No. 22-573

IN THE

Supreme Court of the United States

BRFHH SHREVEPORT LLC,
DBA UNIVERSITY HEALTH SHREVEPORT,
Petitioner,

v.

WILLIS-KNIGHTON MEDICAL CENTER,
DBA WILLIS-KNIGHTON HEALTH SYSTEM,
Respondent.

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

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the district court and court of appeals correctly applied *Bell Atlantic Corp.* v. *Twombly*, 550 U.S. 544 (2007), to dismiss petitioner's claim under Section 1 of the Sherman Act, 15 U.S.C. § 1, because petitioner failed to plausibly allege the existence of a conspiracy.

2. Whether, as this Court held in *Tampa Electric Co.* v. *Nashville Coal Co.*, 365 U.S. 320, 327 (1961), exclusive-dealing arrangements are permissible under the antitrust laws as long as they do not threaten to "foreclose competition in a substantial share of the line of commerce affected."

RULE 29.6 STATEMENT

Pursuant to S. Ct. R. 29.6, respondent Willis-Knighton Medical Center states that it has no parent corporation and no publicly owned company holds 10% or more of its stock.

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BRIEF IN OPPOSITION

INTRODUCTION

This case satisfies none of this Court's demanding criteria for certiorari. The petition principally argues that the Fifth Circuit erred in applying the plausibility requirement of *Bell Atlantic Corp.* v. *Twombly*, 550 U.S. 544 (2007), to an anomalous, non-recurring set of conclusory allegations pertaining to respondent Willis-Knighton's charitable contributions to a third-party state university. But the Fifth Circuit's unanimous decision implicates no contestable legal issues, much less a circuit split, and has no application beyond the complex and unusual factual circumstances from which this case arises. Moreover, the issues petitioner BRFHH Shreveport

LLC ("BRF") seeks to present were correctly decided below. This Court frequently denies petitions alleging *Twombly* was incorrectly applied,[1] and it should do so here as well.

Certiorari is also not warranted on BRF's second question. In fact, that question is not even genuinely presented, because the theory BRF seeks to revive depends on the very same inferences that the courts below, applying *Twombly*, correctly concluded were implausible. Only if the Court were to grant certiorari and reverse on BRF's first question—and thus find the causal link the lower courts deemed missing between BRF's claimed injuries and Willis-Knighton's conduct—would the second question become even theoretically relevant. Even then, however, the alternative grounds on which Willis-Knighton moved to dismiss the complaint in the district court, all of which are antecedent to the second question, would still stand in the way.

Furthermore, BRF's second question rests on an inaccurate account of the decision below. The Fifth Circuit did not, as the petition claims, impose a requirement that every plaintiff alleging "a *threatened refusal to deal*[]" must allege a substantial foreclosure of competition in the relevant market. *Cf.* Pet. i (emphasis added). Instead, the court conducted a much narrower analysis, holding only that a plaintiff seeking to impose liability for a *particular type* of refusal to deal—an exclusive-dealing

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[1] *See, e.g.*, *Newbauer* v. *Carnival Corp.*, No. 22-89; *Byd Co. Ltd.* v. *VICE Media LLC*, No. 21-1518; *Audobon Imports, LLC* v. *Bayerische Motoren Werke Aktiengesellschaft*, No. 21-1382; *Prosterman* v. *Am. Airlines, Inc.*, No. 18-934; *Body by Cook, Inc.* v. *State Farm Mut. Auto. Ins.*, No. 17-892.

arrangement—must allege substantial foreclosure. *See* Pet. App. 18a ("Substantial foreclosure is a prerequisite for every exclusive-dealing Section 2 claim."). The lower courts are in accord on that principle, which is unsurprising given that this Court announced it more than 60 years ago, in a seminal case the court of appeals cited yet the petition neither mentions nor purports to challenge. *See Tampa Elec. Co.* v. *Nashville Coal Co.*, 365 U.S. 320, 327 (1961).

The Fifth Circuit's decision thus rests on a straightforward application of this Court's precedent to a highly unusual fact pattern set forth in a meandering complaint that all four judges below criticized as unusually conclusory and difficult to parse. *See* Pet. App. 17a (observing that BRF was not "entirely clear on its theory"); *id.* at 41a (remarking that "the complaint does not coherently describe" BRF's theory). Certiorari should be denied.

STATEMENT OF THE CASE

A. Factual Background.

1. University Health Shreveport.

LSU Health ("LSU") operates a medical school in Shreveport, Louisiana, which employs many physicians as faculty. ROA.12-13.[2] LSU also owns—and, until 2013, operated—a clinical teaching hospital that was one of six hospitals in Shreveport. *Id.* at 11, 15, 17, 30. In 2013, BRF entered into a collaboration agreement with LSU under which BRF took over management and operational responsibility for LSU's hospital, which became known as University Health Shreveport ("UHS"). *Id.* at 13, 15.

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[2] "ROA" refers to the Record on Appeal in the Fifth Circuit.

Not long thereafter, BRF's relationship with LSU turned hostile. In July 2015, LSU sent BRF a notice-of-breach letter, which identified complaints about BRF's management of UHS as far back as August 2014—less than a year after BRF took over. Pet. App. 3a; Cl..&&plt. ¶ 66, *BRFHH Shreveport, L.L.C.* v. *Willis-Knighton Med. Ctr.*, No. 5:15-cv-2057 (W.D. La. July 16, 2015), ECF No. 1. Then, in September 2015, LSU sued BRF, seeking to terminate BRF's management of UHS. *See* Ex. 35, Pet. for Dec J. & Inj., *BRFHH Shreveport*, No. 5:15-cv-2057 (Sept. 28, 2015), ECF No. 77-1. That effort failed, but LSU continued to try to escape the relationship, attempting to terminate BRF again in summer 2016 and yet again the following year. ROA.25. Finally, in October 2018, BRF exited the hospital business and returned operational control of UHS to LSU and a third party. *Id.* at 10.

2. Petitioner's Two Lawsuits.

Willis-Knighton is a medical-care provider that operates four hospitals in Shreveport and, as a hospital operator in the community, has routinely made substantial philanthropic donations to LSU. *See*, *e.g.*, Pet. App. 3a. As BRF's relationship with LSU fell apart, BRF sought to blame Willis-Knighton. First, in July 2015, BRF sued Willis-Knighton to enjoin it from opening clinics that would be staffed part-time by certain LSU physicians. ROA.11, 17. That lawsuit is still ongoing, but once BRF exited the hospital business, BRF also filed this suit, alleging that from 2016 to 2018, the period when LSU purportedly refused to cooperate with BRF in operating UHS, LSU did so not because the relationship between BRF and LSU was falling apart, but instead because of a supposed conspiracy between

LSU and Willis-Knighton. In particular, BRF maintained that Willis-Knighton had a "longstanding" policy of making philanthropic contributions to LSU only if LSU "did not support [Willis-Knighton's] competitors," ROA.30; Pet. App. 30a, and that a budget crisis at LSU, which began in 2016, made LSU accede to that policy and rebuff BRF's efforts to cooperate, *see* Pet. App. 11a-12a.

BRF asserted that LSU's rejection of its proposals for cooperation reflects an unlawful conspiracy between LSU and Willis-Knighton in violation of Section 1 of the Sherman Act, as well as monopolization or attempted monopolization by Willis-Knighton in violation of Section 2. ROA.8, 80-82; *see* 15 U.S.C. §§ 1, 2. Notably, however, the complaint contains no allegation that Willis-Knighton:

- ever communicated with LSU about its supposed "longstanding" policy;
- knew about any of the alleged proposals LSU rejected before LSU rejected them;
- made any request of LSU with respect to any of the alleged proposals;
- threatened to stop donations if LSU agreed to any of the alleged proposals or refused to cooperate more generally; or
- was aware, either beforehand or afterward, of any of LSU's actions or planned actions with respect to LSU's cooperation or non-cooperation regarding the alleged proposals.

The complaint also does not allege that Willis-Knighton's donations to LSU were affected by whether LSU cooperated with BRF. For instance, there is no allegation that Willis-Knighton would have

ended or reduced its existing funding to LSU if LSU had cooperated with BRF. Similarly, there are no allegations that Willis-Knighton increased funding to LSU as a result of any of the alleged instances of non-cooperation. Moreover, the complaint specifically alleges that Willis-Knighton's supposed coercion of LSU could not have "[c]ommenc[ed]" until "the spring of 2016"—at least six months *after* LSU sued BRF and sought to terminate BRF's role at UHS. ROA.21. It was only in 2016, the complaint alleges, that LSU began to "perce[ive] * * * a 'crisis' reflecting a heightened need for additional funds" that made it susceptible to supposed coercion. *Id.* Yet the complaint also alleges instances of non-cooperation in 2015, *see*, *e.g.*, *id.* at 25, which is not surprising given the animosity and litigation between LSU and BRF at that time.

B. Procedural Background.

1. District Court Proceedings.

The district court dismissed the complaint. Pet. App. 61a. Addressing the Section 1 claim, the court applied established precedent holding that Section 1 prohibits only "concerted action"—not "independent conduct"—in restraint of trade. *Id.* at 43a (citation omitted). As the court emphasized, "'the crucial question'" under Section 1 "'is whether the challenged * * * conduct stems from independent decision or from an agreement, tacit or express.'" Pet. App. 43a (quoting *Twombly*, 550 U.S. at 553). Thus, to survive a motion to dismiss, "[a] plaintiff's allegations must plausibly suggest the unlawful agreement, not simply be consistent with an agreement." *Id.* at 44a (citing *Twombly*, 550 U.S. at 557).

Turning to BRF's complaint, the district court repeatedly noted that although long, "the complaint is lacking in detail" and devoid of "nonspeculative allegations of fact" from which favorable inferences can be drawn. *Id.* at 46a; *see id.* at 49a, 52a, 54a. For example, the court observed that although BRF's theory is that Willis-Knighton made "threats to withhold funds based on LSU's acquiescence in its demands, * * * the so-called 'demands' are never described in terms that are nonconclusory or nonspeculative." *Id.* at 45a (quoting ROA.22). Likewise, although the complaint "repeatedly uses the term 'threat'" to describe communications between Willis-Knighton and LSU, it contains "insufficient" factual material "to plausibly suggest that Willis-Knighton actually threatened [LSU]," and "even less to suggest that [LSU] entered into an unlawful conspiracy with Willis-Knighton to comply with its demands." *Id.* at 54a. Indeed, the only information the complaint alleges was actually communicated by Willis-Knighton to LSU was benign, stating (for example) that Willis-Knighton would be "willing to increase its funding of programs and services to [LSU] if there was 'increased cooperation from leadership and the faculty,'" without any mention—express or otherwise—of non-cooperation with BRF or anyone else. *Id.* at 46a-47a.

As the court put it, BRF's entire "case can be summed up" by BRF's mere assumption that "there must have been an unlawful agreement to conspire against and harm" it, because it "cannot otherwise understand why [LSU] would not have jumped at the chance to implement all of [its] good ideas." *Id.* at 52a. The court found that assumption unwarranted. As noted, when the "ideas," *id.*, were presented, LSU had

already sued BRF for breach of contract and sought to terminate their relationship, and there is no allegation that Willis-Knighton was involved in those efforts at all. *See supra* at 5-6. Moreover, given the absence of factual material supporting the notion that any threats occurred, the court concluded that allegations that LSU "decline[d] business endeavors that would jeopardize its relationship with a donor" were at least as consistent with self-interested, independent (and thus lawful) action as with the existence of a conspiracy. Pet. App. 52a (quoting, *inter alia*, 6 Phillip Areeda & Herbert Hovenkamp, Antitrust Law ¶ 1415c (3d ed. 2010)); *see also* Areeda & Hovenkamp, *supra*, ¶ 1415c (explaining that there is no conspiracy, and thus no Section 1 violation, when an entity seeks to "serve" its own "long-run interest" by "refrain[ing] from taking an otherwise profitable step because someone else has the power to make it unacceptably costly").

As the court explained, the complaint "is silent as to (1) when, where, or how the conspiracy was formed; (2) whether Willis-Knighton communicated with [LSU] about the conspiracy; (3) whether [LSU] communicated with Willis-Knighton about the conspiracy; and," most critically, "(4) whether they shared a common intent or meeting of the minds to restrain trade." *Id.* at 49a-50a. In all, based on the "paucity of facts to entitle [BRF] to the inferences upon which its claims are premised," the court held that BRF "has failed to sufficiently plead a claim under Section 1 of the Sherman Act." *Id.* at 49a, 55a.

The court then dismissed BRF's Section 2 claims for similar reasons. As the court explained, Section 2 claims require allegations of anticompetitive conduct, and "the lack of actual facts in the complaint makes it

nearly impossible to define what Willis-Knighton even did that is deemed exclusionary." *Id.* at 56a-59a. Thus, "[t]he pleading woes that plagued [BRF]'s Section 1 claim similarly doom its Section 2 claim," because BRF's "theories are dependent upon a sufficient showing of a threat, or coercion, or even an insistence" by Willis-Knighton, "all of which lack a plausible showing in the complaint." *Id.* at 60a. In the alternative, the court also held that the claimed conduct was "not anticompetitive" even if it had been adequately alleged, because "any business would refrain from donating to another if the donee intended to help a competitor harm the donor." *Id.*

In sum, "taking the factual allegations as true and making all reasonable inferences in favor of [BRF]," the court could not identify in the complaint "the requisite material to nudge [BRF]'s claim over the line from conceivable to plausible as demanded by *Twombly*." *Id.* at 60a-61a. Thus "constrained to find that the complaint has failed to plausibly state a claim," the court dismissed. *Id.* at 61a.

2. The Fifth Circuit's Decision.

The Fifth Circuit affirmed. Pet. 22a. Like the district court, the court of appeals repeatedly observed that BRF's allegations on critical issues were overwhelmingly conclusory. *See*, *e.g.*, *id.* at 20a-21a (block-quoting a "typical" "paragraph" from the complaint, quoting "[a]nother example" and "[a]nother," and noting that all were "conclusory," "high-level assertions" that "don't tell a coherent story"). Moreover, even assuming *arguendo* that BRF had properly alleged "threats" against LSU, *see id.* at 11a, the court nevertheless concluded, as had the district court, that the Section 1 claim failed for want of a plausibly alleged conspiracy, *id.* at 8a. As the

court reasoned, the complaint does not support an inference that LSU's refusal to cooperate was "*because of*" anything Willis-Knighton did when LSU's "ordinary, self-interested decision that BRF was not a good business partner," as reflected in LSU's efforts in 2015 and beyond to terminate their relationship, provides "a completely independent reason for refusing to cooperate" that "*predated* any alleged coercion." *Id.* at 10a-14a.

The court of appeals also confronted directly two counterarguments BRF's counsel had offered at oral argument. First, noting that "LSU's unambiguous efforts to cut ties through state-court litigation" predated the alleged coercion, the court rejected as both unpleaded and implausible counsel's assertion that "the relationship *really* deteriorated after the threats began." *Id.* at 14a (emphasis added). Second, and relatedly, the court rejected BRF's counsel's unpleaded assertion that "in the months *after* LSU filed its 2015 state-court lawsuit and *before* [the] coercion began, LSU had decided to continue partnering with BRF after all." *Id.* at 14a-15a. As the court put it, BRF offered no "reason (besides, perhaps, wishful thinking) to find that made-to-order account plausible." *Id.*

The court also rejected the Section 2 claims. *Id.* at 15a-22a. As the court explained, "BRF hasn't been entirely clear on its theory" under Section 2. *Id.* at 17a. Nevertheless, based on BRF's concessions at oral argument, the court of appeals took BRF to be asserting that the claimed anticompetitive conduct was a conditional refusal to deal—*i.e.*, Willis-Knighton's alleged refusal to donate to LSU unless LSU satisfied Willis-Knighton's supposed demands. *Id.* Moreover, because the supposed demand was

exclusivity—*i.e.*, insistence that LSU exclude BRF—the court reasoned that the theorized agreement amounted to an exclusive-dealing arrangement. *Id.* at 17a-18a. That was the end of BRF's claim. Exclusive-dealing arrangements are permissible under Section 2 unless the plaintiff alleges that they substantially foreclose competition in the relevant market, *id.* at 18a (citing, *inter alia*, *Tampa Elec.*, 365 U.S. at 329; *OJ Com., LLC* v. *KidKraft, Inc.*, 34 F.4th 1232, 1249-50 (11th Cir. 2022) (Pryor, C.J.)), and the complaint contains no non-conclusory allegations of substantial foreclosure, *id.* at 19a-22a. Thus, the court held, the Section 2 claims would fail even if BRF had sufficiently pleaded that an agreement between LSU and Willis-Knighton existed. *Id.* at 21a.

REASONS FOR DENYING THE PETITION

I. THE FIFTH CIRCUIT'S CORRECT, CASE-SPECIFIC APPLICATION OF *TWOMBLY* DOES NOT WARRANT THIS COURT'S REVIEW.

A. The Fifth Circuit Correctly Applied *Twombly*'s Plausibility Requirement.

Because Section 1 is not concerned with unilateral conduct, the court of appeals correctly held that "[t]o plead an agreement, BRF needed to plausibly allege that LSU's refusal to cooperate with BRF was a response to Willis-Knighton's threat—as opposed to an ordinary, self-interested decision that BRF wasn't a good business partner." Pet. App. 11a, 14a. The district court made much the same observation, "summ[ing] up" BRF's case as depending on the thesis that "there must have been an unlawful agreement to conspire against and harm [BRF] because [BRF] cannot otherwise understand why [LSU] would not

have jumped at the chance to implement all of [BRF's] good ideas." *Id.* at 52a.

As the court of appeals observed, BRF's theory has an obvious problem: as is readily apparent from the face of BRF's complaint, "LSU had a completely independent reason for refusing to cooperate with BRF, which *predated* any alleged coercion by Willis-Knighton." *Id.* at 13a. Specifically, LSU "tried to cut off BRF before Willis-Knighton's alleged coercion *even began*[.]" *Id.* at 14a. Because LSU's ongoing dispute with BRF easily explains LSU's business decision to separate itself from BRF, the court of appeals correctly held that any inference that the non-cooperation was "because of" Willis-Knighton was "not plausible." *Id.* at 10a-14a (emphasis omitted). "At the very most," the court held, "BRF's allegations are *consistent* with an agreement," and that is "not enough" under *Twombly*. *Id.* (citing 550 U.S. at 557) (emphasis added).

The court of appeals' analysis, which cites or quotes *Twombly* nine times, reflects a straightforward, correct application of this Court's precedent to the unusual facts of this case. As *Twombly* makes clear, a Section 1 plaintiff cannot survive a motion to dismiss by alleging behavior that is merely "consistent with conspiracy," when such behavior is "just as much in line with" another, more innocent explanation. 550 U.S. at 554. "[A]n allegation of parallel conduct and a bare assertion of conspiracy will not suffice," because "[w]ithout more, parallel conduct does not suggest conspiracy, and a conclusory allegation of agreement at some unidentified point does not supply facts adequate to show illegality." *Id.* at 556-57. "Hence, when allegations of parallel conduct are set out in order to make a § 1 claim, they

must be placed in a context that raises a suggestion of a preceding agreement, not merely parallel conduct that could just as well be independent action." *Id.*

That analysis compelled the Fifth Circuit's decision. Before both lower courts, BRF's theory was that LSU's non-cooperation "was inconsistent with unilateral, self-interested behavior and '*can only be explained* by [LSU's] acquiescence in and agreement to Willis-Knighton's demands.'" Pet. App. 34a (quoting ROA.26) (emphasis added). As both lower courts observed, however, LSU's supposed non-cooperation can easily be explained as unilateral, self-interested action. For months before the purported conspiracy is claimed to have begun, LSU was litigating tooth-and-nail against BRF to entirely *terminate* their business relationship based on LSU's stated view that, "among many, many other things," BRF "fail[ed] to support LSU's teaching mission," engaged in "bad-faith negotiation," "fail[ed] to complete * * * contemplated transactions," and "fail[ed] to work collaboratively with LSU." *Id.* at 13a.

Moreover, as the district court observed (in offering an independent, alternative ground for dismissal), there is no allegation of any threat transmitted from Willis-Knighton to LSU, so even assuming *arguendo* that LSU's actions were influenced by a desire to please Willis-Knighton, there is no basis on which to infer that such an alleged desire evidenced anything more than LSU's unilateral (and thus lawful) interest in currying favor with a donor. *Id.* at 52a; *see supra* at 8. Given those obvious, alternative, non-actionable explanations for LSU's conduct, any inference of a conspiracy is implausible and thus unwarranted. The lower courts did not err in dismissing the complaint on those grounds.

B. The Fifth Circuit's Case-Specific Analysis Raises No Important Legal Issue Or Circuit Split And Has No Significance Beyond This Case.

Based on four categories of assertions BRF claims to have made in the complaint, BRF argues that the Fifth Circuit created an array of circuit splits, including on issues as basic as whether allegations in a complaint must be taken as true. Pet. 21-29. BRF's contentions, which are a transparent effort to frame in legal terms what is at bottom an idiosyncratic request for fact-bound error correction, all fail. The Fifth Circuit did not err, much less err on a matter of law, and still less create a circuit split. Indeed, despite its claims that other circuits have "rejected the Fifth Circuit's formulation," *id.* at 25, BRF cannot point to a single statement of law in the court of appeals' opinion with which even BRF, let alone any other court, disagrees.

As an initial matter, BRF's contention that the Fifth Circuit disbelieved its factual allegations is unsupportable. The court of appeals made clear that it was "accept[ing] all well-pleaded facts as true" and "construe[ing] the[m] in the light most favorable to" BRF. Pet. App. 7a. The district court, which dismissed the complaint in the first instance, took great pains to make clear it had done the same, "render[ing] its decision" not "based on a disbelief or skepticism of [BRF's]' allegations"—which would be an approach that "Rule 12(b)(6) does not countenance"—but instead because, "taking the factual allegations as true and making all reasonable inferences in favor of [BRF]," the court was "nonetheless constrained to find that the complaint has failed to plausibly state a claim for relief." *Id.* at

61a. Thus, BRF's assertion of error in the lower courts' approach does not pertain to any legal rule, much less one at odds with the 12(b)(6) standard or the holdings of other circuits. Instead, it is simply a complaint about how *Twombly* was applied in this particular case, which is the sort of complaint this Court routinely declines to hear. *Supra* at 2 & n.1; *see* S. Ct. R. 10 (certiorari "is rarely granted when the asserted error consists of * * * the misapplication of a properly stated rule of law").

In any event, no error occurred, because in addition to being entirely case-specific, the four categories BRF sets forth do not undermine the lower courts' decisions. As to category 1 (Dr. Ghali), the complaint itself asserts that there was noncooperation by LSU in 2015, ROA.32, which belies BRF's contention that LSU's non-cooperation began only when Dr. Ghali was appointed, *cf.* Pet. 17-18. Nor does the petition's claim that the court of appeals discarded BRF's *allegations* regarding Dr. Ghali as "wishful thinking" or "made-to-order," *id.* at 22, withstand scrutiny. The Fifth Circuit's analysis referred not to any factual allegations, but instead to an *inference* BRF requested "at oral argument" to the effect that LSU's non-cooperation with BRF began only in 2016. Pet. App. 14a. That requested inference is unpleaded, unwarranted, and specifically contradicted by the complaint's allegations of non-cooperation in 2015. *See*, *e.g.*, ROA.32 (detailing LSU's refusal to attend 2015 meeting with BRF "regarding a possible joint venture").

BRF's remaining three categories also fail to cast doubt on the lower courts' analyses. As to category 2 (BRF's invocation of LSU's Monroe hospital as a comparator), Pet. 19, the complaint's allegations

rarely amount to more than a bare assertion (with no chronological details) that there was "cooperation" in Monroe but not in Shreveport. *See*, *e.g.*, ROA.24 ("At [Monroe], unlike the Shreveport hospital, the LSU administration worked closely with [BRF] in improving productivity, on recruitment and in other areas."). As both lower courts observed with respect to broad swaths of the complaint, *see supra* at 7, 9, such assertions are so conclusory, generalized, and devoid of facts as to be meaningless.

As to category 3 (supposed "direct evidence" of a conspiracy to freeze out BRF), Pet. 19, BRF's *factual* allegations establish only that Willis-Knighton made charitable contributions to LSU, which LSU accepted. There is no "direct evidence" that either the contributions or LSU's alleged non-cooperative acts were tied to BRF's claimed conspiracy. *See*, *e.g.*, ROA.33-34.[3] Finally, category 4 (BRF's argument that LSU's non-cooperation was against LSU's economic self-interest) is contradicted by the complaint's own allegations. The argument fails to account not only for LSU's demonstrated, preexisting desire to terminate its relationship with BRF, but also for the obvious possibility, reflected in the district court's alternative holding, that in the absence of plausible allegations of threats, LSU could just as easily have unilaterally concluded that non-

[3] BRF relies heavily on an email describing LSU's decision to enter into contracts with Willis-Knighton and several other hospitals in the state; the email describes the contracts with other hospitals as "initially just for cover." ROA.36. However, the complaint contains no facts whatsoever shedding light on what was being discussed, much less any facts to suggest that the subject was the conspiracy BRF sought to allege.

cooperation was the best way to secure further financial support from Willis-Knighton.[4]

BRF also cannot support its contention that the Fifth Circuit demanded a greater showing at the motion-to-dismiss stage than do other circuits. In fact, BRF's effort to manufacture a split on that issue rests on little more than the misleading use of quotation marks. The petition implies that the Fifth Circuit claimed an entitlement to "'ferret[] out' what it believe[s] to be 'the most likely reason'" for alleged anticompetitive action on a motion to dismiss. Pet. 28-29. Elsewhere, the petition asserts that "[n]o circuit, other than the Fifth Circuit, has conflated the existence of an 'obvious' alternative explanation for conspiracy with a 'probable' or even 'possible' alternative explanations." *Id.* at 28. In both instances, the petition uses quotation marks, but it is not quoting anything the Fifth Circuit ever said, much less disagreed with. Instead, like the district court, the court of appeals took the complaint's factual allegations as true, correctly applied *Twombly*, and found BRF's complaint wanting under established

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[4] As BRF observed below, BRF 5th Cir. Br. 29, but purports to dispute now, Pet. 27, the Fifth Circuit agrees with other circuits (and with BRF) that where actions against self-interest are plausibly alleged, they can be indicative of conspiracy. *See*, *e.g.*, *MM Steel, L.P.* v. *JSW Steel (USA) Inc.*, 806 F.3d 835, 844 (5th Cir. 2015) (quoting *Viazis* v. *Am. Ass'n of Orthodontists*, 314 F.3d 758, 763 (5th Cir. 2002)); *see also*, *e.g.*, *Starr* v. *Sony BMG Music Ent.*, 592 F.3d 314, 327 (2d Cir. 2010) (cited at Pet. 26) (acknowledging that "[u]nder *Twombly*, allegations of parallel conduct that could just as well be independent action are not sufficient to state a claim," and permitting case to proceed only because plaintiffs "alleged behavior that would plausibly contravene each defendant's self-interest") (internal quotation marks and citation omitted).

law. Moreover, because both courts below correctly held that the inferences BRF seeks are "not plausible" based on the facts BRF alleged, *e.g.*, Pet. App. 14a, no "choice between or among *plausible* interpretations of the evidence" was needed. Pet. 25-26 (quoting *Anderson News, L.L.C.* v. *Am. Media, Inc.*, 680 F.3d 162, 190 (2d Cir. 2012)) (emphasis added); *see also Evergreen Partnering Grp., Inc.* v. *Pactiv Corp.*, 720 F.3d 33, 45-46 (1st Cir. 2013) (similar).

Given that BRF cannot identify any rule of law in the decisions below with which it disagrees, it comes as no surprise that BRF also fails to identify any out-of-circuit case that would have been decided differently under the Fifth Circuit's analysis. Indeed, far from establishing a circuit split, the cases the petition cites only emphasize how fact-intensive BRF's *Twombly* issue is. For instance, in *Evergreen*, the complaint survived not because of any broad legal proposition, but instead because, unlike here, the plaintiff "allege[d] facts concerning when agreement occurred"; specified a particular "meeting as the locus of agreement"; set forth 11 instances of parallel conduct occurring immediately after that agreement (without alleging similar conduct before the claimed agreement, as BRF did here), and otherwise alleged behavior that was "*difficult to explain* outside the context of a conspiracy." *Evergreen*, 720 F.3d at 47-48 (emphasis added). Again, the thrust of both lower courts' decisions in this case is that on the facts BRF alleged, no comparable "difficult[y]," *id.*, exists.[5]

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[5] *See also*, *e.g.*, *Anderson News*, 680 F.3d at 186-87 (complaint in horizontal-conspiracy case was "vastly different from the complaint at issue in *Twombly*," because it "allege[d] not just that all of the defendants ceased, in virtual lock-step, to deal with

The Sixth Circuit's decision in *Watson Carpet & Floor Covering, Inc.* v. *Mohawk Industries, Inc.*, 648 F.3d 452, 457 (6th Cir. 2011), also does not conflict with the decisions here. In that case, an "express agreement" between competitors was "clearly * * * alleged"; the only "contentious issue" was whether certain conduct occurring thereafter was "undertaken as part of that agreement." *Id.* In resolving that question, the court merely held that the plaintiff, having "articulated in detail the facts of the * * * agreement," and that the challenged anticompetitive actions "were the same ones contemplated as part of" the agreement, did not need to identify still another "smoking gun," and could instead rest on the presumption that "conspiracies * * * are ongoing until the participants achieve their objective." *Id.* at 457-58. None of that analysis casts any doubt on the Fifth Circuit's case-specific finding on the separate issue of BRF's failure to allege any conspiracy in the first place. The cases BRF cites thus reflect only that the outcome of any

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[the plaintiff]" but also "that on various dates within the preceding two-week period," defendants' executives "had met or communicated with their competitors and others and made statements that may plausibly be interpreted as evincing their agreement to attempt to eliminate [the plaintiff from the market] * * * and to divide that market between [themselves]"); *SD3, LLC* v. *Black & Decker (U.S.) Inc.*, 801 F.3d 412, 430-32 (4th Cir. 2015) (in horizontal-conspiracy case, complaint "buil[t] a detailed story"; "identifie[d] the particular time, place, and manner in which the boycott initially formed, describing a separate meeting held for that purpose"; identified "ways in which the [participants] attempted to hide their actions, including a mutual agreement not to 'leave a paper trail,'" and otherwise set forth the "who, what, where, when, and why" of agreement).

Twombly analysis necessarily depends on what particular facts a given plaintiff alleges.

II. PETITIONER'S "SUBSTANTIAL FORECLOSURE" ISSUE ALSO DOES NOT WARRANT REVIEW.

A. The Issue Is Not Genuinely Presented.

The second question on which the petition seeks review is whether, to establish a Section 2 violation, BRF was required to plead that the challenged conduct threatened to substantially foreclose competition. *See* Pet i. That question is not genuinely presented. The Fifth Circuit's holding on the first question was that BRF failed to plausibly plead that anything LSU did to supposedly injure BRF was attributable to an agreement with Willis-Knighton, as opposed to LSU's own independent action. Pet. App. 10a-15a. That determination independently defeats BRF's Section 2 claims, which, like BRF's Section 1 claim, are premised on supposed injuries from actions by LSU, not by Willis-Knighton. *E.g.*, *id.* at 17a. Indeed, if BRF cannot overcome the Fifth Circuit's holding that none of LSU's conduct was "because of" Willis-Knighton, *id.* at 10a (emphasis omitted), even its Article III standing is questionable, *see*, *e.g.*, *Clapper* v. *Amnesty Int'l USA*, 568 U.S. 398, 419 (2013).

The lower courts' discussions make the overlap between BRF's two issues clear. As the district court explained, "[t]he pleading woes that plagued [BRF's] Section 1 claim similarly doom its Section 2 claim," because BRF's Section 2 "theories are dependent upon a sufficient showing of a threat, or coercion, or even an insistence" by Willis-Knighton, "all of which lack a plausible showing in the complaint." Pet. App. 60a.

Thus, in the Fifth Circuit, BRF's principal argument on the Section 2 claims was that the district court's rejection of those claims was "based on the same flawed reasoning" as the dismissal of the Section 1 claims—*i.e.*, the conclusion that no agreement was plausibly alleged. BRF 5th Cir. Br. 53. Because the court of appeals then affirmed on Section 1, holding that BRF failed to allege an agreement because it did not plead that anything LSU did was "because of" Willis-Knighton, *e.g.*, Pet. App. 10a (emphasis omitted), anything the Fifth Circuit said about the hypothetical lawfulness of that supposed agreement was at most an alternative ground on which to affirm the dismissal. Put simply, because BRF failed to plausibly plead the claimed agreement's *existence*, any issue of that agreement's *legality* under Section 2 is purely hypothetical.

The second question on which BRF seeks review is therefore irrelevant, and will remain so unless this Court were to overcome an array of constitutional and statutory impediments to review. As explained above, the lower courts' *Twombly* analysis is neither wrong nor warranting of certiorari, yet granting certiorari and reversing would be a necessary precondition to reaching the second question. Even then, however, the second question would not be presented unless the Court went still further, reversing *the district court's* determination that the complaint failed to allege any threats in the first place, *id.* at 54a, which is an issue that could independently defeat BRF's Article III standing, *see*, *e.g.*, *Clapper*, 568 U.S. at 418 (claimed injury must be "fairly traceable" to defendant's challenged conduct). Moreover, the Court would need to go yet further, addressing in the first instance (and rejecting) other grounds for dismissal Willis-Knighton

raised in its motion to dismiss—including antitrust injury and *Noerr-Pennington* immunity arising from the fact that LSU is a government entity—that are antecedent to any question of the supposed agreement's propriety under Section 2. *See*, *e.g.*, Pet. App. 35a-36a. This is a "court of review, not of first view," *Cutter* v. *Wilkinson*, 544 U.S. 709, 718, n.7 (2005), and that plenary, first-instance analysis of the complaint would be improper. Certiorari should be denied on BRF's second question for that reason alone.

B. The Fifth Circuit Did Not Apply The Rule The Petition Purports To Challenge, And The Rule It Did Apply Is Required By *Tampa Electric*.

The second question BRF seeks to raise also rests on an inaccurate account of the Fifth Circuit's decision. BRF asks this Court to opine on whether a "substantial foreclosure" requirement applies to all "*threatened refusal[s] to deal*." Pet i (emphasis added). That issue, however, was neither pressed nor passed upon below. *Cf. United States* v. *Williams*, 504 U.S. 36, 41 (1992). Instead, the rule the court of appeals applied pertains only to *exclusive-dealing* arrangements. Pet. App. 18a ("Substantial foreclosure is a prerequisite for every exclusive dealing Section 2 claim.").

The Fifth Circuit nowhere held that *all* conditional refusals to deal are subject to the substantial foreclosure requirement. Nor did it hold that conditional refusals to deal are always subject to the same analysis as exclusive-dealing arrangements. Instead, it made clear that "a conditional refusal to deal" exists where "'one firm unilaterally refus[es] to deal with another firm unless some condition is met,'"

and that "*where the condition is exclusivity*," the conditional refusal to deal is "[a]n exclusive-dealing arrangement." Pet. App. 17a (quoting *OJ Com.*, 34 F.4th at 1247) (emphasis added).

The petition ignores that methodical analysis, which dooms BRF's Section 2 arguments. BRF does not challenge the Fifth Circuit's conclusion that BRF's sole theory under Section 2 was that Willis-Knighton coerced LSU into excluding BRF, *see*, *e.g.*, Pet. App. 17a, which is the exact theory the Fifth Circuit's *Twombly* analysis rejected, *supra* at 11-13. BRF also fails to raise (and has thus waived) any challenge to the Fifth Circuit's further conclusion that the agreement arising from the claimed coercion—if it had been properly alleged—would have been an exclusive-dealing arrangement. Pet. App. 17a ("An exclusive-dealing arrangement is a conditional refusal to deal where the condition is exclusivity."). Additionally, BRF fails to challenge the Fifth Circuit's holding that BRF failed to allege substantial foreclosure. *Compare id.* at 19a-22a, *with* Pet. 33 (conceding that what BRF alleged "was not foreclosure").

BRF's strategic choice not to challenge those conclusions is presumably attributable to the fact that they are case-specific and clearly correct. Whatever BRF's reasons, however, the choice is fatal to BRF's Section 2 claims, because BRF also cannot (and does not attempt to) attack the rule of law the Fifth Circuit actually applied. That rule—that "[s]ubstantial foreclosure is a prerequisite for every *exclusive-dealing* Section 2 claim," Pet. App. 18a (emphasis added)—comes directly from *Tampa Electric*, in which this Court held that "even though a contract is found to be an exclusive-dealing arrangement, it does not

violate the [antitrust laws] unless the court believes it probable that performance of the contract will foreclose competition in a substantial share of the line of commerce affected." 365 U.S. at 327.[6] BRF does not call for the Court to revisit *Tampa Electric*, which mandated the result the court of appeals reached below. Nor does the petition even mention that case. By addressing only a rule of its own creation, BRF has waived any challenge to what the court of appeals actually did. *See*, *e.g.*, S. Ct. R. 14.1(a); *S.F. Arts & Athletics, Inc.* v. *U.S. Olympic Comm.*, 483 U.S. 522, 547 n.30 (1987) (matters "not fairly encompassed within the questions presented" are "not properly before the Court").

To the extent the petition attempts to critique *Tampa Electric*'s rule *sub silentio*, that effort fails on its merits also. Contrary to the petition's claims, the substantial foreclosure requirement does not immunize exclusive-dealing arrangements "no matter how much * * * [they] impair[] overall competition." Pet. 35. Demonstrating "impair[ment]" of "competition," *id.*, is how a plaintiff would demonstrate substantial foreclosure. *See*, *e.g.*, Pet. App. 19a-22a. Further, BRF's effort to list off

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[6] *Tampa Electric* arose under Section 3 of the Clayton Act. However, "[i]f [an] agreement does not come within the broad provisions of § 3 of the Clayton Act, it cannot come under the more narrow provisions of §§ 1 and 2 of the Sherman Act." *Denison Mattress Factory* v. *Spring-Air Co.*, 308 F.2d 403, 410 (5th Cir. 1962). Thus, "the *Tampa* case holds that [exclusive-dealing arrangements] are not a per se violation of antitrust statutes." *Id.*; *see also*, *e.g.*, *Republic Tobacco Co.* v. *N. Atl. Trading Co.*, 381 F.3d 717, 737-38 (7th Cir. 2004) (similar). In any event, given that the petition fails to even mention *Tampa Electric*, any argument about how broadly that case applies is waived.

supposed anticompetitive effects in the hope of relitigating whether it made the required showing, Pet. 33-34, is nothing more than a misguided attack on the Fifth Circuit's *application* of *Tampa Electric*'s rule. That case-specific attack is neither meritorious nor fairly encompassed in the questions BRF seeks to present. *See* Pet. i; *see also In re EpiPen (Epinephrine Injection, USP) Mktg., Sales Pracs. & Antitrust Litig.*, 44 F.4th 959, 983 (10th Cir. 2022) (noting that, as "[c]ourts repeatedly explain," exclusive-dealing arrangements "are often entered into for entirely procompetitive reasons and pose very little threat to competition even when utilized by a monopolist").[7]

Furthermore, because BRF has not preserved any argument that *Tampa Electric* should be overruled, its claim that the court of appeals applied a broader rule would be irrelevant even if it were true. "[T]his Court reviews *judgments*, not opinions." *Chevron, U.S.A., Inc.* v. *Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 842 (1984) (emphasis added). Assuming *arguendo* that the Court could even reach any Section 2 issue notwithstanding the significant impediments to doing so, *see supra* at 20-22, the Fifth Circuit's judgment falls squarely within *Tampa Electric*'s core and express holding that exclusive-dealing arrangements are lawful unless they threaten to substantially foreclose competition. Accordingly,

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[7] *EpiPen* is the subject of a pending petition for certiorari, *see Sanofi-Aventis U.S., LLC* v. *Mylan, Inc.*, No. 22-628 (docketed Jan. 9, 2023), but that case's eventual disposition has no bearing here. The petition there expressly concedes the substantial foreclosure requirement's existence and challenges only the details of its application. *See*, *e.g.*, Petition for Certiorari at 25, *Sanofi-Aventis*, *supra*. As explained, BRF has waived any such challenge.

BRF's claim that the Fifth Circuit's opinion contains broader dicta is no basis for this Court's review. Indeed, because the petition does not dispute that the challenged conduct is an exclusive-dealing arrangement, Willis-Knighton can easily win affirmance under *Tampa Electric* alone, and neither party would have a concrete interest in defending the broader rule the petition hypothesizes.

C. There Is No Circuit Split.

Petitioner's allegations of a circuit split, Pet. 30-33, are also unsupportable. Specifically, the petition argues that decisions of the First, Sixth, Seventh, Ninth, and Tenth Circuits are somehow in conflict with *Tampa Electric*'s clear holding. That would be remarkable if it were true, but it is not. When confronted with exclusive-dealing arrangements, every one of the circuits in question has adhered to *Tampa Electric*, just as the Fifth Circuit did below. *See*, *e.g.*, *E. Food Servs., Inc.* v. *Pontifical Cath. Univ. Servs. Ass'n, Inc.*, 357 F.3d 1, 8 (1st Cir. 2004) ("[S]ubstantial foreclosure is essential[.]"); *B & H Med., L.L.C.* v. *ABP Admin., Inc.*, 526 F.3d 257, 266 (6th Cir. 2008) ("In *Tampa Electric*, the Supreme Court provided the standard for analyzing exclusive-dealing arrangements, stating that 'the competition foreclosed by the contract must be found to constitute a substantial share of the relevant market.'") (quoting *Tampa Elec.*, 365 U.S. at 333); *Republic Tobacco*, 381 F.3d at 737-38 ("[E]xclusive dealing arrangements violate antitrust laws only when they foreclose competition in a substantial share of the line of commerce at issue[.]") (citing *Tampa Elec.*, 365 U.S. at 320-27); *Omega Env't, Inc.* v. *Gilbarco, Inc.*, 127 F.3d 1157, 1162 (9th Cir. 1997) ("We thus analyze challenges to exclusive dealing arrangements under

the antitrust rule of reason. Only those arrangements whose 'probable' effect is to 'foreclose competition in a substantial share of the line of commerce affected' violate [the antitrust laws].") (quoting *Tampa Elec.*, 365 U.S. at 327; other citations omitted); *EpiPen*, 44 F.4th at 984 ("Whether an exclusive dealing arrangement is an 'unreasonable restraint on competition[]' depends on whether 'performance of the contract will foreclose competition in a substantial share of the line of commerce affected.'") (quoting *Tampa Elec.*, 365 U.S. at 329; other citations omitted).

The cases the petition cites are not to the contrary. *See* Pet. 30-33. BRF concedes that many of them do not involve claims predicated on exclusive-dealing arrangements, *e.g.*, Pet. 31-32, and in fact, not a single one does. The petition's principal Sixth Circuit authority, *Conwood Co.* v. *U.S. Tobacco Co.*, expressly distinguishes exclusive dealing.[8] The Seventh Circuit case the petition invokes, which the Fifth Circuit *cited with approval*, Pet. App. 18a n.4, likewise mentions exclusivity arrangements solely for the purpose of distinguishing them. *See Premier Elec. Constr. Co.* v. *Nat'l Elec. Contractors Ass'n*, 814 F.2d 358, 368-69 (7th Cir. 1987). The petition's remaining authority,

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[8] 290 F.3d 768, 787 n.4 (2002) (conduct was "broader than merely * * * exclusive agreements," and was "distinguishable" from "exclusive dealing," because it involved "pervasively destroy[ing]" competitor's products) (quoting *Omega*, 127 F.3d at 1162); *see Byars* v. *Bluff City News Co.*, 609 F.2d 843, 854 n.30 (6th Cir. 1979) (allegations that defendant "remov[ed] * * * plaintiff's periodicals from sales racks" and "intimidate[ed] plaintiff's customers"). The remaining Sixth Circuit case, *Realcomp II, Ltd.* v. *F.T.C.*, 635 F.3d 815, 822-23 (6th Cir. 2011), involved a horizontal agreement among competitors, not an exclusive-dealing arrangement. *Cf.* Pet. 34 (only "a 'vertical' refusal to deal" is "at issue in this case").

from the First, Ninth, and Tenth Circuits, is similarly inapt.[9]

The petition makes other claims of more minor circuit splits and errors, but none of those claims are colorable either. The Fifth Circuit *agrees* with BRF that most-favored-nation agreements can be anticompetitive. *In re Yarn Processing Pat. Validity Litig.*, 541 F.2d 1127, 1136 (5th Cir. 1976); *cf.* Pet. 32. The FTC's decision in *Beltone Electronics Corp.*, 100 F.T.C. 68, 87-88 (1982), reaffirms the "requirement" that the "lessening of competition * * * must be substantial," and simply questions—as the Fourth Circuit also has—whether substantial foreclosure is *sufficient* to establish anticompetitiveness. *See also*, *e.g.*, *OJ Com.*, 34 F.4th at 1250 (explaining that "'foreclosure is usually no longer sufficient by itself,'" and that "*Tampa Electric* and the decisions that followed made it *harder*, not easier, to establish a violation of the antitrust laws based on exclusive dealing") (citing *McWane, Inc.* v. *F.T.C.*, 783 F.3d 814, 835, 837 (11th

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[9] *See Data Gen. Corp.* v. *Grumman Sys. Support Corp.*, 36 F.3d 1147, 1182-85, 1189 (1st Cir. 1994) (analyzing unilateral refusal to deal, and holding that it was *not* exclusionary); *Coal. for ICANN Transparency, Inc.* v. *VeriSign, Inc.*, 611 F.3d 495, 505-07 (9th Cir. 2010) (analyzing allegations that defendant used "financial pressure and vexatious litigation" against third party to obtain favorable contract terms and "perpetuate [defendant's] role as exclusive regulator" of relevant market, with no mention of exclusive dealing); *Forsyth* v. *Humana, Inc.*, 114 F.3d 1467, 1478 (9th Cir. 1997) (allegations of "tying arrangement[s]," referral restrictions, and predatory scheduling; no allegation of exclusive dealing); *Multistate Legal Studies, Inc.* v. *Harcourt Brace Jovanovich Legal & Pro. Publ'ns, Inc.*, 63 F.3d 1540, 1549-50 (10th Cir. 1995) (allegations of using "tying, predatory pricing, * * * and the creation of schedule conflicts"; no allegation of exclusive dealing).

Cir. 2015)). Moreover, while BRF claims the Fifth Circuit departed from the Sixth Circuit's holdings by rejecting certain language from *Eastman Kodak Co.* v. *Image Tech. Servs., Inc.*, 504 U.S. 451, 481 (1992), *see* Pet. 31 (quoting *Byars*, 609 F.2d at 857 n.38), the decision below quoted that very language with approval. Pet. App. 16a (quoting *Kodak*, 504 U.S. at 481). The Fifth Circuit's resolution of BRF's Section 2 claim thus raises no issue that is subject to dispute.

III. THIS CASE IS A POOR VEHICLE FOR RESOLVING ANY BROADER ISSUE.

Even if this case presented issues worthy of this Court's attention, it would be an exceptionally poor vehicle for resolving them. To begin, both courts below noted that BRF's legal theories were not "clear[ly]" or "coherently" framed. Pet. App. 17a, 41a. The fact that the complaint fails to articulate even its most important allegations in a manner that is "factual," "nonconclusory," and "nonspeculative," *id.* at 45a-46a, would make it all but impossible for the Court to resolve any issue of substance in a manner that provided meaningful guidance to lower courts in future cases.

Moreover, both questions on which the petition seeks review arise in profoundly unusual circumstances. Indeed, even BRF asserts that the Fifth Circuit was "confused" about whether BRF's hypothesized conspiracy was horizontal or vertical. Pet. 34. No such confusion occurred, but if it had, it would have been understandable. LSU—the focal point of BRF's claims, but a nonparty by BRF's strategic choice—is alleged to have been, *inter alia*, a joint venturer with and labor supplier to BRF, as well as a labor supplier to, co-conspirator with, and philanthropic beneficiary of Willis-Knighton. It is

also undisputed that LSU was eager to terminate its relationship with BRF for reasons that had nothing to do with Willis-Knighton. Furthermore, the claimed conspiracy between Willis-Knighton and LSU is highly idiosyncratic, involving a purported condition placed on philanthropic donations to a non-profit entity that is also a state actor—a far cry from the typical antitrust case. Accepting this case would thus require the Court to opine on or attempt to ignore an array of case-specific matters arising from those atypical circumstances, including but not limited to the potential Article III issues discussed above, *see supra* at 20, *Noerr-Pennington* immunity, [10] the general rule that firms are free to refuse to deal with rivals (and thus free to refuse to provide charitable donations that might be used to assist such rivals),[11] the question of how the "plus factors" lower courts typically employ to analyze *horizontal* parallel conduct apply in a case theorizing a *vertical* conspiracy,[12] and the effect of BRF's own concession that Willis-Knighton was free to cease its donations

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[10] *See*, *e.g.*, *Bayou Fleet, Inc.* v. *Alexander*, 234 F.3d 852, 859 (5th Cir. 2000) (holding, based on this Court's precedent, that the *Noerr-Pennington* doctrine "confers immunity to private individuals seeking anticompetitive action from the government").

[11] *See*, *e.g.*, *Verizon Commc'ns Inc.* v. *Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398, 408 (2004) (explaining that this Court "ha[s] been very cautious" in creating exceptions to the rule that even monopolists cannot be compelled to deal with rivals).

[12] *See* Willis-Knighton 5th Cir. Br. 23-25; *cf. Merck-Medco Managed Care, LLC* v. *Rite Aid Corp.*, 201 F.3d 436, 1999 WL 691840, at *9 (4th Cir. Sept. 7, 1999) (unpublished) (per curiam) ("In order to infer a conspiracy, conscious parallelism must be accompanied by 'plus factors.'").

for any reason as long as it did not make the very threats the district court agreed were not adequately alleged. *See*, *e.g.*, C.A. Oral Arg. 15:00-08; Pet. App. 45a. The presence of those complicating factors makes this case an exceedingly unattractive vehicle, particularly when considered in conjunction with the confusing, atypical, and poorly pleaded fact pattern on which the case is based.

CONCLUSION

For the foregoing reasons, the Court should deny the petition.

Respectfully submitted,

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