs:

> "A shareholder of a corporation injured by antitrust violations has no standing to sue in his or her own name . . . ." *Solinger v. A. & M. Records, Inc.*, 718 F.2d 298, 299 (9th Cir. 1983). This rule applies even if the injured shareholder is the sole shareholder, *Sherman v. British Leyland Motors, Ltd.*, 601 F.2d 429, 439 (9th Cir. 1979), or if the shareholder alleges that the antitrust violations were intended to drive the individual out of the industry. *Stein v. United Artists Corp.*, 691 F.2d 885, 897 (9th Cir. 1982). "If shareholders were permitted to recover their losses directly, there would be the possibility of a double recovery, once by the shareholder and again by the corporation." *Id.* at 896–97.

Vinci v. Waste Mgmt., Inc., 80 F.3d 1372, 1375 (9th Cir. 1996). The Ninth Circuit has also held, in an en banc plurality opinion, that "a landlord or receiver of royalties does not establish antitrust standing by showing its receipts are down and it is in the area where an antitrust violation produced this result." *R.C. Dick Geothermal Corp. v. Thermogenics, Inc.*, 890 F.2d 139, 146 (9th Cir. 1989).[14]

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[14] The Court previously declined to read *R.C. Dick* as foreclosing a claim by a landlord alleging anticompetitive conduct in the market for rental transactions. While the Court stands by

Reading those cases together, Oakland's only argument that "'[a]lthough the [OACCA] manages the Coliseum site for Oakland, Oakland is the entity with the economic interest in that site and, accordingly, is the entity that suffers from losses related to that site,'" Opp'n at 13 (quoting FAC ¶ 217), is not sufficient to establish standing. The Court previously declined to reach the question of whether "Oakland's status as an 'indirect' landlord" barred its claims, July 2019 Order at 20 n.12, but with Oakland still having cited no authority allowing claims to proceed under similar circumstances, this Court now holds that they cannot. Absent authority to the contrary, the fact that the non-party OACCA "is directly controlled by Oakland and Alameda County" does no more to impart standing to Oakland than status as a "sole shareholder" did for the plaintiff in *Sherman*, 601 F.2d at 439–40. If anything, because Oakland shares control of the OACCA with non-party Alameda County, its degree of control is less than that of the sole shareholder whose standing the Ninth Circuit rejected. Moreover, the Court holds that the same principles apply equally to lost value in the Coliseum as to lost rental income. Just as mere loss of rental income "in the area where an antitrust violation produced this result" was not a sufficiently direct injury in *R.C. Dick*, loss of property value as a result of failure by a tenant (the OACCA) to secure continued use by a subtenant (the Raiders) is similarly indirect

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that conclusion, it is now clear that Oakland was not itself a landlord renting the Coliseum to the Raiders. *See* FAC ¶ 29 (alleging that Oakland and Alameda County leased the Coliseum to the Oakland-Alameda County Coliseum Financing Corporation, which assigned its rights to the OACCA, which manages the Coliseum).

and insufficient, notwithstanding Oakland's control over the OACCA.

Because Oakland has not alleged a cognizable direct injury to business or property, its antitrust claim must be dismissed.

3. Group Boycott

Finally, to the extent that Oakland continues to argue that it has alleged a "group boycott," Opp'n at 20, it still has not alleged that any NFL team besides the Raiders has refused to deal with Oakland, or that the NFL has prohibited any team from dealing with Oakland or set any "agreed terms" that Oakland must meet to attract a new or different team. Certain commentators' view that "'a threat by an individual team to relocate *may* comprise an *implicit* threat of a concerted boycott'" does not, without more, show that such a boycott in fact occurred. *See id.* (quoting Haddock et al., *League Structure & Stadium Rent-Seeking – The Role of Antitrust Revisited*, 65 Fla. Law Rev. 1, 6 (2013)) (emphasis added).

C. State Law Claims

Oakland asserts its claims for breach of contract and unjust enrichment under California law. With no indication that there is complete diversity of citizenship as required for jurisdiction under 28 U.S.C. § 1332,[15] those claims fall within this Court's subject

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[15] The Court raised this issue at the hearing, and Defendants submitted a supplemental brief confirming that they "do not believe that there is complete diversity of citizenship under 28 U.S.C. § 1332," although they asked the Court to exercise supplemental jurisdiction under 28 U.S.C. § 1367 even if the only

matter jurisdiction only by virtue of their relationship to Oakland's federal antitrust claim under the supplemental jurisdiction provided by 28 U.S.C. § 1367(a). Under subsection (c) of that statute, however, a district court "may decline to exercise supplemental jurisdiction over a claim under subsection (a) if," among other reasons, "the district court has dismissed all claims over which it has original jurisdiction." 28 U.S.C. § 1367(c). "[I]n the usual case in which all federal-law claims are eliminated before trial, the balance of factors to be considered under the [supplemental] jurisdiction doctrine—judicial economy, convenience, fairness, and comity—will point toward declining to exercise jurisdiction over the remaining state-law claims." *Carnegie-Mellon Univ. v. Cohill*, 484 U.S. 343, 350 n.7 (1988).

Although the concerns regarding these claims raised in the Court's previous order remain largely unaddressed, this case has not progressed beyond the pleading stage, and the Court finds no reason to deviate from the usual approach of declining to exercise supplemental jurisdiction after all federal claims have been dismissed. The Court therefore DISMISSES Oakland's state law claims for lack of subject matter jurisdiction, without reaching the parties' arguments regarding the sufficiency of Oakland's allegations.

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federal claim is dismissed. *See* dkt. 84. Oakland also has not suggested that this case satisfies § 1332, and its counsel stated at the hearing that Defendants would likely have more knowledge of the facts relevant to this issue. Apr. 17, 2020 Tr. at 29:5–13.

IV. CONCLUSION

For the reasons discussed above, Defendants' motion is GRANTED, and Oakland's Sherman Act claim is DISMISSED with prejudice. Based on Oakland's failure to redress the deficiencies noted in the previous order, the Court concludes that further leave to amend that claim would be futile. Oakland's state law claims for breach of contract and unjust enrichment are DISMISSED for lack of subject matter jurisdiction, without prejudice to Oakland bringing those claims in a court of competent jurisdiction. The Clerk is instructed to enter judgment in favor of Defendants and close the case.

IT IS SO ORDERED.

Dated: April 30, 2020

/s/
JOSEPH C. SPERO
Chief Magistrate Judge