No. 21-1243

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

REPLY BRIEF FOR PETITIONER

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Respondents are unable to deny the central points demonstrated by the petition. The courts of appeals in antitrust cases consistently apply a multi-factor, *ad hoc* balancing test derived from *Associated General Contractors of California, Inc. v. California State Council of Carpenters*, 459 U.S. 519 (1983) (*AGC*). But in *Lexmark International, Inc. v. Static Control Components, Inc.*, 572 U.S. 118 (2014), this Court rejected that understanding of statutory standing generally and of *AGC* specifically. Nonetheless, the courts of appeals uniformly have stuck to their precedent based on nothing more than the fact that *Lexmark* involved the Lanham Act, not the Sherman Act. But nothing in the slight wording differences between the Lanham and Clayton Acts suggests that a different statutory standing rule applies. Under both, the question is whether the plaintiff's injury was proximately caused by the defendant's conduct. Because only this Court can correct the lower courts' error, certiorari should be granted.

Respondents' arguments to the contrary are unpersuasive. They contest petitioner's Article III standing, which the court of appeals persuasively explained was properly supported by the extensive allegations of the complaint. Further, the question of antitrust standing was thoroughly briefed and decided below. Petitioner was not required to request that the Ninth Circuit overturn its precedent, which remained settled after *Lexmark*. Finally, petitioner's complaint would not be dismissed under *Lexmark*, because Oakland was proximately injured by respondents' cartel behavior. Respondents eliminated the serious prospect that new teams would enter the league,

allowing the existing franchises to extort exorbitant fees from their host cities. Oakland could not afford the supracompetitive price and lost the team. That is a classic injury of the type the antitrust laws were designed to prevent.

I. Respondents' Article III Standing Theory Lacks Merit.

When the respondents in a case before this Court have a serious argument that the question presented does not merit review, they of course lead with it. When they cannot genuinely dispute that fact, they argue that the Court would affirm the judgment on alternative grounds. When they are truly desperate, they invoke an alternative ground that the court of appeals itself thoroughly and correctly rejected. And when they are all-but ready to surrender, they invoke an argument that is so bad that they did not even make it in the district court.

Here, the Ninth Circuit persuasively explained that petitioner has Article III standing as the direct victim of the policies alleged to be unlawfully anticompetitive, but nonetheless held that petitioner lacks statutory standing. The former point was so obvious that respondents "did not challenge the City's constitutional standing in the district court." Pet. App. 13a n.3. But now respondents argue that they missed a glaring flaw in the case and that the court of appeals—which they describe as wise and thoughtful on the question of statutory standing—blundered horribly in its understanding of Article III.

That tortured argument lacks merit. The court of appeals correctly recognized that the case is not properly dismissed on the pleadings, so long as

Oakland has "plausibly allege[d] that, but for [the challenged policies], there is a 'substantial probability' that it would have" "*retained the Raiders* or acquired another team." Pet. App. 14a (quoting, *inter alia*, *Warth v. Seldin*, 422 U.S. 490, 504 (1975)) (emphasis added). "That standard is satisfied here" by an array of plausible allegations that, but for the challenged policies unlawfully limiting the number of teams, the Raiders could not have demanded from Oakland such an exorbitant price for the team to remain. *Ibid*. Petitioner "credibly alleges" that the City "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." *Ibid.*

The opinion below then detailed the relevant allegations from the complaint. First, "that Oakland is a highly desirable host city," Pet. App. 15a—hardly in question, given that the Raiders left, then *came back*. Second, "that in the absence of Defendants' challenged actions (*i.e.*, in a competitive market), there would be more teams in the NFL," *id.* at 14a—hardly a stretch, given that all the policies in question erect obstacles to admitting new franchises and presumably exist for a reason. Third, in turn, absent this lack of competition, respondents "would not be able to threaten relocation or demand supracompetitive prices." *Ibid.* (internal citation omitted). Fourth, "that Oakland lost the Raiders solely because it was unable to pay supracompetitive prices." *Id.* at 15a. In sum, "that, in a competitive market, the Raiders would have *stayed*

in Oakland or Oakland would have landed another team." *Ibid.* (emphasis added).

Respondents argue that there is no plausible allegation of a substantial probability of injury because "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." BIO 13. That is not correct, but it is also completely irrelevant. Petitioner has Article III standing because it has plausibly alleged that in a competitive market the *Raiders* themselves would never have left Oakland. Whether some *new* team would have ended up in Las Vegas—rather than, for example, across the border in Las Cruces, Mexico—makes no difference.

So, respondents are reduced to arguing that the complaint does not plausibly allege that in a competitive market there would have been more NFL teams at all. But that is not even necessary: it is the *prospect* that new teams could enter in a competitive market that would keep prices down. In any event, the court of appeals cited nine different points in the complaint addressing how in a competitive environment new teams would enter the NFL. Pet. App. 14a. The brief in opposition addresses none of them. As noted, the plausibility of that claim is patent: the extensive policies challenged by the complaint erect extensive, express barriers to the creation of new NFL franchises. But according to respondents, it is not even plausible to allege that its own policies have any effect whatsoever, because obviously there would be no new teams anyway. That argument answers itself.

Respondents further cite a treatise to the effect that some sports leagues may have pro-competitive reasons to limit the number of franchises, including

particularly, "administrability." BIO 13. That is just an attempt to convert the merits of the case into a question of Article III standing, then litigate those merits at the pleading stage (based on a statement in a treatise that does not even address the NFL). The fact that the NFL claims it has good reasons for not admitting teams does not negate the complaint's extensive allegations that respondents operate as a classic cartel, limiting output and raising prices. *See* Sports Economists Amicus Br. 13-15. Oakland is the archetypical victim, with obvious constitutional standing to sue. On the merits, respondents are free to argue that its policies, though they reduce output, are lawful because they have a procompetitive justification.

II. There Is No Basis For Respondents' Claim Of Waiver Or Their Assertion That The Question Presented Should Be Allowed To Percolate.

The settled state of the law in the Ninth Circuit and every other court of appeals is not in dispute. The lower courts apply an *ad hoc*, multi-factor inquiry, derived from their understanding of *AGC*. The Ninth Circuit continues to do so post-*Lexmark*. *See, e.g.*, Pet. App. 20a-21a; *In re Cathode Ray Tube (CRT) Antitrust Litig.*, 720 Fed. Appx. 835, 837-38 (9th Cir. 2017). Respondents now argue that petitioner was required to urge the court of appeals to overturn its prior settled precedent. BIO 13-14.

That is not correct. This Court has never applied such a rule, and respondents therefore are unable to cite any decision announcing it. Indeed, on respondents' view, each Term this Court

inappropriately decides numerous cases, many of which are decided below based on the application of settled circuit precedent. The parties to those cases overwhelmingly litigate their cases based on the law of the circuit. When they reach this Court, they are free to argue that the court of appeals' established rule was wrong.

The question of Oakland's "antitrust standing" was both pressed in and passed upon by the court of appeals. That is all that is required to avoid a waiver, and respondents do not (and cannot) seriously suggest otherwise. Imagine if the Court had simply granted certiorari to review the court of appeals' antitrust standing holding, then petitioner had cited *Lexmark* in its brief on the merits. Respondents would not even bother to make a "waiver" argument, because it would be so obviously meritless. That is no less true when the importance of *Lexmark* is front and center in the petition for certiorari.

Instead, respondents are really carping about whether this case is a good vehicle—or perhaps whether petitioner deserves this Court's review—when petitioner argued its case below without attacking the settled Ninth Circuit precedent that this petition questions. But that argument refutes itself. It would have been futile for petitioner to have urged the court of appeals to overturn its long-settled precedent based on *Lexmark*. No other court has done so, and the Ninth Circuit has stuck with its approach to *AGC* even after *Lexmark* was decided. *See supra* at 5. The panel was empowered to disregard settled circuit precedent only if it could say that it was "clearly irreconcilable" with *Lexmark*. *Miller v. Gammie*, 335 F.3d 889, 900 (9th Cir. 2003) (en banc); *see also*

Langere v. Verizon Wireless Servs., LLC, 983 F.3d 1115, 1122 (9th Cir. 2020) (two decisions are "irreconcilable" only if they "cannot both be true at the same time."). Given respondents' argument that *Lexmark* is obviously inapposite, they cannot argue in the same breath that the Ninth Circuit would have overturned its extensive precedent based on that same ruling.

Respondents next argue that the question whether *Lexmark* governs in antitrust cases should be considered further in the lower courts. But this is not the kind of question that benefits from "percolation." Eight years is enough time to read a Supreme Court decision announcing a legal standard. What more is there to do? Respondents do not, for example, identify any factual issues that would be illuminated by the record in later cases or distinct contexts in which *Lexmark* might be deemed inapposite.[*]

III. Respondents Misunderstand *AGC* And *Lexmark*.

On page 18 of the brief in opposition, respondents finally get past their invented obstacles to this Court's review and arrive at the question presented. As discussed at the outset (*supra* at 1-2), respondents cannot seriously dispute the core points made by the petition.

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[*] Respondents' passing argument that Oakland's damages as a sovereign are not compensable under the Clayton Act was not passed upon by the Ninth Circuit and would obviously remain open for decision on remand from this Court. Because the issue does not relate to the question presented—and avowedly raises a "'novel'" question (BIO 24)—there is no reason this Court would reach it.

Respondents therefore principally try to suggest that petitioner's complaint would fail under the standard articulated by *Lexmark*. But their argument in this respect rests on a serious misreading of the ruling below. Under *Lexmark*, the dispositive question is whether the defendants' conduct is the proximate cause of the plaintiff's injury. Respondents incorrectly state that the Ninth Circuit "expressly concluded" that Oakland failed "to establish proximate causation." BIO 20. That is a serious, and troubling, misstatement. There is *no* discussion of proximate cause in the ruling below. Respondents instead add the phrase "to establish proximate causation" to the end of a quote addressing the supposed chain of causation underlying Oakland's injury. *Ibid*. But the existence of multiple causal steps does not preclude finding probable cause, when those steps are the inevitable, natural, and intended consequence of the defendants' anticompetitive conduct. *See, e.g.*, *Staub v. Proctor Hosp*., 562 U.S. 411, 419 (2011) ("Proximate cause requires only some direct relation between the injury asserted and the injurious conduct alleged, and excludes only those links that are too remote, purely contingent, or indirect.") (cleaned up).

That standard is satisfied here. Most of the "chain of causation" cited by the court of appeals—and repeated by respondents here—addresses whether a new team would have specifically located in Las Vegas, and another alternative city would not have emerged, effectively forcing the Raiders to remain in Oakland. But as discussed, petitioner does not need to prove any of those things in order to establish statutory standing. Rather, as the court of appeals itself held in finding Article III standing, Oakland

argues that in a competitive market the Raiders could not have exacted supracompetitive fees to remain.

On that critical question, the Ninth Circuit simply stated that petitioner had not pleaded facts that would show "there are additional potential owners willing to establish new teams if the NFL allowed them to do so." Pet. App. 29a (citation omitted). But as discussed, it is the very *prospect* of entry that keeps market prices down. And in any event, the court of appeals itself in finding Article III standing cited the complaint's extensive allegations that other potential owners would have sought to create teams. *See* C.A. E.R. 191-92 (complaint discussing empirical evidence of demand for more teams). That is again entirely intuitive: if nobody else is interested, despite the billions of dollars in annual profits, why else would respondents establish such extensive barriers to expanding their league? Petitioner, as the direct victim of this price-fixing behavior, has standing to sue. It could not afford the supracompetitive price and lost the team.

For related reasons, respondents err in arguing that Oakland's injuries are not "proximate" because they are "derivative" of the injuries suffered by excluded new teams. That is not accurate. Through price fixing, the Raiders were able to exact a supracompetitive price that Oakland could not afford. That injury is direct.

Moreover, respondents' argument reduces to the claim that no party priced out of a market by supracompetitive prices can sue; only the party that paid the higher price would have a claim. But respondents give no reason to narrow proximate cause so severely. And this would be the least appropriate

context in which to do so. The Ninth Circuit opined that it would be more natural for Las Vegas to sue, given that it paid the exorbitant fees. But Las Vegas won the team and now is a direct beneficiary of the cartel. There is no reason to think that it would sue, or that it could prove damages if it did. *See* Sports Economists Amicus Br. 6-7.

Respondents also argue that under *Lexmark*, the factors derived from *AGC* remain relevant. That is not correct in an important respect. *Lexmark* expressly holds that the supposedly speculative nature of the plaintiff's damages is not a basis for denying standing. 572 U.S. at 135. But in holding that petitioner lacks statutory standing, the Ninth Circuit relied heavily on exactly that consideration, as have other circuits. *See* Pet. App. 33a; Pet. 22 (collecting citations).

Lexmark does recognize that courts may consider the nature and directness of the injury in determining proximate cause. But the lower courts instead deem those questions to be "factors" that should be balanced against each other and other "factors" that vary from case to case with no consistent explanation or application. No less important, that balancing is utterly *ad hoc* because, when divorced from the critical inquiry into proximate cause, there is no legal standard whatsoever. As a result, application of the test has led to inconsistent results and outright circuit conflicts over the details of its operation. *See* Open Markets Inst. Amicus Br. 19-21. In the end, the existing law in the lower courts reduces to whether the particular judges in the particular case think the case has been brought by a good antitrust plaintiff.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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