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

BRIEF OF OPEN MARKETS INSTITUTE IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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INTEREST OF *AMICUS CURIAE*[1]

The Open Markets Institute is a non-profit organization dedicated to promoting fair competitive markets. It does not accept any funding or donations from for-profit corporations. Its mission is to safeguard our political economy from concentrations of private power that threaten liberty, democracy, and prosperity. The Open Markets Institute regularly provides expertise on antitrust law and competition policy to Congress, federal agencies, courts, journalists, and members of the public.

SUMMARY OF ARGUMENT

Congress enacted an expansive and powerful private right of action for the antitrust laws. The aim of this "private attorney general" provision is to make injured parties whole and to deter restraints of trade, monopolization, and other practices that violate the antitrust laws. *Associated General Contractors of California, Inc. v. California State Council of Carpenters*, 459 U.S. 519, 542 (1983); *Illinois Brick Co. v. Illinois*, 431 U.S. 720, 746 (1977). Citing "prudential" concerns and employing a multi-factor balancing test for antitrust standing, however, the lower courts have effectively rewritten and narrowed a law enacted by the people's representatives. The federal judiciary has usurped the legislative authority

[1] No counsel for a party authored this brief in whole or in part, and no person other than *amicus curiae* and its counsel made a monetary contribution to its preparation or submission. The parties consented to the filing of this *amicus* brief.

of Congress. The Supreme Court has made clear the proper role of courts in construing unambiguous statutory text: "When the express terms of a statute give us one answer and extratextual considerations suggest another, it's no contest. Only the written word is the law, and all persons are entitled to its benefit." *Bostock v. Clayton Cty., Georgia*, 140 S. Ct. 1731, 1737 (2020).

The City of Oakland filed an antitrust lawsuit against the Oakland Raiders and the National Football League for collusively limiting the supply of professional football teams. Through a group boycott and price-fixing scheme among member teams, the National Football League robbed Oakland of its long-time football franchise. Oakland suffered substantial harm when the National Football League relocated the Raiders to Las Vegas and prevented the City from hosting a new team to play at the Oakland-Alameda County Coliseum. Furthermore, the NFL deprived the Oakland Raiders' passionate, loyal, and large fanbase—known across the country as "Raider Nation"—of their beloved team.

In affirming the dismissal of the City of Oakland's suit on antitrust standing grounds, the Ninth Circuit turned an expansive private right of action established by Congress into a highly circumscribed right. In Section 4 of the Clayton Act, Congress granted "any person" injured in their business or property the right to obtain treble damages. 15 U.S.C. § 15 (emphasis added). This provision "contains little in the way of restrictive

language." *Reiter v. Sonotone Corp.*, 442 U.S. 330, 337 (1979). Instead of faithfully apply the text of the law, the court, like other courts of appeals, employed a multi-factor balancing test that "prudentially" narrowed a law enacted by Congress. This is not a prerogative of the courts. Enacting or amending legislation is the domain of Congress. *Bostock*, 140 S. Ct. at 1753.

The Supreme Court has repeatedly observed that Congress aimed to create a potent remedy broadly available to members of the public. The Court stated Congress had an "expansive remedial purpose in enacting § 4." *Blue Shield of Virginia v. McCready*, 457 U.S. 465, 472 (1982) (quotations omitted). The Court, in interpreting Section 4, stated "[t]he statute does not confine its protection to consumers, or to purchasers, or to competitors, or to sellers." *Id.* (quoting *Mandeville Island Farms, Inc. v. Am. Crystal Sugar Co.*, 334 U.S. 219, 236 (1949)). The Court further stated, "Consistent with the congressional purpose, we have refused to engraft artificial limitations on the § 4 remedy." *McCready*, 457 U.S. at 472. Accordingly, the Court has declined to impose restrictions on Section 4 "in the absence of some articulable consideration of statutory policy suggesting a contrary conclusion in a particular factual setting." *Id.* at 473.

The lower courts' tests for antitrust standing conflict with the text of Section 4 of the Clayton Act. In interpreting statutes, the Court has been clear that the text of the law controls: "This Court normally interprets a statute in accord with the ordinary public

meaning of its terms at the time of its enactment." *Bostock*, 140 S. Ct. at 1738. The "any person" used in Section 4 is broad and without restriction. Yet, the lower courts have adopted and applied tests for standing that disregard that expansive phrase, substituting their own policy judgments for those made by Congress. Further, the tests they apply introduce extraordinary subjectivity into the question of who has standing to sue for treble damages under the antitrust laws.

Through the application of prudential standing requirements, the courts have converted the broad private right of action Congress established—and granted to "any person"—into a limited and uncertain right. Whereas Section 4 uses the expansive phrase "any person" and "contains little in the way of restrictive language," the lower courts have held that only a person who satisfies a multi-factor balancing test can bring an antitrust suit for damages. Drawing on the Court's decision in *Associated General Contractors*, lower courts have held that antitrust plaintiffs, to establish standing, must satisfy a multi-factor balancing test. Some courts, including the Ninth Circuit in this case, listed these factors: (1) the nature of the injury, (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. *E.g.*, *Hanover 3201 Realty, LLC v. Vill. Supermarkets, Inc.*, 806 F.3d 162, 171 (3d Cir. 2015); *Am. Ad Mgmt., Inc. v. Gen. Tel. Co.*, 190 F.3d 1051, 1054 (9th Cir. 1999).

Other courts have gone even further and instituted bright-line limits on who can enforce the antitrust laws. In applying multi-factor balancing tests, some courts have applied a per se rule or presumption that *only* customers and competitors can establish antitrust injury and therefore demonstrate antitrust standing. *See, e.g.*, *Carpet Group Int'l v. Oriental Rug Importers Ass'n.*, 227 F.3d 62, 77 (3d Cir. 2000), overruled on other grounds by *Animal Sci. Prod., Inc. v. China Minmetals Corp.*, 654 F.3d 462 (3d Cir. 2011); *Jebaco, Inc. v. Harrah's Operating Co.*, 587 F.3d 314, 320 (5th Cir. 2009). This rule is derived from nothing in the statutory language of the Clayton Act. The text of Section 4 makes the treble damages remedy available to "any person" and makes no mention of "consumers" or "competitors" nor limiting the treble damages remedy only to these classes.

As the Court has long recognized, customers and competitors are not the only parties who can be injured by antitrust violations. The Sherman Act "does *not* confine its protection to consumers, or to purchasers, or to competitors, or to sellers." *Mandeville Island Farms*, 334 U.S. at 236 (emphasis added). For instance, workers can be injured by employer cartels and seek damages for depressed wages. *Anderson v. Shipowners' Ass'n of Pac. Coast*, 272 U.S. 359, 360, 364-65 (1926). In 2019, the Court recognized the right of upstream market participants to obtain damages arising from antitrust violations and wrote, "A retailer who is both a monopolist and a monopsonist may be liable to different classes of plaintiffs—both to downstream consumers and to

upstream suppliers—when the retailer's unlawful conduct affects both the downstream and upstream markets." *Apple Inc. v. Pepper*, 139 S. Ct. 1514, 1525 (2019).

In developing restrictive tests for antitrust standing and limiting who can file suit for damages under the Clayton Act, the courts have usurped Congress's legislative prerogatives. For damages claims under Section 4 of the Clayton Act, courts have "limit[ed] a cause of action that Congress has created merely because 'prudence' dictates." *Lexmark International, Inc. v. Static Control Components, Inc.*, 572 U.S. 118, 128 (2014). They have done what the Supreme Court warned them not to do: "If judges could add to, remodel, update, or detract from old statutory terms inspired only by extratextual sources and our own imaginations, we would risk amending statutes outside the legislative process reserved for the people's representatives." *Bostock*, 140 S. Ct. at 1738.

In addition to ignoring the policy choice made by Congress, the courts have introduced tremendous subjectivity into Section 4 with their multi-factor tests for standing. The current tests for antitrust standing, "like other open-ended balancing tests, can yield unpredictable and at times arbitrary results." *Lexmark*, 572 U.S. at 136. Whether plaintiffs need to satisfy all factors, most factors, or just a few factors of the courts' prudential standing test is unclear. As noted, some courts have held that plaintiffs who are neither competitors nor consumers cannot demonstrate antitrust injury and therefore cannot

show antitrust standing. Moreover, certain factors are duplicative or at least very similar.

The result is extraordinary discretion for judges. Two antitrust lawyers wrote that "[t]he many-factored balancing analysis introduced by *Associated General Contractors* appeared to provide a license to the lower courts to engage in imprecise, outcome-oriented decision making." Jonathan M. Jacobson & Tracy Greer, *Twenty-One Years of Antitrust Injury: Down the Alley with* Brunswick v. Pueblo Bowl-O-Mat, 66 Antitrust L.J. 273, 293 (1998).

The lower courts have split over their application of the multi-factor balancing tests for antitrust standing. Some circuits have restricted antitrust standing only to customers and competitors of the alleged antitrust violators. The Fifth Circuit has held only these two classes can bring suits for damages under the Clayton Act. *Norris v. Hearst Tr.*, 500 F.3d 454, 476 (5th Cir. 2007). While the Eighth Circuit stated that "standing is generally limited to actual market participants," it did not suggest any exceptions and ruled a plaintiff lacked standing because it was neither a competitor nor a customer of the defendant. *S.D. Collectibles, Inc. v. Plough, Inc.*, 952 F.2d 211, 213 (8th Cir. 1991). Two other courts of appeals have applied a presumption that only customers and competitors can establish standing. *SAS of Puerto Rico, Inc. v. Puerto Rico Tel. Co.*, 48 F.3d 39, 45 (1st Cir. 1995); *Ethypharm S.A. France v. Abbott Lab'ys*, 707 F.3d 223, 232-37 (3d Cir. 2011).

Several circuits have rejected a per se rule or presumption limiting antitrust standing to customers and competitors of the antitrust violator. The Second Circuit weighs factors purportedly derived from *Associated General Contractors*. *See Gelboim v. Bank of Am. Corp.*, 823 F.3d 759, 772-80 (2d Cir. 2016). The Fourth Circuit expressly rejected a monopolist-defendant's proposed "'consumer-or-competitor' rule." *Novell, Inc. v. Microsoft Corp.*, 505 F.3d 302, 311 (4th Cir. 2007). The Sixth Circuit has similarly applied a broader view of antitrust injury and standing. *NicSand, Inc.v.3M Co.*, 507 F.3d 442, 449-50 (6th Cir. 2007) (en banc). The Tenth Circuit held "an antitrust plaintiff need not necessarily be a competitor or consumer." *Reazin v. Blue Cross and Blue Shield of Kansas, Inc.*, 899 F.2d 951, 963 (10th Cir. 1990).

The Supreme Court should restore the plain meaning of the Clayton Act and harmonize antitrust standing with its general approach to statutory standing. As the Court stated more than a century ago: "It is elementary that the meaning of a statute must, in the first instance, be sought in the language in which the act is framed[.]" *Caminetti v. United States*, 242 U.S. 470, 485 (1917). Only the Court can correct the erroneous interpretations of the Clayton Act that have proliferated across the lower courts.

In 2014, the Court decided which classes of plaintiffs can enforce the Lanham Act. *Lexmark*, 572 U.S. at 120. This law, which protects trademarks and proscribes deceptive marketing practices, features a broad private right of action. It provides that "any

person who believes that he or she is or is likely to be damaged" by a firm's false advertising can bring a civil lawsuit. 15 U.S.C. § 1125(a).

In *Lexmark*, Justice Scalia, writing for a unanimous Court, stressed the judicial function of faithfully applying the law. The question for the Court was to "determine the meaning of the congressionally enacted provision creating a cause of action . . . [and] apply traditional principles of statutory interpretation." *Lexmark*, 572 U.S. at 128. In applying these principles of statutory interpretation, the *Lexmark* decision held that a plaintiff could bring a Lanham Act claim if it could (1) show it was within the "zone of interests" protected by the statute and (2) establish proximate causation between the defendant's violation and its own injury. *Id.* at 129. The *Lexmark* Court rejected on textualist grounds both the multi-factor balancing tests that some lower courts had used and the rule that other courts had adopted permitting only competitors to bring Lanham Act suits. *Id.* at 135-36.

The Court should apply the approach articulated in *Lexmark* to determine antitrust standing too. The Court should reject the "prudential" multi-factor balancing tests used by the lower courts and apply the traditional tools of statutory construction. Instead, the Court should hold that a plaintiff must show that it (1) falls within of the Clayton Act's zone of interests and (2) sustained an injury proximately caused by the defendant's violation

of the antitrust laws. The text of the Clayton Act compels this result.

ARGUMENT

I. Congress Established a Broad Private Right of Action Against Antitrust Violators

Congress enacted an expansive and powerful private right of action for the antitrust laws. The aim of this "private attorney general" provision is to make injured parties whole and deter restraints of trade, monopolization, and other conduct that violates the antitrust laws. *Associated General Contractors of California, Inc. v. California State Council of Carpenters*, 459 U.S. 519, 542 (1983); *Illinois Brick Co. v. Illinois*, 431 U.S. 720, 746 (1977).

Section 4 of the Clayton Act states that "*any* 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." 15 U.S.C. § 15 (emphasis added). The national legislature employed the language it had already used in Section 7 of the Sherman Act (the original law authorizing antitrust treble damages actions) and created a strong private right of action for violations of all the antitrust laws, not only violations of the Sherman Act. Section 4 "contains little in the way of restrictive language." *Reiter v. Sonotone Corp.*, 442 U.S. 330, 337 (1979). The Court emphasized this theme again in a 2019 decision and wrote, "[T]he text of § 4 broadly affords injured

parties a right to sue under the antitrust laws." *Apple Inc. v. Pepper*, 139 S. Ct. 1514, 1522 (2019).[2]

The relevant legislative history offers no indication, or even hint, that the drafters wanted the courts to read "any person" narrowly. For instance, Senator Edmunds, who helped author the private right of action in the Sherman Act, stated the law created "the right of anybody to sue who chooses to sue." 21 Cong. Rec. 3148 (1890). A Senate colleague described the private right of action as "giv[ing] a remedy to all the people[.]"). 21 Cong. Rec. 3146 (1890) (statement of Sen. Regan). In supporting the enactment of Section 4 of the Clayton Act, which extended the Sherman Act's private right of action to the new antitrust law, Representative Webb said the law would "open the door of justice to every man, whenever he may be injured by those who violate the antitrust laws[.]" 51 Cong. Rec. 9073 (1914). Relying on such statements of the drafters, the Court concluded, "Congress used the phrase 'any person' intending it to have its naturally broad and inclusive meaning. There was no mention in the floor debates of any more restrictive language." *Pfizer Inc. v. India*, 434 U.S. 308, 312 (1978).

The Supreme Court has repeatedly recognized that Congress aimed to create a potent private remedy

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[2] To further aid and promote private enforcement of the antitrust laws, Congress enacted a law that holds that judgment or decree in a civil or criminal action brought by the United States constitutes *prima facie* evidence of a violation in a subsequent private suit challenging the same practice by the same defendant. 15 U.S.C. § 16(a).

broadly available to members of the public. The Court has stated Congress had an "expansive remedial purpose in enacting § 4." *Blue Shield of Virginia v. McCready*, 457 U.S. 465, 472 (1982) (quotations omitted). The Court, in interpreting Section 4, stated "[t]he statute does not confine its protection to consumers, or to purchasers, or to competitors, or to sellers." *Id.* (quoting *Mandeville Island Farms, Inc. v. American Crystal Sugar Co.*, 334 U.S. 219, 236 (1949)). The *McCready* Court stated, "Consistent with the congressional purpose, we have refused to engraft artificial limitations on the § 4 remedy." 457 U.S. at 472. Accordingly, the Court has declined to impose limitations on Section 4 "in the absence of some articulable consideration of statutory policy suggesting a contrary conclusion in a particular factual setting." *Id.* at 473.

As a corollary, the Court has resolved any textual ambiguities in Section 4 in favor of a broad private right of action. *Apple*, 139 S. Ct. at 1522. The Court in *McCready* was clear: "[T]he unrestrictive language of the section, and the avowed breadth of the congressional purpose, cautions us not to cabin § 4 in ways that will defeat its broad remedial objective." 457 U.S. at 477. For instance, in *Pfizer*, the Court had to decide whether foreign governments qualify as "any person[s]" under Section 4. The Court noted "that the legislative history of the Sherman Act demonstrates that Congress used the phrase 'any person' intending it to have its naturally broad and inclusive meaning. . . . [and] during the course of those debates the word 'person' was used interchangeably with other terms

even broader in connotation." *Pfizer*, 434 U.S. at 312-13. Relying on the text and legislative history of the law, the Court "conclud[ed] that a foreign nation, like a domestic State, is entitled to pursue the remedy of treble damages when it has been injured in its business or property by antitrust violations." *Id.* at 318.

In creating this broad private right of action, Congress sought to advance two aims: compensation of victims and deterrence of antitrust violations. *Illinois Brick*, 431 U.S. at 746. First, under Section 4, parties, whether consumers, competitors, or sellers, can recover treble damages for higher prices, lost profits, or depressed wages on account of antitrust violations. *E,g.*, *LePage's Inc. v. 3M*, 324 F.3d 141, 166 (3d Cir. 2003) (en banc); *In re Urethane Antitrust Litigation*, 768 F.3d 1245, 1269-70 (10th Cir. 2014); *In re High-Tech Employee Antitrust Litigation*, 2015 WL 5159441 (N.D. Cal. 2015). The Clayton Act's treble damages provision "provide[s] ample compensation to the victims of antitrust violations." *McCready*, 457 U.S. at 472. Second, the law deters antitrust violations by depriving wrongdoers of "the fruits of their illegality." *Hanover Shoe, Inc. v. United Shoe Machinery Corp.*, 392 U.S. 481, 494 (1968). For example, the Court stressed that excluding foreign governments from the definition of "any person" "would lessen the deterrent effect of treble damages." *Pfizer*, 434 U.S. at 315.

II. The Current Tests for Antitrust Standing Narrow the Broad Text of the Clayton Act and Are Highly Subjective in Practice

The current tests for antitrust standing conflict with the text of Section 4 of the Clayton Act. In interpreting statutes, the text of the law controls: "This Court normally interprets a statute in accord with the ordinary public meaning of its terms at the time of its enactment." *Bostock v. Clayton Cty., Georgia*, 140 S. Ct. 1731, 1738 (2020). The "any person" used in Section 4 is broad and without restriction. Yet, the lower courts have adopted and applied tests for standing that disregard this expansive phrase, substituting their own policy judgments for those made by Congress. Further, the tests they apply introduce extraordinary subjectivity into the question of who has standing to sue for treble damages under the antitrust laws.

When deciding whether a private suit can proceed under statutory standing doctrines, courts must determine whether Congress authorized the suit, not whether Congress should have authorized the suit. Courts should not substitute their policy preferences for those of the national legislature. *Lexmark International, Inc. v. Static Control Components, Inc.*, 572 U.S. 118, 128 (2014). Whether the law is good policy is for Congress, not for the courts, to decide. *See Reiter*, 442 U.S. at 345 ("[P]]olicy considerations [are] more properly addressed to Congress than to this Court.").

Through the application of prudential standing requirements, the courts have converted the broad remedial right Congress established—and granted to "any person"—into a highly circumscribed and uncertain right. Although Section 4 "contains little in the way of restrictive language," *Id.*, the lower courts have held that "any person," in practice, means a person who meets a multi-factor balancing test. Drawing on the Court's decision in *Associated General Contractors*, the lower courts have held that antitrust plaintiffs must satisfy a multi-factor balancing test to establish standing. Some courts, including the Ninth Circuit in this case, list these factors: (1) the nature of the injury, (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. *E.g.*, *Hanover 3201 Realty, LLC v. Vill. Supermarkets, Inc.*, 806 F.3d 162, 171 (3d Cir. 2015); *Am. Ad Mgmt., Inc. v. Gen. Tel. Co.*, 190 F.3d 1051, 1054 (9th Cir. 1999). Other courts have added an intent requirement to this five-part test. *E.g.*, *McDonald v. Johnson & Johnson*, 722 F.2d 1370, 1374 (8th Cir. 1983).

Some lower courts have reconceptualized prudential standing as an "efficient enforcer" test. They have ruled that plaintiffs must show that they are "the most efficient enforcer" of the antitrust laws, however that may be defined. *See, e.g.*, *Gelboim v. Bank of Am. Corp.*, 823 F.3d 759, 772 (2d Cir. 2016); *Duty Free Americas, Inc. v. Estee Lauder Cos.*, 797 F.3d 1248, 1273 (11th Cir. 2015). For example, the Eleventh Circuit held that, in addition to determining whether

the plaintiff showed antitrust injury, "the court should determine whether the plaintiff is an efficient enforcer of the antitrust law, which requires some analysis of the directness or remoteness of the plaintiff's injury." *Todorov v. DCH Healthcare Authority*, 921 F.2d 1438, 1449 (11th Cir. 1991). Contrary to these decisions, Congress made the treble damages remedy available to "any person," 15 U.S.C. § 15, not only to persons who demonstrate they are an "efficient enforcer" of the law.

Despite the clear statutory language, other courts have gone even further and adopted bright-line limits on who can enforce the antitrust laws. In applying multi-factor balancing tests, some courts have applied a per se rule or presumption that *only* customers and competitors can establish antitrust injury and therefore demonstrate antitrust standing. *See, e.g.*, *Carpet Group Int'l v. Oriental Rug Importers Ass'n.*, 227 F.3d 62, 77 (3d Cir. 2000), overruled on other grounds by *Animal Sci. Prod., Inc. v. China Minmetals Corp.*, 654 F.3d 462 (3d Cir. 2011); *Jebaco, Inc. v. Harrah's Operating Co.*, 587 F.3d 314, 320 (5th Cir. 2009); *Serfecz v. Jewel Food Stores*, 67 F.3d 591, 597 (7th Cir. 1995). This rule is derived from nothing in the statutory language of the Clayton Act. Section 4 grants the treble damages remedy to "any person" injured in their business or property and makes no mention of "consumers" or "competitors" nor limiting the private right of action only to these classes.

As the Court has long recognized, customers and competitors are not the only actors who can be injured by antitrust violations. The Sherman Act "does

not confine its protection to consumers, or to purchasers, or to competitors, or to sellers." *Mandeville Island Farms*, 334 U.S. at 236 (emphasis added). For instance, workers can be injured by employer cartels and seek damages for depressed wages. *Anderson v. Shipowners' Ass'n of Pac. Coast*, 272 U.S. 359, 360, 364-65 (1926). In 2019, the Court again recognized the right of upstream market participants to obtain damages arising from antitrust violations and wrote, "A retailer who is both a monopolist and a monopsonist may be liable to different classes of plaintiffs—both to downstream consumers and to upstream suppliers—when the retailer's unlawful conduct affects both the downstream and upstream markets." *Apple*, 139 S. Ct. at 1525.[3]

In developing restrictive tests for antitrust standing and limiting who can file suit for damages under the Clayton Act, the courts have usurped Congress's legislative prerogatives. For suits under Section 4 of the Clayton Act, courts have "limit[ed] a cause of action that Congress has created merely because 'prudence' dictates." *Lexmark*, 572 U.S. at 128. The courts have done what the Supreme Court warned them not to do: "If judges could add to, remodel, update, or detract from old statutory terms inspired only by extratextual sources and our own

[3] In a case last term, the Court affirmed a district court ruling and injunction against the NCAA for collusively capping payments to college basketball and football players. *Nat'l Collegiate Athletic Ass'n v. Alston*, 141 S. Ct. 2141, 2167-68 (2021).

imaginations, we would risk amending statutes outside the legislative process reserved for the people's representatives." *Bostock*, 140 S. Ct. at 1738. Due to this judicial activism, a "miasma of adjectives . . . has accumulated around the words of § 4." *Crimpers Promotions Inc. v. Home Box Off., Inc.*, 724 F.2d 290, 297 (2d Cir. 1983) (Friendly, J.).

In addition to ignoring the policy choice made by Congress, the courts have introduced tremendous subjectivity into Section 4 with their multi-factor tests for standing. The current tests for antitrust standing, "like other open-ended balancing tests, can yield unpredictable and at times arbitrary results." *Lexmark*, 572 U.S. at 136. Whether plaintiffs need to satisfy all factors, most factors, or just a few factors of the courts' prudential standing test is unclear. Certain factors appear to carry more weight than others. As noted, some courts have held that plaintiffs who are neither competitors nor consumers cannot demonstrate antitrust injury and therefore cannot show antitrust standing. Moreover, other factors are duplicative or at least very similar. One legal scholar noted, "If damages are indirect, they are more likely to be speculative." C. Douglas Floyd, *Antitrust Victims without Antitrust Remedies: The Narrowing of Standing in Private Antitrust Actions*, 82 Minn. L. Rev. 1, 44 (1997).

Under these prudential standing tests, courts have broad discretion to permit or bar private antitrust suits. They can use the purportedly neutral framework of standing to make judgments about the

substance of the underlying antitrust claims. *See* Jonathan M. Jacobson & Tracy Greer, *Twenty-One Years of Antitrust Injury: Down the Alley with* Brunswick v. Pueblo Bowl-O-Mat, 66 Antitrust L.J. 273, 293 (1998) ("The many-factored balancing analysis introduced by *Associated General Contractors* appeared to provide a license to the lower courts to engage in imprecise, outcome-oriented decision making.").

III. A Clear Circuit Split Exists on Antitrust Standing

The lower courts have split over their application of the multi-factor balancing tests for antitrust standing. Some courts have adopted a bright-line rule that categorically or presumptively grants standing only to competitors or customers of the alleged antitrust violator(s). Other circuits have rejected this limitation and instead weighed and applied all the factors in a five- or six-part test.

Two circuits have restricted antitrust standing only to customers and competitors of the alleged antitrust violators. The Fifth Circuit has held only these two classes can bring suits for damages under the Clayton Act. *Norris v. Hearst Tr.*, 500 F.3d 454, 476 (5th Cir. 2007). While the Eighth Circuit stated that "standing is generally limited to actual market participants," it did not suggest any exceptions and ruled a plaintiff lacked standing because it was neither a competitor nor a customer of the defendant. *S.D. Collectibles, Inc. v. Plough, Inc.*, 952 F.2d 211, 213 (8th Cir. 1991).

Instead of a strict per se rule restricting antitrust standing to customers and competitors, two courts of appeals have applied a presumption that only customers and competitors have standing. The First Circuit wrote, "competitors and consumers are favored plaintiffs in antitrust cases." *SAS of Puerto Rico, Inc. v. Puerto Rico Tel. Co.*, 48 F.3d 39, 45 (1st Cir. 1995). And the court added that "the list of those presumptively disfavored is far longer." *Id.* The Third Circuit has held that, in general, only customers and competitors can show antitrust injury and therefore establish antitrust standing. *Ethypharm S.A. France v. Abbott Lab'ys*, 707 F.3d 223, 232-37 (3d Cir. 2011). Although the Third Circuit previously restricted standing strictly to customers and competitors, *Barton & Pittinos, Inc. v. SmithKline Beecham Corp.*, 118 F.3d 178, 184 (3d Cir. 1997), it subsequently created an opening for other plaintiffs "whose injuries are the means by which the defendants seek to achieve their anticompetitive ends." *W. Penn Allegheny Health Sys., Inc. v. UPMC*, 627 F.3d 85, 102 (3d Cir. 2010).

In contrast, several circuits have rejected a per se rule or presumption limiting antitrust standing to customers and competitors of the antitrust violator. The Second Circuit weighs factors purportedly derived from *Associated General Contractors*. *See Gelboim*, 823 F.3d at 772-80. The Fourth Circuit expressly rejected a defendant's proposed "'consumer-or-competitor' rule." *Novell, Inc. v. Microsoft Corp.*, 505 F.3d 302, 311 (4th Cir. 2007). The Sixth Circuit has similarly applied a broader view of antitrust injury and standing. *NicSand, Inc.v.3M Co.*, 507 F.3d 442, 449-50 (6th Cir.

2007) (en banc). The Tenth Circuit held "an antitrust plaintiff need not necessarily be a competitor or consumer." *Reazin v. Blue Cross and Blue Shield of Kansas, Inc.*, 899 F.2d 951, 963 (10th Cir. 1990).

IV. The Supreme Court Should Apply the Standard Two-Part Standing Test for Antitrust Damages Claims

The Supreme Court should hear this case to restore the plain meaning of the Clayton Act and to harmonize antitrust standing with the general approach to statutory standing. The proper judicial approach to interpreting statutes was articulated more than a century ago: "It is elementary that the meaning of a statute must, in the first instance, be sought in the language in which the act is framed[.]" *Caminetti v. United States*, 242 U.S. 470, 485 (1917). Only the Supreme Court can correct the erroneous interpretations of the Clayton Act that have proliferated across the lower courts.

In 2014, the Court had to decide which classes of plaintiffs can enforce the Lanham Act. *Lexmark*, 572 U.S. at 120. This law, which protects trademarks and proscribes deceptive marketing practices, features a broad private right of action. It provides that "any person who believes that he or she is or is likely to be damaged" by a firm's false advertising can bring a civil lawsuit. 15 U.S.C. § 1125(a). Until the *Lexmark* decision, the courts had applied three different standing tests, including a "prudential" test that relied on *Associated General Contractors* and resembled the multi-factor balancing test the lower courts have used

to determine antitrust standing. *Conte Bros. Automotive, Inc. v. Quaker State-Slick 50, Inc.* 165 F.3d 221, 233-35 (3d Cir. 1998), abrogated by *Lexmark,* 572 U.S. at 134-35.

In *Lexmark*, the Court applied the traditional tools of statutory construction in interpreting the text of the Lanham Act. Critically, open-ended judicial policymaking—and limitations on standing—under the rubric of "prudence" was rejected. *Id.* at 128. In a unanimous decision authored by Justice Scalia, the Court held the judiciary "cannot limit a cause of action that Congress has created merely because 'prudence' dictates." *Id.* Furthermore, this prudential approach conflicts with the principle that the federal judiciary's "obligation to hear and decide cases within its jurisdiction is virtually unflagging." *Sprint Communications, Inc. v. Jacobs*, 571 U.S. 69, 77 (2013) (quotations omitted).

The *Lexmark* Court stressed the judicial function of faithfully applying the law. The Court's role was to "determine the meaning of the congressionally enacted provision creating a cause of action . . . [and] apply traditional principles of statutory interpretation." 527 U.S. at 128. In applying these principles of statutory interpretation, the *Lexmark* decision held that a plaintiff could bring a Lanham Act claim if it could (1) show it was within the "zone of interests" protected by the statute and (2) establish proximate causation between the defendant's violation and its own injury. *Id.* at 129. *See also Bank of Am. Corp. v. City of Miami, Florida*, 137 S. Ct. 1296, 1305

(2017) (applying the same two-part test for deciding whether plaintiff has statutory standing under Fair Housing Act). The *Lexmark* Court rejected both the multi-factor balancing test that some lower courts had used and the rule that only competitors had the right to bring Lanham Act suits for being inconsistent with the statutory text. 572 U.S. at 134-36.

The Court should apply the approach used in *Lexmark* to determine antitrust standing too. The Court should reject the "prudential" multi-factor balancing tests used by the lower courts and employ the traditional tools of statutory construction. As in *Lexmark*, the Court should "not ask whether in [the Court's] judgment Congress should have authorized [the plaintiff's antitrust] suit, but whether Congress in fact did so." 572 U.S. at 128. Accordingly, the Court should hold that a plaintiff establishes antitrust standing if it shows that it (1) falls within the Clayton Act's zone of interests and (2) sustained an injury proximately caused by the defendant's violation of the law.

One court of appeals has noted the striking divergence between standing under the Lanham Act and standing under the Clayton Act. The court observed that *Lexmark* "casts doubt on the future of prudential standing doctrines" and added whether a private party can enforce a law "is a statutory interpretation question." *Duty Free Americas*, 797 F.3d at 1273 n.6. Because it was deciding an antitrust case and not a Lanham Act case, however, the court

concluded it was bound to follow the precedent of its circuit and could not reconcile the discrepancy. *Id.*

The Supreme Court is under no such constraint and can remedy the discrepancy between the Lanham Act and Clayton Act and correct the erroneous test for antitrust standing nationally. The breadth of the Clayton Act's "any person" language is clear. As the Court observed, "When the express terms of a statute give us one answer and extratextual considerations suggest another, it's no contest. Only the written word is the law, and all persons are entitled to its benefit." *Bostock*, 140 S. Ct. at 1737. Accordingly, a plaintiff, such as the City of Oakland, that shows that it falls within the zone of interests of the Clayton Act and sustained injuries proximately caused by the defendants' antitrust violations should have the right to take its claim to trial.

CONCLUSION

The Court should grant certiorari in this case to resolve the circuit split and to restore the plain meaning of Section 4 of the Clayton Act.

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Respectfully submitted,

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