No. 21-1243

In the Supreme Court of the United States

CITY OF OAKLAND, CALIFORNIA, PETITIONER

v.

OAKLAND RAIDERS, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether, as required to establish Article III standing, petitioner City of Oakland's alleged injuries from the Raiders' relocation to Las Vegas are fairly traceable to a National Football League rule requiring that admission of a new team be approved by a three-quarters vote of existing teams.

2. Whether the court of appeals erred in applying the well-established statutory antitrust standing analysis that petitioner itself advocated in both courts below to hold that "[t]here are too many speculative links in the chain of causation" (Pet. App. 30a) for petitioner to establish proximate cause sufficient to bring an antitrust claim under the Clayton Act.

RULE 29.6 STATEMENT

The National Football League is an unincorporated association of 32 member clubs.

Tennessee Football, Inc., a private corporation, is a subsidiary of KSA Industries, Inc., a private corporation.

Pro-Football, Inc., a private corporation, is a subsidiary of WFI Group, Inc., a private corporation, which is a subsidiary of Washington Football, Inc., a private corporation.

Pittsburgh Steelers LLC, a private limited liability company, is a subsidiary of Pittsburgh Steelers Sports Holdco LLC. Pittsburgh Steelers Sports, Inc., a private corporation, is a majority owner of Pittsburgh Steelers Sports Holdco LLC.

Panthers Football, LLC, a private limited liability company, is a subsidiary of Panthers Football Holdco, LLC, which is a subsidiary of DT Panthers, LLC, which is a subsidiary of DT Sports Holding, LLC, which is a subsidiary of Tepper Sports Holding, Inc.

Buccaneers Team LLC, a private limited liability company, is a subsidiary of Buccaneers Holdings LLC, which is a subsidiary of Tampa Bay Broadcasting, Inc.

Philadelphia Eagles, LLC, a private limited liability company, is a subsidiary of Philadelphia Eagles Limited Partnership, which is a subsidiary of Philadelphia Eagles, Inc.

Other than the entities listed above, no respondent has a parent corporation and no publicly held corporation owns more than 10% of any respondent's stock.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a–42a) is reported at 20 F.4th 441. The opinion of the district court dismissing petitioner's first amended complaint (Pet. App. 43a–79a) is reported at 445 F. Supp. 3d 587. The opinion of the district court dismissing petitioner's original complaint is unreported, but available at 2019 WL 3344624.

INTRODUCTION

In its petition for certiorari, petitioner seeks to challenge the same statutory antitrust standing doctrine that it urged the courts below to apply. Petitioner's failure to assert below the argument that it advances here, and the understandable absence of analysis in the court of appeals' decision regarding an issue not presented to it, are reason enough to deny the petition. But there are multiple other reasons to deny review. Petitioner lacks Article III standing, as recognized by Judge Bumatay's concurring opinion below, and petitioner would lose even under

its proposed statutory standing test. Petitioner also fails to show any error or circuit conflict.

Both courts below correctly concluded that petitioner lacks statutory standing to bring a private antitrust action under the Clayton Act to challenge the rule of the National Football League ("NFL" or "League") governing admission of new teams. Both courts held that petitioner's alleged injuries were so attenuated and speculative that it had no plausible claim that its injuries were proximately caused by the rule, and accordingly fell outside the scope of the Clayton Act. In reaching that conclusion, both courts followed circuit precedent and this Court's decision in *Associated General Contractors of California, Inc.* v. *California State Council of Carpenters*, 459 U.S. 519 (1983), which identified considerations for courts to apply in determining whether an alleged injury is too remote from the alleged restraint to be within the scope of the Clayton Act. Petitioner itself urged that analysis before both courts below.

Unable to prevail under that long-settled standard, petitioner now contends for the first time that the Court's analysis of statutory standing under the Lanham Act in *Lexmark Int'l, Inc.* v. *Static Control Components, Inc.*, 572 U.S. 118 (2014), limited *Associated General Contractors* and its progeny. Petitioner asserts that *Lexmark* precludes use of *Associated General Contractors*' statutory standing analysis in cases brought under the federal antitrust statutes. Pet. I, 2, 9, 26. Petitioner argues that this Court's review is necessary because the courts of appeals are "ignoring" *Lexmark*'s "unambiguous instruction." Pet. 17. But that issue was neither pressed nor passed upon below. Moreover, aside from passing dictum in a single case that *rejected* the idea, petitioner cites no court decision even addressing the argument that *Lexmark* limits *Associated General Contractors*' statutory standing analysis for antitrust claims under the

Clayton Act; there is therefore no split among the courts of appeals meriting review. For those reasons alone, this Court's review is not warranted.

Petitioner's argument is not just waived, unripe, and splitless; it is also wrong. *Lexmark* interpreted the Lanham Act's prohibition against false advertising. Nothing in that decision suggested that the long-established analysis outlined in *Associated General Contractors* governing who may bring an *antitrust* claim under the Clayton Act is no longer good law. *Lexmark* did not reject the *Associated General Contractors* analysis as a means of determining whether an antitrust plaintiff is within the Clayton Act's "zone of interests" and can establish proximate causation sufficient to show that its claims come within the sweep of the statute. 572 U.S. at 126–127.

Indeed, *Lexmark* itself emphasized that "[p]roximate-cause analysis is controlled by the nature of the statutory cause of action." 572 U.S. at 133. There is no reason that an antitrust cause of action under the Clayton Act would require the same analysis as a false advertising claim under the different language of the Lanham Act. And though petitioner strains to portray the test it urged on the courts below as a "prudential" test reflecting mere policy considerations, Pet. 24–25, the Ninth Circuit here made clear that it was inquiring into "*statutory* standing," Pet. App. 14a, to determine to which antitrust injuries "Congress * * * afford[ed] a remedy" under the Clayton Act, *id.* at 20a (citation omitted). That is exactly the kind of analysis *Lexmark* contemplated. See 572 U.S. at 128 & n.4 ("[T]he question this case presents is whether [the plaintiff] falls within the class of plaintiffs whom Congress has authorized to sue * * * . * * * We have on occasion referred to this inquiry as 'statutory standing' * * *."). And the record demonstrates that petitioner would still lose under the standard it now advocates because it cannot

establish proximate cause even under its proposed statutory standing analysis.

In any event, this case would be a singularly poor vehicle to address whether *Lexmark* abrogated *Associated General Contractors* because petitioner cannot show that it has Article III standing. As Judge Bumatay explained in his concurring opinion, petitioner's allegations rely on "an elaborate string of speculations" that reveal that its alleged injuries are "too remote and too conjectural to be traceable to the NFL's entry process." Pet. App. 40a. Petitioner's lack of Article III standing represents a foundational, jurisdictional obstacle to addressing the question presented.

Finally, the district court correctly concluded that there is "a separate and sufficient reason for dismissal[:] none of [petitioner's alleged] damages are of a type compensable under the Clayton Act" because all represent "economic injuries to * * * sovereign interests" rather than the kinds of commercial interests that are the concern of the federal antitrust statutes and that the Clayton Act protects. Pet. App. 73a. Further review is not warranted.

STATEMENT

A. Factual Background

The Oakland Raiders is a professional football team that plays in the NFL. The Raiders began playing in Oakland in 1960 as a member of the American Football League ("AFL") and in 1966 moved to the Oakland Alameda County Coliseum ("Coliseum"), which petitioner City of Oakland indirectly leases through intermediate entities. C.A.E.R. 2:184.

Petitioner has a history of using aggressive litigation tactics against professional teams seeking to relocate. When the Raiders relocated to Los Angeles in 1982,

petitioner unsuccessfully tried to block that move by "attempt[ing] to acquire the Raiders through eminent domain." *City of Oakland* v. *Oakland Raiders*, No. 18-cv-07444-JCS, 2019 WL 3344624, at *1 (N.D. Cal. July 25, 2019). The team later returned to Oakland and resumed playing in the Coliseum in 1995. C.A.E.R. 2:216–217.

The Coliseum deteriorated significantly as it aged; the facility became so run down that it gained notoriety as "perhaps America's most hated sports stadium. Players and coaches deride it. * * * The lights are breaking, mice are dying in the soda machines, and the sewage that sometimes floods the dugouts has its own Twitter account." Jack Nicas, *The Beauty of America's Ugliest Ballpark*, N.Y. Times (Oct. 3, 2019), https://bit.ly/39M9ahp. *Cf.* Vinnie Iyer, *Ranking All 31 NFL Stadiums, from Worst to Best*, Sporting News (May 17, 2019), https://bit.ly/3NQatuM (ranking Coliseum as second-worst NFL stadium). After years of unsuccessful negotiations for a new stadium in Oakland (C.A.E.R. 2:219–221), and after a succession of Coliseum lease extensions had expired, the Raiders decided in 2016 to relocate to Las Vegas. C.A.E.R. 2:220–222.

As provided by the NFL Constitution, the Raiders submitted an application to the League for approval of the proposed relocation, a process that requires the consent of three-quarters of the League's member teams. C.A.E.R. 2:222. The teams approved the relocation by a vote of 31 to 1.

Although petitioner's case challenges the Raiders' relocation, the City of Oakland's petition seeks to attribute its injury to another provision of the NFL Constitution—the provision for admission of a new team to the League. That also requires the assent of three-quarters of existing teams. Since the Raiders began playing in the Coliseum in 1966, the NFL has admitted a total of eighteen

additional teams—ten (including the Raiders) from the AFL in 1970, and eight additional expansion teams from across the country. The League currently has 32 member teams. C.A.E.R. 2:184–187.

B. Proceedings Below

1. Petitioner responded to the Raiders' relocation by filing an antitrust lawsuit, alleging that the NFL and its member teams had engaged in a "group boycott, refusal to deal, and price fixing." 2019 WL 3344624, at *8 (capitalization and quotation marks omitted). It focused primarily on an argument that the League and its teams had violated the antitrust laws against restraint of trade by *permitting* the Raiders to relocate. During later briefing, petitioner shifted focus to its contention that the League's rule on adding teams was anticompetitive.

The district court dismissed the complaint. The court rejected petitioner's contention that "restraints on team relocation * * * are *required* under the antitrust laws," concluding that the City's claim was not "of the type the antitrust laws were intended to prevent." 2019 WL 3344624, at *10. The court relied on circuit precedent that applied *Associated General Contractors of California*, which petitioner agreed governs the inquiry. See Opp. to Mot. to Dismiss 8, Dkt. 48.

The court also concluded that to the extent petitioner based its claim on the League's admission rule, petitioner had not alleged antitrust injury and lacked standing. The court concluded that petitioner had not plausibly alleged in its complaint "that it would have been able to host an NFL team if the NFL allowed more teams in the league" because it had failed to make numerous basic factual allegations, such as "whether there are additional potential owners willing to establish new teams" and "whether the Raiders" or "an additional team" would have chosen to play in Oakland if the League had additional teams. 2019

WL 3344624, at *10; Pet. App. 66a (quoting "'list of issues' * * * not addressed in Oakland's original complaint").

2. Petitioner then filed a First Amended Complaint, asserting federal antitrust statutory claims and invoking the court's supplemental jurisdiction over state-law claims. C.A.E.R. 2:170. Petitioner alleged that respondents had engaged in a "group boycott" and "collective refusal to deal" by allowing the Raiders to relocate and "den[ying] [petitioner] the opportunity to receive another [football team]." C.A.E.R. 2:227. Petitioner also alleged that the NFL was "a classic price-fixing scheme," "constraining the supply of NFL teams" by subjecting membership applications to a three-fourths vote, thereby "driving up the price of hosting an NFL team * * * far beyond the price that would be found in a competitive marketplace." C.A.E.R. 2:229. Even though petitioner's lease with the Raiders had expired and the Raiders had no obligation to renew the lease at the Coliseum, petitioner sought compensation for the "loss of investments" it had made to improve the Coliseum and build a training facility; lost revenue from a ticket surcharge and from rental income for the Coliseum; lost tax revenues from ticket sales, concessions, stadium parking, player compensation, and merchandising; and for devaluation of the Coliseum property. C.A.E.R. 2:245–250.[1]

3. The district court dismissed petitioner's antitrust claims with prejudice, concluding that it had failed to cure the defects in its original complaint. See Pet. App. 61a–62a, 66a–67a. The court rejected petitioner's group boycott theory because it had "not alleged that any NFL team besides the Raiders had refused to deal with Oakland, or

[1] The amended complaint included a request for disgorgement "[i]n addition, or alternatively," to damages, C.A.E.R. 2:252, 256, and a boilerplate request for "[a]ny other relief to which [petitioner] may be entitled as a matter of law or equity," C.A.E.R. 2:256.

that the NFL has prohibited any team from dealing with Oakland." *Id.* at 77a.

The court also concluded that petitioner's challenge to the League admission rule failed because petitioner lacked antitrust standing under circuit precedent following *Associated General Contractors*, Pet. App. 57a–58a (quoting *Knevelbaard Dairies* v. *Kraft Foods, Inc.*, 232 F.3d 979, 987 (9th Cir. 2000) (citing *Associated Gen. Contractors*, 459 U.S. at 535)), which petitioner again agreed governs the inquiry. Opp. to Mot. to Dismiss First Amended Complaint 11, Dkt. 74 (quoting *Glen Holly Ent.* v. *Tektronix Inc.*, 352 F.3d 367, 372 (9th Cir. 2003)). The court concluded that petitioner's alleged injuries "remain[ed] speculative" because the City "had not plausibly alleged that, but for the limited number of teams, Oakland would still have an NFL team," noting that petitioner had still failed to allege that "there are additional potential owners willing to establish new teams," much less that they would have chosen to locate in either Las Vegas or Oakland rather than another city. Pet. App. 66a–67a.

Lastly, the district court held that, "[a]s a separate and sufficient reason for dismissal, none of Oakland's damages are of a type compensable under the Clayton Act." Pet. App. 73a. The court reasoned that lost tax revenue and lost municipal investments do not constitute harm to "business or property" recoverable under that antitrust statute (*id.* at 73a–74a), and the City could not recover for lost rent that would have been paid to the assignee of a third party rather than to the City itself (*id.* at 75a). The court declined to exercise supplemental jurisdiction over petitioner's state-law claims. *Id.* at 78a.

4. The court of appeals affirmed. Pet. App. 1a–42a. The court ruled that petitioner had failed to state a group boycott claim because it "ha[d] 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 16a–19a (citation omitted).

The court also rejected petitioner's "horizontal price-fixing" claim because of petitioner's "lack of antitrust standing" under the Clayton Act, Pet. App. 20a–21a (citing *Knevelbaard Dairies*, 232 F.3d at 987; *Am. Ad Mgmt., Inc.* v. *Gen. Tel. Co. of Cal.*, 190 F.3d 1051, 1054 (9th Cir. 1999)), following circuit precedent that applied the *Associated General Contractors* analysis that petitioner had advocated, see Pet. C.A. Reply 14–15 (citing *Associated Gen. Contractors*, 459 U.S. 519, and *Glen Holly Ent.*, 352 F.3d at 372). The court agreed with the district court that "[t]here are too many speculative links in the chain of causation between [respondent]s' alleged restrictions on output and the City's alleged injuries," Pet. App. 30a (citing *Associated Gen. Contractors*, 459 U.S. at 540), to establish that petitioner's injuries were proximately caused by the challenged League rule and thus within the scope of the antitrust statute. The court concluded that petitioner had failed to allege that but for respondents' "alleged restrictions on output," "additional potential owners willing to establish new teams" would have emerged and "based a team in Las Vegas" or Oakland, or that "the City [would] have been willing and able to pay a competitive price" to retain a team. *Id.* at 29a–30a (citation omitted). For similar reasons, the court also concluded that petitioner's alleged "damages—'lost investment value,' 'tax revenues associated with Raiders games,' and 'devaluation of the Coliseum property'"—were "only speculative," "far afield from the conventional horizontal price-fixing case," and "particularly unsuitable as a novel expansion of antitrust liability." *Id.* at 32a–33a (citations omitted).

Two panel members held that petitioner's allegations, though "rel[ying] on a somewhat speculative chain of causation," were "sufficiently plausible" to meet the constitutional minimum of Article III standing. Pet. App. 15a.

But Judge Bumatay, in a concurring opinion, concluded that petitioner's allegations of "causation between the illegal conduct and injury" were too attenuated "to satisfy the threshold of constitutional standing." *Id.* at 34a–35a (citation omitted). Judge Bumatay outlined the multiple causal steps that would be required to tie the challenged admission rule to petitioner's purported injury and observed that "Oakland's price-fixing claim relies on speculation upon speculation * * * every step of the way." *Id.* at 36a–37a. He noted that petitioner had identified in its complaint no basis to conclude that "potential football franchises" would apply for admission to the League under "a more lenient admission rule." *Id.* at 38a. Nor had petitioner alleged facts suggesting the NFL could support additional teams, given concerns about "scheduling constraints, the quality of competition, and existing contracts and commitments with players." *Id.* at 38a–39a. Petitioner also had not alleged any facts suggesting that a hypothetical new team would have chosen to play in Las Vegas and thus blocked the Raiders' move, or that the NFL would attract "enough new franchises * * * to prevent other host cities from attracting the Raiders away from Oakland." *Id.* at 39a. Given the "layers of speculative judgments" necessary to try to link the challenged NFL admission rule to the Raiders' departure from Oakland, each "relying on inferences about what unknown, independent parties would do under hypothetical circumstances," Judge Bumatay concluded that "Oakland's loss of the Raiders is too remote and too conjectural to be traceable to the NFL's entry process" that petitioner challenged. *Id.* at 40a–41a.

REASONS TO DENY THE PETITION

A. Petitioner Lacks Article III Standing Because Its Alleged Injury Is Not Fairly Traceable To The NFL Admission Rule It Challenges

Article III standing is a "threshold question * * * determining the power of the [C]ourt to entertain" a case. *Warth* v. *Seldin*, 422 U.S. 490, 498 (1975). It is a jurisdictional prerequisite that must be established before the Court has authority to review the issue raised in the petition. Thus, "[i]t is sound practice * * * to deny a petition for certiorari when the facts do not firmly establish that the petitioner has standing to raise the question presented." *Vasquez* v. *United States*, 454 U.S. 975, 977 n.3 (1981) (Stevens, J., respecting denial of certiorari).

Petitioner falls far short of that requirement. Article III standing requires that a plaintiff establish that it has suffered an injury in fact "fairly traceable to the challenged conduct of the defendant." *Spokeo, Inc.* v. *Robins*, 578 U.S. 330, 338 (2016); accord *Lujan* v. *Defs. of Wildlife*, 504 U.S. 555, 560 (1992). A plaintiff satisfies that requirement by showing there is "a causal connection between the injury and the conduct complained of." *Lujan*, 504 U.S. at 560. A claim fails that test when "the line of causation between the illegal conduct and injury is too attenuated." *Allen* v. *Wright*, 468 U.S. 737, 752 (1984); accord *Clinton* v. *City of New York*, 524 U.S. 417, 434 n.23 (1998). And a standing theory that "rests on a 'highly attenuated chain of possibilities'" requires "far stronger evidence" to establish that it is fairly traceable to the challenged conduct. *California* v. *Texas*, 141 S. Ct. 2104, 2119 (2021).

To establish that petitioner was injured by the NFL's admission rule rather than other, independent causes, petitioner would have to show that it would still have a tenant team in Oakland if the NFL had adopted some different admission rule. As Judge Bumatay explained,

that means petitioner must show that under a different admission rule there would have been more applicants, resulting in the NFL approving the admission of more teams, such that another team would already have been established in Las Vegas (thus blocking the Raiders' move). It also requires showing that no *other* host city besides Las Vegas would have sought to attract the Raiders away from Oakland, or that another team would have moved into the Coliseum upon the Raiders' departure.

Petitioner has not identified what new rule would meet the threshold step of that causal chain—what rule, in its view, would give hypothetical ownership groups adequate incentives to apply or lead to the admission of more teams to the League. Petitioner also provides no plausible reason to believe that "imaginary franchises would have a significant incentive to apply" for admission under some other rule, given the complex array of considerations influencing a potential owner's decision to make the enormous investment necessary to establish an NFL team. Pet. App. 38a. This step also "rest[s] on speculation about the decisions of independent actors," and courts are rightly reluctant to "endorse" such standing theories. *Clapper* v. *Amnesty Int'l USA*, 568 U.S. 398, 414 (2013).

Petitioner would also have to show that the NFL would admit more teams under a different admission rule. Pet. App. 38a–39a. But other factors related to the nature of the League also drive those decisions. As the leading antitrust treatise explains, sports leagues need to keep "limits on the number of teams" for fundamental reasons of administrability stemming from scheduling constraints, existing contracts, and other logistical considerations. Phillip E. Areeda & Herbert Hovenkamp, *Antitrust Law: An Analysis of Antitrust Principles and Their Application* ¶¶ 2214a–2241b (5th ed. 2021). Admitting additional teams also raises concerns about the talent pool being sufficient to maintain "the quality of

competition." Pet. App. 38a. Petitioner provides no reason to believe a lower vote threshold would have more influence on the number of teams admitted than these inherent limitations on league size.

Even assuming a lower vote threshold were to result in an increased number of teams, petitioner offers no basis to conclude that a new NFL team would have ended up playing in Las Vegas, thereby blocking the Raiders' move there. Pet. App. 39a. Nor does petitioner provide any reason to believe that if Las Vegas had a team, a third city would not have "still attracted the Raiders with a more appealing stadium or better economics." Pet. App. 40a. Nor has petitioner shown that it could have attracted another team if the admission vote threshold were lower. Indeed, petitioner does not allege that any ownership group has expressed interest in establishing a team in Oakland, let alone that the NFL's members rejected an application from a team that would have played in Oakland (or Las Vegas) under its existing admission rules.

Petitioner's attempt to establish standing to sue thus rests on "speculat[ion] about events at every step of the causal chain—relying on inferences about what unknown, independent parties would do under hypothetical circumstances." Pet. App. 40a–41a. Petitioner's claimed injury is far "too conjectural to be traceable to the NFL's entry process." *Id.* at 40a. That flaw alone warrants denying review. See *Vasquez*, 454 U.S. at 976, 977 n.3 (Stevens, J., respecting denial of certiorari).

B. Petitioner Waived Its *Lexmark* Argument

Petitioner contends that this Court's review is warranted because *Lexmark* tacitly overruled or limited the statutory antitrust standing analysis of *Associated General Contractors*. But petitioner has waived that issue.

In neither the district court nor in the Ninth Circuit did petitioner suggest that *Lexmark* in any way altered

long-established statutory antitrust standing analysis. Indeed, at every stage of the litigation, petitioner affirmatively invoked *Associated General Contractors* and its Ninth Circuit progeny as the correct test for determining whether petitioner had standing to pursue a cause of action under the federal antitrust statutes. See, *e.g.*, Pet. C.A. Reply 14, 15; Oakland Opp. to Mot. to Dismiss First Am. Compl. 5, Dkt. 74 ("As this Court recognized * * *, antitrust standing is governed by the factors discussed in *Associated Gen. Contractors*."); Oakland Opp. to Mot. to Dismiss 8, Dkt. 48. Understandably, given petitioner's position before the courts below, neither court even mentioned *Lexmark*, much less addressed any purported effect of *Lexmark* on antitrust standing.

This Court's traditional rule "precludes a grant of certiorari * * * when 'the question presented was not pressed or passed upon below.'" *United States* v. *Williams*, 504 U.S. 36, 41 (1992) (citation omitted). The Court has explained that when a petitioner "did not raise [an] argument in the Court of Appeals, * * * we will not address it in the first instance." *Kennedy* v. *Plan Adm'r for DuPont Sav. & Inv. Plan*, 555 U.S. 285, 290 n.2 (2009). That principle applies with special force here, where petitioner not only failed to raise the issue below, but actively steered the lower courts away from any such argument. To avoid encouraging this sort of gamesmanship, this Court has long barred parties from "asserting a claim in a legal proceeding that is inconsistent with a claim taken by that party in a previous proceeding." *New Hampshire* v. *Maine*, 532 U.S. 742, 749 (2001).

Had petitioner raised its *Lexmark* issue below instead of affirmatively endorsing *Associated General Contractors* and its Ninth Circuit progeny, this Court would have the benefit of the views of the lower courts on the application of *Lexmark* to this case, rather than needing to rely on petitioner's bare assertions that its "claims

clearly satisfy" *Lexmark*. Pet. 26. There is no reason for this Court to depart from its settled practice here. This is "a court of review, not of first view." *Brownback* v. *King*, 141 S. Ct. 740, 748 n.4 (2021) (quoting *Cutter* v. *Wilkinson*, 544 U.S. 709, 718 n.5 (2005)).

Petitioner suggests that its waiver should be excused because the Ninth Circuit was "precluded from revisiting its balancing test by its prior precedent." Pet. 26. But the implication of petitioner's argument that *Lexmark* "necessarily rejected" (Pet. 20) the *Associated General Contractors* analysis is that lower courts were free (indeed, *required*) to revisit the antitrust standing test in light of that intervening Supreme Court precedent. See, *e.g.*, *United States ex rel. Air Control Techs., Inc.* v. *Pre Con Indus., Inc.*, 720 F.3d 1174, 1176–1177 (9th Cir. 2013). At minimum, there was no obstacle that prevented petitioner from arguing that *Lexmark* undermined circuit precedent. Instead, petitioner affirmatively invoked the test that it now claims is mistaken.

C. The Courts Of Appeals Have Not Squarely Considered The Issue Petitioner Presents, Much Less Disagreed About It

1. Petitioner's belated invocation of *Lexmark* for the first time in its certiorari petition is just one example of broader prematurity of this issue. Petitioner asserts that courts have "expressly rejected" (Pet. 25) the idea that *Lexmark* invalidated antitrust statutory standing analyses under *Associated General Contractors* and that the lower courts "have refused to read *Lexmark* to abrogate the use of their preexisting prudential balancing tests for *antitrust* standing," Pet. 9 (emphasis in original).

But the only example petitioner identifies of a court *even considering* that possibility is a single footnote stating only that *Lexmark* "*casts doubt* on the future of prudential standing doctrines such as antitrust standing";

and that court went on to conclude that *Lexmark*'s discussion of the Lanham Act was too far afield to justify revisiting circuit precedent about statutory standing in *antitrust* cases. See *Duty Free Ams.* v. *Estee Lauder Cos., Inc.*, 797 F.3d 1248, 1273 n.6 (11th Cir. 2015) (emphasis added) (cited at Pet. 9, 25). Even that footnote was concededly dicta, and as the Eleventh Circuit acknowledged, that issue was "utterly immaterial" because the plaintiff there lacked Article III standing. *Ibid.*

Petitioner asserts that "plaintiffs have specifically requested that the circuits conform their analysis to the limited inquiry *Lexmark* requires," Pet. 25, but the briefs petitioner cites (Pet. 25 n.2) tell a different story. One such brief, authored by petitioner's counsel, states that "the Supreme Court articulated a number of *useful* factors for assessing proximate cause in [*Associated General Contractors*]" that appellate courts had "distilled" into "a multi-faceted analysis," and it conceded that "[c]ourts can *and should* look to such factors when they answer questions of antitrust standing." Br. for 18 Professors of Antitrust Law as Amici Curiae Supporting Appellants at 9, Dkt. 40-1, *In re Am. Express Anti-Steering Rules Antitrust Litig.*, 19 F.4th 127 (2d Cir. 2021) (No. 20-1766) (emphasis added). The only other brief petitioner identifies does not suggest that *Lexmark* overruled *Associated General Contractors* or its progeny. See Appellant's Br. at 29–30, *Hanover 3201 Realty* v. *Vill. Supermarkets, Inc.*, 806 F.3d 162 (3d Cir. 2015) (No. 14-4183) ("For antitrust claims, courts look at a number of factors as enunciated by *Associated General Contractors* * * *. These factors are applied on a case-by-case basis, without giving any one factor determinative weight."). Far from urging the courts of appeals to reconsider their *Associated General Contractors*-based analyses of antitrust standing, the briefs that petitioner cites indicate that counsel have noted the *utility* of such analyses even after *Lexmark*.

2. Petitioner also has identified no disagreement among the courts of appeals regarding the appropriate test for standing to bring a private antitrust claim under the Clayton Act. To the contrary, petitioner acknowledges that all courts of appeals employ essentially "the exact same" analysis, Pet. 23, that closely follows *Associated General Contractors*. See also Pet. 2 (court of appeals analysis in this case is "[l]ike many other circuits"); Pet. 22 (likening "the Third, Seventh, and Eleventh Circuits[']" decisions to the Second Circuit's analysis); Pet. 23 (likening those courts' analysis to Fifth and Seventh Circuit decisions). "[T]he Second, Third, Fifth, Seventh, Ninth, Eleventh, and D.C. Circuits continue to apply" antitrust standing analyses based on *Associated General Contractors*, Pet. 20, and "no circuit has revised its precedents" on antitrust standing in light of *Lexmark*. Pet. 25. Thus, petitioner cannot demonstrate that "a United States court of appeals has entered a decision in conflict with the decision of another United States court of appeals." R. 10(a).[2]

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[2] Petitioner's *amicus* contends that some courts of appeals have "adopted a bright-line rule that * * * grants standing only to competitors or customers," while "[o]ther circuits have rejected this limitation." Open Mkts. Inst. Amicus Br. ("OMI Br.") 19. That sweeping characterization was not adopted by petitioner and cannot be squared with the actual state of the law. For example, *amicus* claims that the Fifth Circuit allows only consumers and competitors to bring antitrust claims, but that court has written that "[r]elief for antitrust claims is not confined to 'consumers, or to purchasers, or to competitors, or to sellers.'" *Am. Cent. E. Tex. Gas Co.* v. *Union Pac. Res. Grp., Inc.*, 93 F. App'x 1, 7 (quoting *Blue Shield of Va.* v. *McCready*, 457 U.S. 465, 472 (1982)). And the Eighth Circuit case *amicus* cites states only that "standing is *generally* limited to actual market participants," OMI Br. 7 (quoting *S.D. Collectibles, Inc.* v. *Plough, Inc.*, 952 F.2d 211, 213 (8th Cir. 1991) (emphasis added)). In any event, *amicus* does not contend, much less demonstrate, that the purported rule has any effect on the outcome of cases generally or of this case.

Petitioner is thus mistaken in asserting that "only this Court's intervention can bring [the courts of appeals] into compliance with *Lexmark*'s clear command." Pet. 26. Petitioner has failed to establish that the courts of appeals have even been presented with the argument that "*Lexmark* * * * abrogate[d] the use of" multifactor analyses of antitrust standing following *Associated General Contractors*, let alone reached conflicting results. Pet. 9. Until the courts of appeals have had a reasonable opportunity to consider that issue, review by this Court would be premature. See *Arizona* v. *Evans*, 514 U.S. 1, 23 n.1 (1995) (Ginsburg, J., dissenting) ("[P]eriods of 'percolation' in, and diverse opinions from, * * * appellate courts may yield a better informed and more enduring final pronouncement by this Court."); accord *Guedes* v. *Bureau of Alcohol, Tobacco, Firearms & Explosives*, 140 S. Ct. 789, 791 (2020) (Gorsuch, J., respecting denial of certiorari).

D. The Ninth Circuit's Judgment Was Correct

1. In *Associated General Contractors*, this Court addressed as a matter of statutory interpretation the "scope of the private remedy created by" Congress in Section 4 of the Clayton Act, and the "class of persons who [could] maintain a private damages action under" that statutory provision. 459 U.S. at 529, 532. The Court concluded that the statute's provision that authorized suit by "[a]ny person who shall be injured in his business or property by reason of" a violation of the antitrust laws, *id.* at 529, did *not* "allow every person tangentially affected by an antitrust violation to maintain an action to recover threefold damages," *id.* at 535 (quoting *Blue Shield of Va.* v. *McCready*, 457 U.S. 465, 477 (1982)).

The Court read the statutory provision to allow only certain persons to bring an action under the Clayton Act, and "identif[ied] factors that circumscribe and guide the exercise of judgment in deciding whether the law affords

a remedy in specific circumstances." 459 U.S. at 537. The Court looked to the "common-law background" against which Congress enacted the statutory language, *id.* at 531, and to the judicial interpretations already given similar statutory language in the Sherman Act that incorporated "doctrines such as * * * proximate cause, directness of injury [and] certainty of damages" to establish standing under the statute, *id.* at 532–533.

The Court concluded that a key consideration is "the nature of the plaintiff's alleged injury," and whether it "was of a type that Congress sought to redress in providing a private remedy for violations of the antitrust laws." 459 U.S. at 538. The Court also cited "the directness or indirectness of the asserted injury." *Id.* at 540. Focusing on proximate causation, the Court noted the significance of the length of "the chain of causation between the * * * injury and the alleged restraint" of trade, *id.* at 540, which increases chances that harms "may have been produced by independent factors" and thus renders damages "highly speculative," *id.* at 542. The Court also noted that indirectness of injury and presence of potential intervening causes require consideration of "the risk of duplicate recoveries on the one hand," and "the danger of complex apportionment of damages on the other." *Id.* at 544. The Court directed that "courts should analyze each situation in light of the[se] factors." *Id.* at 536 n.33.

2. The Ninth Circuit correctly applied the *Associated General Contractors* analysis in this case. See Pet. App. 21a–33a (applying *Am. Ad Mgmt.* v. *Gen. Tel. Co. of Cal.*, 190 F.3d 1051, 1054 (9th Cir. 1999) (citing *Associated Gen. Contractors*, 459 U.S. at 540)). Although the court found that the type of injury petitioner alleged was generally of a type contemplated by the antitrust laws, Pet. App. 23a–26a, the court correctly concluded that that alleged injury to petitioner was both indirect and too speculative to establish proximate causation, *id.* at 26a–32a. The court

concluded that those who claim to have been "priced out of the market" like petitioner must allege facts to establish that their injuries would have been avoided in a competitive market. *Id.* at 26a (quoting Areeda & Hovenkamp ¶ 391b1). But petitioner failed to plead facts that, if proven, would show that there were "additional potential owners willing to establish new teams," that "such potential owners would have based a team in Las Vegas before the Raiders decided to locate there," or that petitioner had "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 29a (quoting district court opinion). Thus, the court correctly concluded that petitioner had not plausibly alleged that "the City would have retained the Raiders" or another football team in a competitive market. *Id.* at 32a.

Contrary to petitioner's repeated assertion that the court of appeals "did not deny that defendants had proximately caused Oakland's injury," Pet. 24; see also Pet. 2 ("court * * * without denying that Oakland itself suffered an injury proximately caused" by the League's conduct); Pet. 28 ("the court never disputed that" petitioner's "injuries were proximately caused by the relevant antitrust violations"), the court of appeals expressly concluded that "[t]here are too many speculative links in the chain of causation between [respondent's] alleged restrictions on output and [petitioner's] alleged injuries" to establish proximate causation. Pet. App. 30a.

Despite petitioner's repeated effort to portray the decisions below as an exercise of "prudential" standing based on ad hoc policy factors, the decisions were a straightforward application of the very principles enunciated in *Lexmark*. The decisions below did not so much as mention the word "prudential." Rather, the Ninth Circuit was unambiguous that its determination was based on "*statutory* standing," and explained that its analysis

sought to determine to which plaintiffs Congress "afford[ed] a remedy" under "§ 4 of the Clayton Act." Pet. App. 20a (quoting *Knevelbaard Dairies*, 232 F.3d at 987). That is precisely how *Lexmark* framed the inquiry. 572 U.S. at 128 & n.4 ("[T]he question this case presents is whether [the plaintiff] falls within the class of plaintiffs whom Congress has authorized to sue * * * . * * * We have on occasion referred to this inquiry as 'statutory standing' * * *.").[3]

3. Nothing in *Lexmark* calls into question the Ninth Circuit's analysis. *Lexmark* concerned whether a party had a cause of action to sue for false advertising under the Lanham Act, not a cause of action under a federal antitrust statute. 572 U.S. at 129. While this Court in *Lexmark* deemed the Third Circuit's analysis (derived from *Associated General Contractors*) to represent "a commendable effort to give content to" determining the appropriate zone of interests and scope of proximate causation to maintain an action, it considered the analysis "slightly off the mark" in the Lanham Act context. *Id.* at 135. The Court "h[e]ld instead that a direct application of the zone-of-interests test and the proximate-cause requirement supplies the relevant limits on who may sue" in that statutory context. *Id.* at 134.

The *Lexmark* Court did not suggest that *Associated General Contractors* and its progeny were inappropriate tests for the antitrust statutes. Indeed, *Lexmark* emphasized that "[p]roximate-cause analysis is controlled by the nature of the statutory cause of action," so different statutes naturally would be governed by different tests.

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[3] Because the Ninth Circuit's analysis, like that in *Lexmark* and *Associated General Contractors*, sought to discern the scope of the statute Congress enacted, petitioner's contention that the decision below implicates "significant separation of power concerns" (Pet. 35) is specious.

Lexmark, 572 U.S. at 133.[4] As petitioner concedes, the only appellate court to address the effect of *Lexmark* on the antitrust statutes concluded 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." Pet. 25 (citing *Duty Free Ams.*, 797 F.3d at 1273 n.6).

4. Petitioner's claim fails even under the *Lexmark* standard it now attempts to invoke. Although petitioner asserts that its antitrust claim "clearly satisf[ies]" (Pet. 26) *Lexmark*, that case requires plaintiffs to show that the defendant's challenged conduct was the proximate cause of their alleged injuries. 572 U.S. at 132–134, 137–140. As discussed above, the court of appeals held that petitioner failed to establish that requisite proximate cause.

Moreover, *Lexmark* did not dispute that the first factor of the *Associated General Contractors* analysis (the nature of the alleged injury) is relevant to determining the statutory zone of interests. Nor did it dispute that the second and third factors (directness of the injury and the speculative nature of the injury) are appropriate for determining proximate causation. 572 U.S. at 135. As

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[4] Although petitioner contends that the Lanham Act's language is "indistinguishable" from that of the Clayton Act, Pet. 26, the only words both have in common are "any person." The Lanham Act "authorizes suit by 'any person who believes that he or she is likely to be damaged' by a defendant's false advertising," *Lexmark*, 572 U.S. at 129 (quoting 15 U.S.C. § 1125(a)), while the Clayton Act provides a cause of action for "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. Especially given this Court's emphasis in *Associated General Contractors* on the "judicial gloss" courts had given a predecessor provision of the Sherman Act, 459 U.S. at 530–534, there is no reason to believe that the analysis for determining the scope of the antitrust cause of action under the Clayton Act would be identical to the analysis for determining the scope of a cause of action for false advertising under the Lanham Act.

petitioner now emphasizes, Pet. 19, *Lexmark* simply stated that those factors were not to be "weighed in a balance," but rather "*must be met in every case*." 572 U.S. at 135 (emphasis added).

But if those three factors are mandatory (and not just the first, see Pet. App. 22a), it would be *more difficult* for petitioner to establish antitrust standing, and petitioner's claims would fail even more resoundingly. Indeed, petitioner advocated a balancing test in the courts below. See Opp. to Mot. to Dismiss 8 & n.5, Dkt. 48 (noting that "[n]o single factor is decisive" under test it advocated) (quoting *Am. Ad Mgmt.*, 190 F.3d at 1055). And petitioner failed to satisfy all aspects of the analysis that inquire into proximate causation, Pet. App. 26a–32a, with the court below concluding that petitioner's injuries were too "indirect" and that the theory of harm involved "too many speculative links in the chain of causation" and too many independent acts of third parties, *id.* at 30a, to establish proximate causation under the Clayton Act. Cf. *Holmes* v. *Sec. Inv. Prot. Corp.*, 503 U.S. 258, 272–273 (1992) (holding nonpurchasing customers could not sue under provision of the Racketeer Influenced and Corrupt Organizations Act modeled on section 4 of the Clayton Act, and noting speculative nature of "determin[ing] the extent to which their [injury] was the result of the alleged conspiracy to manipulate as opposed to, say, the[ir] poor business practices or their failures to anticipate developments in the financial markets").

Petitioner now faults the court of appeals for briefly considering that it "would be exceedingly difficult to calculate" petitioner's claimed "damages—'lost investment value,' 'tax revenues associated with Raiders games,' and 'devaluation of the Coliseum property.'" Pet. App. 32a. But *Lexmark* itself noted that the difficulty of ascertaining "damages caused by some remote action is a motivating principle behind the proximate-cause requirement,"

and thus is related to the proximate-cause inquiry. 572 U.S. at 135. Similarly, in a brief petitioner cited as a correct statement of law, Pet. 25 n.2, a group of academics stated that factor "ha[s] an obvious connection to issues of proximate cause" and rejected the idea that it would be "incorrect for courts to consider [it]." Br. of 18 Professors of Antitrust Law 11–12. In any event, the court of appeals noted the difficulty of calculating damages as a reason *in addition to* the absence of proximate cause for why petitioner is not within the statutory zone of interests to bring its Clayton Act claim. See Pet. App. 32a (noting that "even if" petitioner could demonstrate proximate causation, damages would be difficult to demonstrate).

Petitioner also fails to address the fact that the district court concluded—"[a]s a separate and sufficient reason for dismissal"—that *none* of the types of damages indicated "are of a type compensable under the Clayton Act" because all represent "economic injuries to the sovereign interests of a State" rather than the kinds of commercial interests the Clayton Act protects. Pet. App. 73a; see also *id.* at 32a–33a (noting that this case was "a novel expansion of antitrust liability" and "this case is far afield from" conventional antitrust theories). That represents an alternative basis for affirming the judgment below.[5]

5. Petitioner's antitrust claim runs afoul of the traditional common-law rule, which *Lexmark* reaffirmed, that statutes should not be construed to "stretch proximate

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[5] Petitioner contends that the court of appeals "ignored that Oakland was also seeking equitable and declaratory relief." Pet. 24; accord Pet. 34. But aside from disgorgement (which presents its own problems regarding difficulty of calculation), petitioner did not specifically request equitable or declaratory relief and included only a boilerplate request for "any other relief to which [it] may be entitled as a matter of law or equity." C.A.E.R. 2:256. Nor did petitioner invoke any pursuit of equitable or declaratory relief below in discussing antitrust standing.

causation beyond the first step." 572 U.S. at 139 (quoting *Holmes*, 503 U.S. at 271). Courts limit the sweep of statutes to the first step of proximate causation because "there ordinarily is a 'discontinuity' between the injury to the direct victim and the injury to the indirect victim, so that the latter is not surely attributable * * * to the defendant's conduct[], but might instead have resulted from 'any number of [other] reasons.'" 572 U.S. at 140 (quoting *Anza* v. *Ideal Steel Supply Corp.*, 547 U.S. 451, 458–459 (2006)) (alteration in original).

Petitioner's alleged injuries fall "well beyond the first step" of harm from the alleged anticompetitive conduct, precluding any finding of proximate causation. *Hemi Grp., LLC* v. *City of New York*, 559 U.S. 1, 2 (2010). Petitioner is not an ownership group that sought and was denied admission to the League. Accordingly, even if petitioner could state a claim that the League's admission rule is somehow anticompetitive, and that a hypothetical ownership group was denied admission under that rule (which petitioner does not even allege), petitioner's alleged injuries would be entirely derivative of that alleged injury to the would-be new team. The lost value of investments in the Coliseum, "devaluation of the Coliseum property," and lost "tax revenues associated with Raiders games," Pet. App. 32a, are downstream effects suffered only because a purportedly anticompetitive rule denied a new team admission to the League that supposedly would have located in Oakland (or prevented the Raiders' relocation to Las Vegas) such that a team would remain in the Coliseum and conduct taxable business.

Such damages have always been thought to be beyond the reach of the federal antitrust statutes (as well as the RICO provision based on them). *E.g.*, *Associated Gen. Contractors*, 459 U.S. at 534; *Hemi Grp.,* 559 U.S. at 9–11 (plurality finding that New York City's "theory of causation" for a RICO claim seeking lost municipal tobacco tax

revenue from an out-of-state online cigarette seller would require "mov[ing] well beyond the first step"). Petitioner is thus mistaken that unless disappointed cities are allowed to sue, "*no* willing plaintiff can or will ever sue to redress the NFL's unlawful cartelization." Pet. 31. Disappointed teams denied admission to the League would be highly motivated to bring such claims.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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