No.

In the Supreme Court of the United States

CSX TRANSPORTATION, INC.,

Petitioner,

v.

NORFOLK SOUTHERN RAILWAY COMPANY; NORFOLK & PORTSMOUTH BELT LINE RAILROAD COMPANY,

Respondents.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

This Court has held that the Clayton Act statute of limitations permits recovery of damages for injuries arising from "conduct which constituted a continuing violation of the Sherman Act and which inflicted continuing and accumulating harm on" the plaintiff, even if the conduct began outside the limitations period. *Hanover Shoe, Inc.* v. *United Shoe Mach. Corp.*, 392 U.S. 481, 502 n.15 (1968). In this case, defendants initiated a monopoly and conspiracy to restrain trade outside the statute-of-limitations period but continued those violations into that period, when the unlawful conduct injured plaintiff.

The question presented is whether the continuation of a Sherman Act violation retriggers the statute of limitations when the violation causes injury within the limitations period.

PARTIES TO THE PROCEEDING

The parties in the court of appeals are identified in the case caption.

CORPORATE DISCLOSURE STATEMENT

Petitioner CSX Transportation, Inc.'s parent corporation is CSX Corporation, which owns 10% or more of its stock.

STATEMENT OF RELATED PROCEEDINGS

There are no related proceedings in state or federal courts, or in this Court.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner CSX Transportation, Inc. (CSXT) respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-24a) is reported at 114 F.4th 280. The relevant opinion of the district court (App., *infra,* 75a-167a) is reported at 648 F. Supp. 3d 679.

JURISDICTION

The judgment of the court of appeals was entered on August 29, 2024. This Court's jurisdiction rests on 28 U.S.C. § 1254.

STATUTORY PROVISION INVOLVED

The Clayton Act, 15 U.S.C. § 15b, provides in relevant part:

> Any action to enforce any cause of action under [the federal antitrust laws] shall be forever barred unless commenced within four years after the cause of action accrued.

INTRODUCTION

The Clayton Act's statute of limitations permits recovery of damages stemming from "conduct which constituted a continuing violation of the Sherman Act and which inflicted continuing and accumulating harm on" the plaintiff, even if that conduct began outside the limitations period. *Hanover Shoe, Inc.* v. *United Shoe Mach. Corp.*, 392 U.S. 481, 502 n.15 (1968). That is what happened in this case. The defendants, respondents here, first devised and imple-

mented a monopoly and a restraint-of-trade conspiracy in 2009, demanding an anticompetitive "switch rate" for rail access to a critical marine terminal. That scheme denied petitioner CSXT rail access to the terminal, harming CSXT by denying it business every year that the anticompetitive rate remained in effect. Defendants have maintained that exclusionary rate to the present day, despite CSXT's request that they implement a lower rate, damaging CSXT year after year. CSXT therefore brought suit against defendants in 2018.

But the Fourth Circuit held that defendants' continuing demand for the anticompetitive rate and continued infliction of *new* injury within the limitations period was not a continuing violation, ruling that the Clayton Act's four-year statute of limitations began to run in 2009 and therefore precludes a damages action commenced in 2018. The court held this to be so for three reasons. In its view, (1) maintaining an anticompetitive practice is "inaction" that does not retrigger the statute of limitations, even when that practice causes new harm in the limitations period; (2) continuously demanding the same anticompetitive rate involves "reaffirmation" of wrongful conduct, which also does not recommence the limitations period; and (3) although continuing to demand an anticompetitive price from a *customer* restarts the limitations period whenever the demand causes injury, continuing an unlawful demand does not restart the limitations period when the injury is inflicted on a *competitor*.

The Fourth Circuit's narrow interpretation of the continuing-violation doctrine warrants review for several reasons:

First, the courts of appeals are in conflict, and confused, regarding each aspect of the Fourth Circuit's

reasoning. There is no question that the courts are in disarray on the contours of the continuing-violation doctrine. The district court below itself recognized repeatedly that the governing rules are "exceedingly complex"; that "[e]ven within one 'type' of case, federal courts often differ as to the correct approach when deciding limitations issues and the application of 'continuing violation' theory"; and that there is a "circuit split" on the significance of "reaffirmation." App., *infra*, 89a, 107a-108a, 109a. A leading antitrust treatise agrees that "[t]he cases are inconsistent and often hypertechnical [on application of the continuing-violation doctrine], which makes analysis of the general problem difficult." Phillip Areeda & Herbert Hovenkamp, *Antitrust Law: An Analysis of Antitrust Principles and Their Application* ¶320a (2023 Supplement). Accordingly, this Court's guidance is urgently needed.

Second, the Fourth Circuit was wrong as to each aspect of its holding, all of which rest on wholly irrational distinctions. Purposeful "inaction" that causes injury is no less harmful, and should be no less actionable, than is affirmative anticompetitive conduct. Reaffirmation of a harmful practice is no less injurious than is a novel violation. And the same antitrust statute-of-limitations rule should apply to all plaintiffs, whether customers of the defendant, competitors, or neither.

Third, the issues here are ones of tremendous practical significance. Questions involving application of the continuing-violation doctrine arise with great frequency, meaning that the confused state of the law misleads potential plaintiffs about their time to sue, while causing excessive and wasteful litigation. The

rules applied below, meanwhile, will make it impossible to seek damages for longstanding and continuing antitrust violations—and in this case would *permanently* prevent an antitrust challenge to ongoing and destructive violations of the Sherman Act. That would frustrate vital goals of the antitrust laws: "Employing the limitations statute * * * to immunize recent repetition or continuation of [antitrust] violations and damages occasioned thereby not only extends the [limitations] statute beyond its purpose, but also conflicts with the policies of vigorous enforcement of private rights through private actions." *W. Penn Allegheny Health Sys., Inc.* v. *UPMC*, 627 F.3d 85, 107-108 (3d Cir. 2010) (cleaned up).

Review by this Court accordingly is in order.

STATEMENT

A. The antitrust violation

CSXT and defendant-respondent Norfolk Southern Railway Company (NSR) are the only two railroads that operate throughout the eastern United States and Canada. They "vigorously compete for the domestic rail transportation of international 'intermodal' containers delivered to and from various East Coast ports, including the Port of Virginia in Hampton Roads (the 'POV')." App., *infra*, 77a-78a. Defendant-respondent Norfolk & Portsmouth Belt Line Railroad Company (NPBL) is majority owned by NSR. CSXT is NPBL's minority shareholder. *Id.* at 6a, 76a; C.A. App. 89-96. NPBL is a much smaller terminal railroad that is capable of providing switching services to CSXT at Norfolk International Terminals (NIT) in Hampton Roads, the largest marine terminal in the POV and one of the most important terminals for international intermodal cargo on the East Coast,

through which almost all major ocean carriers move international intermodal traffic. App., *infra*, 5a; C.A. App. 458-459.

Access to NIT is essential to CSXT's business. Ocean carriers contract with railroads to transport intermodal freight from marine terminals to inland destinations. Those carriers typically award a large percentage of their business (generally over 80%) in multi-year contracts to a single railroad. C.A. App. 438-443. At NIT, there is no adequate substitute for on-dock rail access—that is, for a railroad's ability to move its trains into the marine terminal so that containers can be loaded onto railcars either on or near the dock. App., *infra*, 79a-80a; C.A. App. 487-488.

CSXT has no tracks of its own into NIT; only NSR does. CSXT can access NIT by rail only by paying a switching fee to NPBL, which has its own tracks and "trackage rights" over NSR's tracks that enable it to deliver rail cars to the terminal. And "[u]tilizing NPBL's trackage rights requires CSX to pay the NPBL 'switch rate,' which is the cost per train car 'well' that NPBL charges customers to use its tracks/switching services." C.A. App. 277; see App., *infra*, 6a. (A "well" is a railcar designed to carry vertically stacked containers; see *id*. at 6a n. 1.)

In 2009, NSR and NPBL set NIT's switch rate at $210 per "well," an amount so high that it became economically infeasible for CSXT to access NIT once the rate took effect in early 2010. App., *infra*, 6a-7a, 77a; C.A. App. 472-473, 490. It is undisputed that, once implemented in 2010, the exclusionary NIT switch rate continued in force over the following years and remains in effect today. App., *infra*, 77a.

The continued application of the switch rate has had the practical effect of almost entirely precluding CSXT from offering on-dock rail service at NIT. App., *infra*, 6a-7a, 157a; C.A. App. 482-484. CSXT is forced to truck or "dray" containers from NIT to its railyard, an inefficient and ineffective substitute. App., *infra*, 6a. As would be expected, this practical exclusion from NIT has placed CSXT at a severe competitive disadvantage vis-a-vis NSR. App., *infra*, 79a; C.A. App. 444-446. This suppression of competition has allowed NSR to charge supracompetitive prices to ocean carriers that rely on use of NIT, simultaneously injuring rail customers and, record evidence shows, costing CSXT hundreds of millions of dollars in lost profits. C.A. App. 447-453; see also *id.* at 460-463.[1]

B. Proceedings below

1. CSXT brought suit against NSR and NPBL in October 2018. Focusing on the exclusionary switch rate, CSXT contended that defendants "committed monopolistic antitrust violations, or unlawfully colluded with each other in restraint of trade," to prevent CSXT from competing at NIT. App., *infra*, 78a, C.A.

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[1] Beginning in 2015, defendants took additional steps that further effectuated their scheme to exclude CSXT from NIT. That year, a period of "extreme port congestion across the East Coast," business imperatives required CSXT "to move a small number of trains [at NIT] out of necessity even though it would lose money doing so." App., *infra*, 120a. In addition to requiring payment of the prohibitive rate at that time, defendants also "took affirmative steps to complicate or delay CSX's operational use of the track to NIT for one or more trains." *Id.* at 119a; see *id*. at 7a. And in 2018, defendants rebuffed CSXT's request that they modify the exclusionary switch rate. See App., *infra*, 7a-8a,137a-138a; C.A. App. 211-224.

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App. 239. The complaint presents multiple federal antitrust claims under Sections 1 and 2 of the Sherman Act, seeking damages and injunctive relief. App. *infra*, 8a, 80a.

The district court largely denied defendants' motions to dismiss and for summary judgment on the merits, finding that CSXT presented substantial antitrust claims. App., *infra*, 50a-167a. As the court explained, CSXT offered evidence that would allow a factfinder to conclude that NSR and NPBL acted unlawfully "to preclude CSX from accessing NIT by rail." *Id.* at 77a n. 2. In reaching this conclusion, the court expressly rejected defendants' specific challenges "to CSX's ability to prevail at trial on its federal antitrust claims." *Id.* at 153a; see *id.* at 153a-157a.

But the court then granted defendants summary judgment on CSXT's damages claims, invoking the statute of limitations. In opposing defendants' motion, CSXT had acknowledged that, under 15 U.S.C. § 15b, an antitrust damages action is barred "unless commenced within four years after the cause of action accrued." CSXT also recognized that defendants' actionable anticompetitive conduct had started at least by 2009, more than four years before CSXT brought suit in 2018. CSXT maintained, however, that defendants' antitrust violations continued into the limitations period and to the present day, accruing *new* rights of action whenever those acts caused injury—as they do every day that demand for the unlawful switch rate denies CSXT business at NIT.

The district court disagreed. App., *infra*, 75a-167a. While repeatedly noting that the law in this area "is exceedingly complex" (*id.* at 88a, 101a, 107a-108a) and recognizing that the elevated switch rate

has remained in place continuously through the limitations period, the court nevertheless held the continuing-violation doctrine inapplicable because CSXT cannot establish "that antitrust 'overt acts' were committed during the limitations period." *Id.* at 87a. In reaching this conclusion, the court acknowledged that *customers* of antitrust defendants may sue when they pay anticompetitive prices that initially had been fixed outside the limitations period. The court ruled, however, that *competitors* of antitrust defendants may not sue for damages caused by business lost as a consequence of monopolistic practices initially implemented outside the limitations period but continuously applied within it. *Id.* at 106a-108a. Because CSXT was suing in its capacity as competitor of NSR, the court held that this rule is fatal to the claim.[2]

In a subsequent ruling, the court held that CSXT's request for federal injunctive relief is barred by 15 U.S.C. § 26, which denies a court authority to grant such relief if the defendant is "a common carrier subject to the jurisdiction" of the Surface Transportation Board. App., *infra*, 62a. As a consequence, absent an

[2] In this connection, the court held that the acts that occurred in 2015, when defendants both collected the elevated rate from CSXT and delayed CSXT's trains, could constitute overt acts that restarted the statute of limitations, but only insofar as CSXT sued and sought damages in its capacity as NPBL's customer. App., *infra*, 113a, 115a-116a. As for the conduct that occurred in 2018, when defendants declined to act on CSXT's proposal to lower the excessive switch rate, the court labeled this "purposeful inaction" that could not qualify as an overt act that restarted the limitations period. *Id.* at 140a-142a.

injunctive suit initiated by the United States, defendants' continuing and indefinite maintenance of an unlawful rate is not subject to antitrust challenge at all.[3]

2. The court of appeals affirmed. App., *infra*, 1a-24a.

The Fourth Circuit accurately described CSXT's argument as being that "'the acts of maintaining supracompetitive prices day after day to keep a competitor out of the market are injurious overt acts that restart the limitations period each day that the high price remains in place.'" App., *infra*, 15a. The court also recognized CSXT's reliance for this proposition on the Third Circuit's decision in *In re Lower Lake Erie Iron Ore Antitrust Litigation*, 998 F.2d 1144 (3d Cir. 1993). See App., *infra*, 15a. But the Fourth Circuit rejected that argument, for three reasons.

First, relying principally on its almost 50-year-old decision in *Charlotte Telecasters, Inc.* v. *Jefferson-Pilot Corp.*, 546 F.2d 570, 573 (4th Cir. 1976), the court held that "mere silence or inaction from a defendant—even though the allegedly unlawful conspiracy to exclude a plaintiff remains in effect—isn't enough to restart the limitations period." App., *infra*, 17a; see *id.* at 15a ("a defendant's 'silence' or failure to act after committing an initial antitrust violation, with no 'promise [to] act[] in the future,' doesn't qualify as an act sufficient to extend the statute of limitations"). Instead, the court held that, for suit to go forward, there must be "an *affirmative act* committed within the limitations period in furtherance of the conspiracy to exclude the plaintiff from the relevant market." App., *infra*, 19a (emphasis added). NSR's continued demand

[3] The court also rejected CSXT's state-law claims. App., *infra*, 157a-166a. Those claims are not at issue here.

for the anticompetitive rate, the Fourth Circuit held, is not such an affirmative act.

Second, the Fourth Circuit stated that *Charlotte Telecasters* "tracks with the understanding of other circuits," citing and quoting decisions of the Sixth and Tenth Circuits holding that "'reaffirmations of a previous act'" do not restart the limitations period. App., *infra*, 17a (quoting *Z Techs. Corp.* v. *Lubrizol Corp.*, 753 F.3d 594, 600 (6th Cir. 2014)); see *ibid.* (quoting *Kaw Valley Elec. Co-op. Co.* v. *Kan. Elec. Power Co-op., Inc.*, 872 F.2d 931, 934-35 (10th Cir. 1989) (addressing "'reaffirmation[s] of a previous [pre-limitations] refusal'" to deal)).

Third, the Fourth Circuit agreed with the district court that the *customer* of a monopolist has a cause of action that "accrue[s] to the plaintiff each time it paid the inflated price within the limitations period," even if the defendant "formed [the] monopoly enabling it to overcharge its customers 'several decades' before the customer-plaintiff filed its action." App., *infra*, 19a. But the court rejected CSXT's argument that the same rule applies to *competitors* of an antitrust defendant that are injured by a violation commenced outside the limitations period. Relying on *Berkey Photo, Inc.* v. *Eastman Kodak Co.*, 603 F.2d 263 (2d Cir. 1979), the court reasoned: "'The differing treatment between these two types of claims is grounded in the concept that, unlike an excluded *rival* who is injured as soon as the exclusion begins, a *customer* is not injured until a sale occurs, and it suffers a new and accumulating injury each time a subsequent supracompetitive price is paid.'" App., *infra*, 20a.[4]

[4] Like the district court, the Fourth Circuit held that defendants'

Accordingly, the Fourth Circuit held that the action here is barred by the statute of limitations "even accepting that maintaining an exclusionary price is the 'functional equivalent of affirmatively posting a price.'" App., *infra*, 20a.

REASONS FOR GRANTING THE PETITION

As the case comes to this Court, it must be assumed that the switch rate first promulgated by defendants in 2009 is a violation of the Sherman Act, implemented for the purpose—and maintained year-in and year-out with the effect—of injuring CSXT. That violation concededly has continued to the present, causing *new* harm to CSXT every year by effectively precluding it from competing for business at NIT. But the Fourth Circuit's statute-of-limitations holding will allow that unlawful conduct to continue without Sherman Act challenge—forever.

Unsurprisingly, other courts of appeals would have resolved this question differently. More generally, the decision below also contributes to confusion and uncertainty in the circuits about the nature of the continuing-violation doctrine. And as the United States recently noted when criticizing reasoning similar to that used below, "[t]his analysis risks preventing recovery in damages suits when conspiracies last longer than four years," which "is 'contrary to the congressional purpose that private actions serve as a bulwark of antitrust enforcement and that the antitrust

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demand for the anticompetitive switch rate in 2015 could retrigger the limitations period only as to claims brought by CSXT in its capacity as a customer. App., *infra*, 21a-22a. As for defendants' failure to lower the rate in response to CSXT's request in 2018, the court of appeals held that, under *Charlotte Telecasters*, "inaction or silence isn't enough." *Id.* at 21a n. 9.

laws fully protect the victims of the forbidden practices as well as the public.'" Corrected Brief for the United States as *Amicus Curiae* in Support of Plaintiffs-Appellants at 32-33, *Giordano* v. *Saks & Co.*, No. 23-600 (2d Cir. Aug. 7, 2023), ECF No. 89 (U.S. *Giordano* Br.) (quoting *Zenith Radio Corp.* v. *Hazeltine Res., Inc.*, 401 U.S. 321, 340 (1971) (cleaned up)). This Court should grant review and set aside the Fourth Circuit's decision.

I. THE CONTINUING-VIOLATION DOCTRINE RESTARTS THE STATUTE OF LIMITATIONS WHEN CONTINUATION OF AN ANTITRUST VIOLATION CAUSES NEW INJURY IN THE LIMITATIONS PERIOD.

This case turns on the meaning of the continuing-violation doctrine that the Court has recognized as governing the antitrust statute of limitations. Although the Court has not yet had occasion to address the doctrine in the precise factual circumstances presented by this case, it has stated the principle that controls: Injury caused by an antitrust violation beginning outside the limitations period but causing new harm in that period restarts the statute of limitations.

The seminal decision on the doctrine—*Hanover Shoe*—both defined the principle and would appear to control this case. There, defendant United Shoe Machinery refused to sell manufacturing equipment to plaintiff Hanover Shoe, instead adopting a policy of only renting the equipment—an allegedly unlawful policy that caused Hanover Shoe to spend far more for the equipment than it would have through purchases. 392 U.S. at 483-84. Although Hanover Shoe first felt the harmful effects of this policy in 1912, it did not

bring suit until 1955, after suffering damage for more than forty years. *Id*. at 502 n.15.

But the Court held that Hanover Shoe's claim was not time-barred. "We are not dealing with a violation which, if it occurs at all, must occur within some specific and limited time span," the Court explained. 392 U.S. at 502 n.15. "Rather, we are dealing with conduct" that "inflicted continuing and accumulating harm on Hanover"—the unchanging demand that Hanover Shoe submit to a lease instead of buying the desired equipment outright. *Ibid*. As the Court concluded, "[a]lthough Hanover could have sued in 1912 for the injury then being inflicted, it was equally entitled to sue in 1955." *Ibid*.

In subsequent years, the Court has articulated the doctrine in similar terms. In *Zenith Radio Corp.* v. *Hazeltine Research, Inc.*, the Court explained that, "[i]n the context of a continuing conspiracy to violate the antitrust laws," "if a plaintiff feels the adverse impact of an antitrust conspiracy on a particular date, a cause of action immediately accrues to him to recover all damages incurred by that date and all provable damages that will flow in the future from the acts of the conspirators on that date." 401 U.S. 321, 338, 339 (1971). The Court left no doubt what it meant by this principle, offering as an illustration Judge J. Skelly Wright's ruling in *Delta Theaters, Inc.* v. *Paramount Pictures, Inc.*, 158 F. Supp. 644 (E.D. La.1958). That case involved a theater that lost profits when conspirators kept it from exhibiting first-run films. As Judge Wright explained, "[i]n the case of successive damages suffered day by day from a continuing conspiracy, *the statute begins to run on each day's damage as it occurs*." *Id*. at 649 (emphasis added); see *Zenith*, 401 U.S. at 338 (citing *Delta Theaters*).

The Court elaborated on the principle yet again in *Klehr* v. *A.O. Smith Corp.*, 521 U.S. 179 (1997). Although that case involved a RICO rather than an antitrust suit, the Court addressed "the ordinary Clayton Act rule," explaining:

> Antitrust law provides that, in the case of a continuing violation, say, a price-fixing conspiracy that brings about a series of unlawfully high priced sales over a period of years, each overt act *that is part of the violation and that injures the plaintiff*, *e.g.,* each sale to the plaintiff, starts the statutory period running again, regardless of the plaintiff's knowledge of the alleged illegality at much earlier times.

Id. at 189 (cleaned up; emphasis added). In reaching this conclusion, the Court distinguished between acts that cause harm once, even when that harm persists or compounds over time; and situations in which a continuing anticompetitive policy causes *new* harm to the plaintiff in subsequent years.

In the first situation, "the plaintiff cannot use an independent, new predicate act as a bootstrap to recover for injuries caused by other earlier predicate acts that took place outside the limitations period." 521 U.S. at 190. In that circumstance (as in *Klehr* itself), the plaintiffs "have not shown how any new act could have caused them harm *over and above the harm that the earlier acts caused*." *Ibid.* (emphasis added). The second situation, in contrast, is that of the "'continuing violation,'" where "each act is part of the violation that injures the plaintiff." *Id.* at 189 (cleaned up). That is when the plaintiff's "complaint is based on continuing antitrust behavior, *not merely the continuing damage [that the plaintiff] feels from a single*

day's monopoly" in the year of the monopoly's creation. *Poster Exch., Inc.* v. *Nat'l Screen Serv. Corp.*, 517 F.2d 117, 125 (5th Cir. 1975) (emphasis added). By drawing this distinction, the continuing-violation doctrine "is meant to differentiate those cases where a continuing violation is ongoing—and an antitrust suit can therefore be maintained—from those where all of the harm occurred at the time of the initial violation." *Samsung Elecs. Co.* v. *Panasonic Corp.*, 747 F.3d 1199, 1202 (9th Cir. 2014).

As thus stated, the continuing-violation doctrine rests on a principle that the Court has applied for well over a century. As Justice Holmes wrote for the Court, addressing the continuing impact of an antitrust conspiracy, "[i]t is true that the unlawful agreement satisfies the definition of the crime, but it does not exhaust it." *United States* v. *Kissel*, 218 U.S. 601, 607 (1910). For that reason, although entry into a "contract" to restrain trade is "instantaneous," a conspiracy to restrain trade "contemplates bringing to pass a continuous result" and "the conspiracy continues up to the time of abandonment or success." *Id.* at 607-608. See, *e.g.*, *United States* v. *Borden Co.*, 308 U.S. 188, 202 (1939) (antitrust conspiracy "is in effect renewed during each day of its continuance"); cf. *United States* v. *ITT Cont'l Baking Co.*, 420 U.S. 223, 232-33 (1975) (acquirer of a company in violation of an FTC order is subject to daily rather than one-time fine because "[a]ny anticompetitive effect of an acquisition continues as long as the assets are retained, and the violator could undo or minimize any such effect by disposing of the assets at any time after the initial transaction"). Thus, as the United States recently noted, antitrust decisions consistently recognize "the distinction between instantaneous and ongoing violations." U.S. *Giordano* Br. at 29.

And the United States also has explained that this rule is grounded in fundamental antitrust policy. It is essential that antitrust violations remain actionable when continuing violations cause renewed injury over time. Otherwise, "plaintiffs forever los[e] their right to recover damages four years after the conspiracy was formed. This [outcome] risks preventing recovery in damages suits when conspiracies last longer than four years," which is "'contrary to the congressional purpose that private actions serve as a bulwark of antitrust enforcement and that the antitrust laws fully protect the victims of the forbidden practices as well as the public.'" U.S. *Giordano* Br. at 32-33 (quoting *Zenith Radio*, 401 U.S. at 340 (cleaned up)); cf. *Berkey Photo*, 603 F.2d at 296 ("[I]t would undercut enforcement of the Sherman Act to hold that, if a monopolist merely retains its illicit market control for four years after its last anticompetitive action, it may charge an exorbitant price until its power is eviscerated in an appropriate suit for equitable relief.").

II. THE FOURTH CIRCUIT'S APPLICATION OF THE CONTINUING-VIOLATION DOCTRINE CONFLICTS WITH THE HOLDINGS OF OTHER CIRCUITS AND DEPARTS FROM THIS COURT'S GUIDANCE.

A finding that this case involves a continuing violation that retriggers the statute of limitations whenever demand for the elevated switch rate causes injury to CSXT therefore seems to follow directly from this Court's instruction. After all, the district court determined that CSXT had adduced sufficient evidence of an antitrust violation to preclude summary judgment for defendants on the merits. It is undisputed that the violation—in particular, demand for the anticompetitive switch rate—continued into the statute-

of-limitations period. And that violation certainly caused new harm *in* the limitations period, keeping CSXT from entering into profitable contracts during that time.

But the Fourth Circuit disagreed. It identified three considerations that motivated its rejection of the doctrine: (1) that the antitrust violation here inflicted injury through inaction rather than action; (2) that the misconduct was merely a "reaffirmation" of prior wrongful activity; and (3) that the plaintiff is a competitor rather than a customer of the antitrust defendant. Each rationale, however, conflicts with, or rests on a misunderstanding of, the decisions of other courts of appeals. And each is wrong. This Court should resolve the manifest confusion in the lower courts demonstrated by the Fourth Circuit's ruling.

A. The statute of limitations is retriggered by inaction that causes new injury within the limitations period.

1. First, the court of appeals saw a crucial distinction between injury inflicted by intentional inaction and that caused by affirmative conduct. It held that "mere silence or inaction from a defendant—even though the allegedly unlawful conspiracy to exclude a plaintiff remains in effect—isn't enough to restart the limitations period." App., *infra*, 17a. Instead, the court held that, for suit to go forward, there must be "an *affirmative act* committed within the limitations period in furtherance of the conspiracy to exclude the plaintiff from the relevant market." *Id.* at 19a (emphasis added). NSR's continued demand for the anticompetitive rate, the Fourth Circuit held, is not such an affirmative act.

This holding, however, is flatly inconsistent with the Third Circuit's decision in *Lower Lake Erie*. There, plaintiffs brought suit in 1982, alleging that railroad companies had conspired to stop competitors from entering the market for land transport of iron ore shipped across the Great Lakes. 998 F.2d at 1151. The defendants accomplished this anticompetitive goal, plaintiffs alleged, by "artificially inflat[ing]" the dock-handling rates charged to these new competitors (*id.* at 1172), "refusing to lease [their new competitors] dock property suitable for the shipment of iron ore, and * * * overcharging the companies to use the railroads to ship ore." *W. Penn Allegheny*, 627 F.3d at 107 (describing *Lower Lake Erie*). These actions effectively foreclosed the competitors' entry into the market. See *Lower Lake Erie*, 998 F.2d at 1153-54 ("plaintiffs claimed injury due to the railroads' refusal to permit them entry into the iron ore unloading business").

The defendant railroad companies argued that the plaintiffs' 1982 lawsuit was time-barred because the conspiracy started in the 1950s. Of particular relevance here, the defendants argued that there were no "injury-causing overt acts" during the limitations period—defendants' decision not to do business with plaintiffs and to set artificially high prices having been made before the limitations period started. *Lower Lake Erie*, 998 F.2d at 1172. But the Third Circuit rejected this distinction between action and inaction, explaining: "This argument fails to recognize that certain conspiracies, such as boycotts, operate through inaction." *Ibid.* Thus, "[t]he purposeful nature of the inaction—here an ongoing refusal to sell or lease—obviously constitutes an injurious act, although perhaps not an overt one in the commonly-understood sense." *Ibid.* That was sufficient to restart the limitations period.

Lower Lake Erie is materially identical to this suit. In both cases, defendants unlawfully raised the price of a facility that competitors needed to enter the market—there, increasing dock fees and railroad shipping rates; here, imposing an excessive switch rate for access to NIT. In both cases, the exclusionary prices first were set more than four years before suit was brought but continued unchanged into the limitations period. In both cases, the defendants priced their competitors out of conducting business in the relevant market, causing injury in the limitations period. And in both cases, the nature of the actionable conduct was the same—just as the *Lower Lake Erie* conspiracy could "be viewed as a continuing series of acts upon which successive causes of action may accrue" (998 F.2d at 1173 (cleaned up)), so the anticompetitive conduct here caused injury and generated a right of action every day that NSR and NPBL maintained the harm-causing supracompetitive switch rate.

This conflict between the Third and Fourth Circuits is not fairly disputable. It was implicitly recognized by the court below, which noted CSXT's reliance on *Lower Lake Erie* but made no attempt to distinguish the Third Circuit's decision, instead pointing to "our [*i.e.*, the Fourth Circuit's] precedent holding otherwise"—namely, *Charlotte Telecasters*. App., *infra*, 15a. That statement amounts to an acknowledgement that the Fourth Circuit's rule differs from that of the Third Circuit. And the conflict was expressly acknowledged by the district court below, which recognized that *Lower Lake Erie* "offers CSX a favorable interpretation * * * in support of CSX's limitations and damages theories." App., *infra*, 94a. But that court likewise did not seek to distinguish *Lower Lake Erie*, in-

stead outright disagreeing with it. See *ibid*. Consequently, the conflict is clear and dispositive; this case would have come out differently in the Third Circuit.[5]

2. The Fourth Circuit is on the wrong side of this disagreement. Although that court was clear in its insistence that "[t]he decision to keep [an] * * * exclusionary [requirement] in place [doesn't] trigger the [continuing-violation] doctrine" (App., *infra*, 4a), the court very notably made no real attempt to justify that rule beyond the invocation of its prior decision in *Charlotte Telecasters*—which itself did not explain its reason for distinguishing between action and inaction.

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[5] Although the district court suggested that the Third Circuit subsequently backed away from *Lower Lake Erie* (see App., *infra*, 94a-97a), that is incorrect. To the contrary, in *West Penn Allegheny* the Third Circuit forcefully reaffirmed *Lower Lake Erie*. The court of appeals there described the facts of *Lower Lake Erie* in some detail, recounted *Lower Lake Erie*'s holding that the plaintiffs' "claims were timely because the [defendants'] exclusionary conduct * * * had continued into the limitations period," and approved that holding even though "the acts that occurred within the limitations period were reaffirmations of decisions originally made outside the limitations period." 627 F.3d at 107. Nothing in this decision disavowed *Lower Lake Erie* in any respect. See also *Toledo Mack Sales & Serv., Inc.* v. *Mack Trucks, Inc.*, 530 F.3d 204, 218 (3d Cir. 2008) ("'a conspiracy's refusal to deal, which began outside the limitations period, may be viewed as a continuing series of acts upon which successive causes of action may accrue'") (quoting *Lower Lake Erie*, 998 F.2d at 1173). Indeed, the United States very recently cited and relied upon *Lower Lake Erie*, nowhere suggesting that the decision has been called into question. See Statement of Interest of the United States of America at 21, 22, *Mizell* v. *Univ. of Pittsburgh Med. Ctr.*, No. 24-cv-00016 (W.D. Pa. Sept. 30, 2024), ECF No. 50 (U.S. *Mizell* Statement).

And that rationale is not apparent. As a matter of logic and antitrust policy, the Third Circuit was correct that certain antitrust violations achieve their goals and inflict new injury, day after day, through inaction.

In fact, it is often difficult—and sometimes simply impossible—even to distinguish in a meaningful sense between action and inaction in this context. This case is an example. Defendants' anticompetitive rate governed operations at NIT during the limitations period, controlling conduct there anew every day. Defendants maintained that rate purposefully; they concededly could have been changed it but instead chose to leave it in place. See App., *infra*, 4a, 104a. That being so, there is no logical reason, and the court below did not explain, why this policy was insufficiently "active" to restart liability—or why "active" collection of excessive charges pursuant to a policy formulated in 2009 would have retriggered the limitations period, but purposefully continuing to demand that rate for its inevitable exclusionary effect did not.

Other decisions illustrate similar ways in which continuation of a policy for its anticompetitive effects will retrigger the statute of limitations. For example, in *National Souvenir Center, Inc.* v. *Historic Figures, Inc.*, 728 F.2d 503 (D.C. Cir. 1984), a right of action continued to accrue during the running of a lease that had "continuing allegedly 'anticompetitive' effect[s]." *Id.* at 514. As Judge Wald there wrote for the D.C. Circuit, "the 'overt act' requirement may be satisfied merely by the parties continuing to maintain contractual relationships that directly affect competition in the tied product market." *Id.* at 510. But that conduct was no more "active" than defendants' conduct here.

The confusion in the courts is likewise suggested by the Fourth Circuit's treatment of *Poster Exchange, supra*. There, the Fifth Circuit held that a refusal-to-deal could be a continuing violation and remanded for a determination whether the refusal to deal in that case continued into the limitations period. 517 F.2d at 127-29. The Fourth Circuit took *Poster Exchange* to stand for the proposition that a continuing violation is established only when there was "an affirmative act committed within the limitations period in furtherance of the conspiracy to exclude the plaintiff from the relevant market." App., *infra*, 19a.

But that is not so. Although the Fifth Circuit did indeed say that the plaintiff "is obliged to demonstrate some act of the defendants during the limitations period foreclosing or interfering with its access to supplies" (517 F.2d at 128), the court's focus was not on the *affirmative* nature of the act, but on the need for assurance that the plaintiff actually "has been refused access to standard accessories by [the defendants] during th[e limitations] period." *Ibid*. Because "a mere absence of dealing" does not establish an antitrust violation at all, an "act or word" of the defendants reaffirming the refusal to deal during the limitations period was necessary to establish that the antitrust violation was the cause of the plaintiff's injury. *Ibid.* In this case, however, there is no need for any such additional act or word because the continuation of the misconduct is established beyond dispute by maintenance of the switch rate into the limitations period. The court below misunderstood *Poster Exchange*.

Consequently, the line drawn below between injury-causing action and inaction creates a conflict in the circuits. It is confusing. It makes no logical sense.

And it allows for the continued infliction of new competitive injury every year, indefinitely.[6]

B. Reaffirmation of anticompetitive conduct retriggers the statute of limitations.

1. The Fourth Circuit also held that defendants' continued demand for an anticompetitive rate was not a continuing violation on the ground that "'reaffirmations of a previous act'" do not restart the limitations period. App., *infra*, 17a (quoting *Z Techs. Corp.* v. *Lubrizol Corp.*, 753 F.3d 594, 600 (6th Cir. 2014)). The Fourth Circuit plainly understood the "no-reaffirmation" decisions to be central to its holding, specifically quoting "no-reaffirmation" language from the Sixth and Tenth Circuits as a "*[s]ee*, *e.g.*," to establish that the Fourth Circuit's "holding in *Charlotte Telecasters* tracks with the understanding of other circuits." *Ibid.*

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[6] The Fourth Circuit doubled down on its "inaction" analysis when it held that defendants' decision to maintain the elevated rate in 2018, even in the face of CSXT's request for a change, is not actionable because "inaction or silence isn't enough." App., *infra*, 21a n. 9. And on that, as well as on the court of appeals' related dismissal of defendants' other anticompetitive acts within the limitations period, the Fourth Circuit misunderstood the significance of an overt act for statute-of-limitations purposes. Although the Fourth Circuit seemed to believe that damages are recoverable only if they flow directly from in-limitations-period overt acts (see *id.* at 19a-22a), other courts have expressly rejected the notion that a plaintiff is required to "tie its damages to specific acts" within the limitations period, finding it sufficient that "the plaintiff * * * support its allegation that the defendant had continued during the period in suit to refuse to deal." *Lower Lake Erie*, 998 F.2d at 1173 (cleaned up); see *Pioneer Co.* v. *Talon, Inc.*, 462 F.2d 1106, 1109 (8th Cir. 1972) (allowing the plaintiff to recover "all damages suffered within the statutory period" and not just those "flowing" directly from the overt acts in that period (citing *Delta Theaters*, 158 F. Supp. 644)).

And in fact, there doubtless is a close relationship between the concepts of inaction and reaffirmation, with continued implementation of the same illegal policy containing elements both of inactivity (*i.e.*, failure to change the policy) and of reaffirmation (*i.e.*, applying the policy over and over again). That seems to be what the Fourth Circuit meant when it said that, even accepting that "maintaining an exclusionary price is the 'functional equivalent of affirmatively posting a price,'" CSXT's claim still "fails because it hasn't shown that such conduct inflicted *new* harm causing *new* injury to it within the limitations period." *Id.* at 20a. So rejection of the no-reaffirmation rule would lead to a different outcome here.

But this holding also contributes to a conflict in the circuits. Here again, the existence of the conflict is not debatable. The district court in this case expressly recognized the conflict, noting a "circuit split" on "whether a 'reaffirmation' of a prior bad act should restart the limitations period." App., *infra*, 101a. So has the Third Circuit, which acknowledged but rejected "authority" from the Sixth Circuit finding reaffirmation insufficient to retrigger the limitations period. See *W. Penn. Allegheny*, 627 F.3d at 106.

And those courts' belief that a conflict on this point exists is clearly correct. As noted above, the court below quoted decisions of the Sixth and Tenth Circuits applying a reaffirmation limit on the continuing-violation doctrine. App., *infra*, 17a (citing cases). The Second Circuit also has stated that rule. See *US Airways, Inc.* v. *Sabre Holdings Corp.*, 938 F.3d 43, 68 (2d Cir. 2019) (the defendant's injurious act "must be a new and independent act that is not merely a reaffirmation of a previous act").

In contrast, the Third and Fifth Circuits have made clear that reaffirmation *will* restart the statute of limitations. See *W. Penn Allegheny*, 627 F.3d at 106-08 (rejecting as "inconsistent with controlling precedent" the argument that a cause of action does not accrue based on acts occurring "within the limitations period, if those acts are merely 'reaffirmations' of acts done or decisions made outside the limitations period"); *Poster Exch.*, 517 F.2d at 127 (observing that in *Zenith* this Court "conspicuous[ly]" relied on cases "eschewing the requirement of acts different in kind to set up a later accruing cause of action"). Indeed, the United States recently noted that "[s]ome courts" have held that reaffirmation will not "trigger a new limitations period under the continuing-violation doctrine" (citing the Fourth Circuit's decision in this case and the Second Circuit's in *US Airways*), but "[t]he Third Circuit * * * has rejected that rule." U.S. *Mizell* Statement, at 22 note 5 (citing *W. Penn Allegheny*, 627 F.3d at 106).

2. On this point as well, the Fourth Circuit is on the wrong side of the conflict: The proposition that reaffirmation (and consequent continued implementation) of illegal acts does not restart the limitations period fails to withstand scrutiny. The court below did not even attempt to provide a rationale for its reaffirmation rule.[7] But there are many reasons why that rule is insupportable as a matter of precedent, antitrust policy, and logic.

For one thing, as the Third Circuit noted, disregarding "'reaffirmations' of acts done or decisions

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[7] Nor does the rule find substantial support in the decisions of the Second, Sixth, and Eighth Circuits, which simply recite "no-reaffirmation" language without explanation or any attempt to reconcile it with *Hanover Shoe* or *Klehr*.

made outside the limitations period" cannot be squared with this Court's decisions. *W. Penn Allegheny*, 627 F.3d at 106. Most obviously, in *Hanover Shoe* itself the challenged conduct constituted a continuing violation "even though the injurious acts that took place within the limitations period * * * were simply manifestations of the lease-only policy, which had been established in 1912, well before the start of the limitations period." *Id*. at 107. Similarly, *Klehr* recognized that sales made pursuant to an old price-fixing conspiracy restart the limitations period even though such sales, almost by definition, rest on reaffirmation of the original wrongful conduct. *Ibid*. (citing *Klehr*, 521 U.S. at 189-90).

As for antitrust policy, as already noted, "'[e]mploying the limitations statute * * * to immunize recent repetition or continuation of violations and damages occasioned thereby not only extends the statute beyond its purpose, but also conflicts with the policies of vigorous enforcement of private rights through private actions.'" *W. Penn Allegheny*, 627 F.3d at 108 (quoting *Poster Exch.*, 517 F.2d at 127-28). The point seems obvious: There is no logical reason why antitrust violators should get a pass simply because they unimaginatively implement the same wrongful policy repeatedly or continuously ("reaffirming" it), while more innovative wrongdoers are subject to liability.

So on this point as well, the line drawn below contributes to a growing conflict in the circuits. It is not supported by any articulated (or articulable) rationale. And it unapologetically allows for the continued infliction of new injury, year-after-year, indefinitely.

C. The same statute-of-limitations rule applies to customers and to competitors, both of which may sue when continued implementation of an antitrust violation causes new injury.

Finally, the decision below turned crucially on the Fourth Circuit's view that different statute-of-limitations rules apply to customers than to competitors of antitrust violators. The court agreed that the customer of a monopolist does have a cause of action that "accrue[s] to the plaintiff each time" it is injured "within the limitations period," even if the defendant "formed [the] monopoly enabling it to overcharge its customers 'several decades' before the customer-plaintiff filed its action." App., *infra*, 19a. But the court ruled that a different standard applies to competitors of an antitrust defendant, holding that a competitor's cause of action accrues once and for all when the monopoly or conspiracy is first formulated. Relying on *Berkey Photo, supra*, the court reasoned: "'The differing treatment between these two types of claims is grounded in the concept that, unlike an excluded rival who is injured as soon as the exclusion begins, a customer is not injured until a sale occurs, and it suffers a new and accumulating injury each time a subsequent supracompetitive price is paid.'" App., *infra*, 20a.

This embrace of disparate rules for customers and competitors rests on a misunderstanding of *Berkey Photo*, however—and makes no sense. In *Berkey Photo*, the Second Circuit simply recognized that causes of action may accrue at different times for dif-

ferent plaintiffs, depending upon the particular plaintiff's factual circumstances.[8] But *Berkey Photo* does not suggest that different limitations rules categorically should apply to customers and to competitors when those categories of victims suffer injuries at the same time. In fact, customers typically *do* suffer injury as soon as an antitrust scheme begins (as in cases of monopoly or price-fixing, where defendants rarely hold off implementing their inflated prices), while competitors sometimes do *not*.[9] There accordingly is no basis for allowing customers to sue every time they suffer injury from an antitrust violation, even many years after the illegal scheme began—as all courts, including the Fourth Circuit, permit—while denying competitors the right to sue every time *they* suffer new injury from a continuing scheme.

The United States recently made just this point, explaining why *Berkey Photo* does *not* state different

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[8] *Berkey Photo* addressed a particular type of violation, predatory pricing. In that kind of case, as the Second Circuit explained, the competitor generally is injured as soon as the scheme begins, as the predator's lower prices will immediately take business from its competitors. 603 F.2d at 295. Customers, meanwhile, actually will be benefitted by predatory pricing when the scheme begins, "for they receive the temporary boon of artificially low prices." *Ibid*. Customers will be injured only later, when the predatory-pricing scheme succeeds and they start paying inflated prices. In such a case, competitors may have a right of action earlier than do customers because they suffer injury earlier.

[9] It is not correct that a competitor necessarily suffers injury at the moment that an anticompetitive practice is formulated. Here, for example, CSXT was injured when the anticompetitive rate kept it from competing for customer contracts at NIT. Depending on when competition for specific multi-year contracts occurred, that might not have happened until some time after defendants first devised and posted the excessive rate.

statute-of-limitations rules for different categories of plaintiff:

> While *Berkey Photo* noted that competitors' monopolization claims might accrue at different times than consumers' monopolization claims, [603 F.2d] at 295, that is not because the different types of plaintiffs are subject to "different accrual rules[.]" * * * The same accrual rule (*Zenith Radio*'s) applies to both types of claims, yet factual differences can lead to different outcomes: Competitors are often "injured" as soon as "the dominant firm commences" an anticompetitive policy, but sometimes consumers are not injured right away—only after the firm excludes competitors and "boost[s] its price to excessive levels." *Berkey Photo*, 603 F.2d at 295 (citing *Zenith Radio*, 401 U.S. at 339). * * * If plaintiffs suffer antitrust injury during the limitations period due to overt acts committed pursuant to a continuing violation, the plaintiffs may bring suit, whether they are "consumers," "competitors," or neither.

U.S. *Giordano* Brief at 30-31.

Here, in its role as competitor, CSXT is in precisely the same position as is a customer. It may (or may not) have first suffered competitive injury shortly after implementation of the anticompetitive switch rate, just as the customer of a price-fixer may (or may not) first suffer injury shortly after prices are fixed. But CSXT suffers *new* injury from continued implementation of the excessive rate every time denial of on-dock rail access at NIT denies it business, just as the price-fixer's customer suffers new injury every time it pays fixed prices into the future.

The peculiarity of the Fourth Circuit's distinction is especially acute in this case, given that CSXT was *both* a customer *and* a competitor of the defendants (competing for shipping customers with NSR and purchasing switching services from NPBL). The court below offered no reason why CSXT would be permitted to sue for excessive payments had it paid the exorbitant switch rate on particular dates years after the rate was first formulated, but may not sue for lost profits because that rate was *so* high that the charge altogether precluded CSXT from competing for contracts at NIT on those *same* dates in those *same* years.

In short, the Fourth Circuit's ruling rests on a misapplication of Second Circuit doctrine. And more fundamentally, that holding is confused, confusing, and inconsistent with basic antitrust policy. In this area, as with the other points where the court below went astray, there is no basis for a rule that allows the perpetual infliction of injury on certain disfavored categories of antitrust victims.

III. PROPER APPLICATION OF THE CONTINUING-VIOLATION DOCTRINE IS AN ISSUE OF GREAT PRACTICAL IMPORTANCE.

The issue presented in this petition is a matter of significant importance that warrants this Court's attention, for several reasons.

First, as the number of reported cases addressing the continuing-violation doctrine demonstrates, questions about the doctrine arise with great frequency. Clarity in the rules governing the doctrine is essential to avoid wasteful litigation, misunderstandings about lawsuit deadlines, inconsistent outcomes, and forum shopping.

Second, the goals of the antitrust laws require an approach that permits plaintiffs to challenge anticompetitive practices that continue into the limitations period. As the Third Circuit has explained, a rule like that applied below would "improperly transform the limitations statute from one of repose to one of continued immunity. For according to [the Fourth Circuit's approach], a plaintiff who suffers [damage from a continuing antitrust violation] is barred not only from proving violations and damages more than four years old, but is barred forever from complaining of [the continuation] of the unlawful conduct." That outcome "conflicts with the policies of vigorous enforcement of private rights through private actions." *W. Penn Allegheny*, 627 F.3d at 107-08 (citation omitted); see also *Lawlor* v. *Nat'l Screen Serv. Corp.*, 349 U.S. 322, 329 (1955) (rejecting theory that "would in effect confer on [defendants] a partial immunity from civil liability for future violations" of the antitrust laws).

And on that last point, the possibility of injunctive relief is not a sufficient curative. As a general matter, "[t]he treble-damages provision wielded by the private litigant is a chief tool in the antitrust enforcement scheme" (*Mitsubishi Motors Corp.* v. *Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 635 (1985)), with Congress recognizing a strong "public interest in vigilant enforcement of the antitrust laws through the instrumentality of the private treble-damage action." *Lawlor*, 349 U.S. at 329. And in any event, the district court's reading of 15 U.S.C. § 26 makes injunctive relief at the request of a private party unavailable in this case. A possible equitable action by the government would not fill that gap; it was "the congressional purpose that private actions serve 'as a bulwark of antitrust enforcement.'" *Zenith*, 401 U.S. at 340; see *Minn. Mining & Mfg. Co.* v. *N.J. Wood Finishing Co.*,

381 U.S. 311, 318 (1965) ("Congress has expressed its belief that private antitrust litigation is one of the surest weapons for effective enforcement of the antitrust laws.").

Third, this case itself has a significant practical impact. There are hundreds of millions of dollars already at stake between the parties (see page 6, *supra*), and—with no way for CSXT to bring an antitrust challenge to defendants' continuing Sherman Act violation—the amount of business lost by CSXT will greatly compound over time. And that violation also will more broadly degrade competitive conditions at one of the most important ports on the East Coast, injuring not just CSXT but the public interest by causing higher prices for rail customers as NSR remains free from competitive constraints at NIT.[10]

In all, the Fourth Circuit has stated a rule that departs from the approach taken by other courts; that confuses the law in other respects; that embraces irrational and internally inconsistent distinctions; and that leaves significant antitrust violations in place, indefinitely. This Court should determine whether that rule is the proper one.

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[10] It is not only CSXT saying this. The Virginia Port Authority asked NPBL as long ago as 2018 to set a competitive switch rate, noting that the "lack of proper access to NIT by CSX" puts the Commonwealth at a "competitive disadvantage" and "may lead to * * * businesses seeking alternative Ports and states" through which to ship. C.A. App. 509.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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