No. 24-591

In the Supreme Court of the United States

CSX TRANSPORTATION, INC., PETITIONER

v.

NORFOLK SOUTHERN RAILWAY CO.; NORFOLK & PORTSMOUTH BELT LINE RAILROAD COMPANY

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

BRIEF IN OPPOSITION

Shay Dvoretzky
Counsel of Record
Parker Rider-Longmaid
Steven Marcus
SKADDEN, ARPS, SLATE, MEAGHER & FLOM LLP
1440 New York Ave. NW
Washington, DC 20005
202-371-7000
shay.dvoretzky@skadden.com

Counsel for Respondent Norfolk Southern Railway Co.

James Long Chapman, IV
W. Ryan Snow
CRENSHAW WARE & MARTIN, PLC
150 W. Main St., Ste. 1923
Norfolk, VA 23510

Counsel for Respondent Norfolk & Portsmouth Belt Line Railroad Co.

QUESTION PRESENTED

In 2009, the Board of Norfolk & Portsmouth Belt Line Railroad Co. (Belt Line) voted to set a uniform, at-cost rate for railcar switching services for its customers, including those who sought service to or from Norfolk International Terminal (NIT), an international shipping terminal in the Port of Virginia. CSX Transportation, one of the railroads that uses Belt Line, designates two members of Belt Line's Board, and those members were at the 2009 meeting. Despite CSX's knowledge of the ratesetting, however, CSX waited nine years to file suit alleging in 2018 that Belt Line and Norfolk Southern Railway Co. conspired to exclude CSX from competing at NIT, in violation of the Sherman Act, and seeking hundreds of millions of dollars in lost profits. The district court granted summary judgment to Norfolk Southern and Belt Line, concluding that the four-year statute of limitations barred suit. Separately, the district court held that CSX failed to offer a damages model that distinguished between potentially actionable conduct, on the one hand, and lawful or time-barred conduct, on the other. The Fourth Circuit agreed on both counts, holding that CSX's suit was untimely and that CSX offered a fatally flawed damages model.

The question presented is whether the Fourth Circuit correctly held that CSX's 2018 lawsuit falls outside the Sherman Act's four-year statute of limitations because it seeks damages resulting from a rate set in 2009, where CSX does not identify an allegedly anticompetitive act since that time.

PARTIES TO THE PROCEEDING AND RELATED PROCEEDINGS

The parties in the court of appeals are identified in the case caption. There are no related proceedings in state or federal court, or in this Court.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

CASES

TABLE OF AUTHORITIES
(continued)

Page(s)

TABLE OF AUTHORITIES
(continued)

Page(s)

TABLE OF AUTHORITIES
(continued)

Page(s)

INTRODUCTION

This case satisfies none of the criteria for this Court's review. The Fourth Circuit correctly applied this Court's precedents interpreting the Sherman Act's statute of limitations. 15 U.S.C. § 15b. And its decision presents no circuit conflict for this Court to resolve. CSX Transportation, Inc., points to a lone decision—a 1993 Third Circuit case, *In re Lower Lake Erie Iron Ore Antitrust Litigation*, 998 F.2d 1144 (3d Cir. 1993)—that it claims creates a split by allowing inaction during the limitations period to restart the statute of limitations. But *Lower Lake Erie* holds no such thing, as later Third Circuit caselaw confirms. What's more, CSX's reading of *Lower Lake Erie* squarely conflicts with this Court's later holding in *Klehr v. A. O. Smith Corp.*, 521 U.S. 179 (1997). The courts of appeals uniformly follow this Court's guidance and agree that plaintiffs must identify an affirmative act within the limitations period to restart the statute of limitations.

Regardless, this case presents no occasion to resolve the question presented, because the Fourth Circuit affirmed summary judgment against CSX on an additional, independent ground that CSX does not challenge here. As both the district court and the Fourth Circuit explained, CSX failed to present a damages model that would allow the jury to disaggregate conduct for which CSX could not recover (because it occurred outside the limitations period) from conduct for which CSX could potentially recover (because it occurred within the limitations period). The result is a fatally flawed model that would leave the jury with no basis to award non-speculative damages, requiring summary judgment for Norfolk Southern

Railway Co. and Norfolk & Portsmouth Belt Line Railroad Co. (Belt Line). But CSX doesn't even *mention* that issue, much less ask this Court to consider it. That makes the Fourth Circuit CSX's final destination, because this Cout's resolution of the question presented would be entirely academic given CSX's failure to present a valid damages model.

This case arises from CSX's efforts to compete with Norfolk Southern to provide rail service in and out of the Port of Virginia. The Port contains two international terminals, NIT and Virginia International Gateway, that load and unload shipping containers for transport to and from overseas destinations. Belt Line provides railcar switching services so railroads can access the docks at NIT. It provides those services using a portion of tracks owned by Norfolk Southern.

CSX's complaint arises out of the Belt Line's 2009 decision to set the uniform rate for switching railcars throughout its system at $210 per railcar. Belt Line set that rate at cost, consistent with its governing documents, and the rate remains the same to this day. Belt Line's shareholders are Norfolk Southern and CSX, who, in turn, appoint three and two members, respectively, of Belt Line's board, with the sixth appointed by the board itself. So when the board voted to adopt the $210 rate, CSX knew about it.

CSX then sat on its hands for nine years before suing Norfolk Southern and Belt Line in 2018 and claiming that the rate had actually caused it hundreds of millions of dollars in damages in lost profits because the $210 rate shut it out from competing with Norfolk Southern at NIT. The district court granted summary judgment for Norfolk Southern and Belt Line on two independent grounds. *First*, the court found CSX's suit untimely under the Sherman Act's four-year statute of limitations. *Second*, the court found that CSX failed to present a viable damages model, meaning CSX could not go to a jury.

The Fourth Circuit affirmed, relying on this Court's decisions in *Klehr* and *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 401 U.S. 321 (1971), as well as circuit consensus on well-established statute-of-limitations principles. The court explained that the statute of limitations begins to run when the cause of action accrues, and the cause of action accrues when the defendant allegedly takes unlawful action and causes the plaintiff's injury. If accrual occurred, the court explained, it occurred in 2009 and 2010, because that is when Belt Line set the $210 rate and CSX, according to CSX's theory, suffered the antitrust harm of exclusion at NIT. The court rejected CSX's theory that simply maintaining the $210 rate could restart the limitations period, because merely maintaining a rate isn't an affirmative act. Separately, the court of appeals agreed with the district court that CSX's damages theory was fatally flawed because it would have left the jury to speculate about damages.

The Fourth Circuit's decision is correct and does not warrant this Court's review. The Court correctly concluded that the 2009 ratesetting was outside the statute of limitations and that simply maintaining that rate was inaction that did not retrigger the statute of limitations on a daily basis. And that ruling does not conflict with the ruling of any other court of appeals, as the Fourth Circuit itself explained in addressing arguments little different from the contentions CSX recycles here. Even if it did, this case would present no opportunity to address the issue, because CSX doesn't challenge the Fourth Circuit's splitless independent holding that CSX's damages model is fatally flawed. Nor can CSX show that the question presented is important. To the contrary, the decisions CSX cites to claim confusion or conflict don't just fail to show confusion or conflict; they also show that the last time courts had to think about these issues was decades ago.

CSX has only itself to blame for sitting on its hands. The Court should deny review.

STATEMENT

A. Factual background

1. Norfolk Southern and CSX compete to provide rail transportation to and from various East Coast ports, where cranes transfer shipping containers between railcars and ships. App. 76a-77a. Each railway has invested in different competitive advantages. For instance, CSX worked to develop the ability to transport multiple containers per railcar—called double-stacking—on tracks running into and out of the Port of New York-New Jersey. CA4 App. 191. Norfolk Southern, in contrast, invested hundreds of millions of dollars to develop double-stack capability to and from the Port of Virginia. CA4 App. 182, 266. CSX did not develop double-stacking capability into and out of Virginia until 2016. CA4 App. 183.

Belt Line was founded in 1896 as a joint venture intended to provide "switching services" to railroads in the Hampton Roads area in Virginia. App. 5a-6a, 76a. One of the services Belt Line provides is interchanging railcars among different railroads, including Norfolk Southern and CSX, that transfer shipping containers in and out of the Port. App. 5a. In simple terms, Belt Line allows railroads without tracks at the

Port to have "on-dock access," meaning their trains pull right up to the dock. CA4 App. 178.

Until 2020, the Port of Virginia had three terminals for international container shipments. Norfolk Southern and CSX have differing access to each of the three terminals. At Virginia International Gateway, CSX and Norfolk Southern have on-dock access. *Id.* At Portsmouth Marine Terminal (which shuttered in 2020), CSX had on-dock access through its own tracks, and Norfolk Southern could access PMT only by using Belt Line. CA4 App. 179. At NIT, Norfolk Southern has on-dock access through its own tracks, while CSX can access the terminal with trucks or by using Belt Line. CA4 App. 179, 277, 323.

2. Today, Belt Line is wholly owned by Norfolk Southern and CSX and governed by a six-member board consisting of three members appointed by Norfolk Southern, two members appointed by CSX, and a sixth member appointed by the board. App. 136a. Belt Line's operating agreement requires it to operate so that it breaks even and collects enough income to pay shareholders a 6% dividend. CA4 App. 184. Belt Line thus sets its rate through a rate committee that considers Belt Line's costs. That is what Belt Line did in 2009 when it set its rate at $210 per railcar. App. 77a.

Although a CSX executive described that rate as "not an unusual number," CSX threatened to sue Belt Line in 2009, but didn't follow through. CA4 App. 163, 186. The rate has not changed since 2009. Between 2009 and 2018, CSX tried to use Belt Line's switching services to move intermodal freight in and out of NIT just a few times, all in 2015 during a period of "extreme port congestion across the East Coast," when CSX couldn't use trucks to keep up. CA4 App. 319-320.

CSX also contemplated but never followed through with proposals to lower the rate. In 2018, CSX proposed that Belt Line carve out a special rate just for CSX, but no board member—not even CSX's designees—moved for a vote (or was asked to) at the board meeting just weeks later. CA4 App. 335-342.

B. Procedural history

1. In 2018, CSX sued Norfolk Southern and Belt Line in the Eastern District of Virginia, claiming that Norfolk Southern and Belt Line violated the Sherman Act, 15 U.S.C. §§ 1 and 2, as well as Virginia law. CSX's theory was that the $210 rate, set in 2009, excluded CSX from competing at NIT, causing CSX to lose profits to its competitor Norfolk Southern. CSX sought its lost profits, not recovery of any supposed supracompetitive prices it paid the handful of times it used Belt Line's services in 2015.

Norfolk Southern and Belt Line moved for summary judgment on the ground (among others) that CSX's 2018 suit based on a 2009 rate was time-barred given the Sherman Act's four-year statute of limitations. CSX responded by claiming that, under the continuing-violation doctrine, the daily maintenance of the $210 rate was an overt act that restarted the limitations period every day. App. 14a-15a. Alternatively, CSX pointed to its 2018 aborted effort to lower the $210 rate as a within-limitations period act.

Norfolk Southern and Belt Line also sought summary judgment on the ground that CSX's damages model impermissibly aggregated damages for potentially actionable and undisputedly time-barred conduct, meaning the jury would have no basis to award damages to CSX without speculating.

2. The district court granted summary judgment to Norfolk Southern and Belt Line. *See* App. 75a-167a.

a. The district court first held that CSX's claims were time-barred because they accrued "in and around 2009" as a result of the $210 ratesetting and the continuing-violation doctrine did not apply. App. 118-119a. The court explained that CSX alleged "only a single injury"—exclusion from NIT—as a result of the $210 rate, and that injury allegedly began more than four years before 2018. *Id.* And the continuing-violation doctrine did not apply, because CSX failed to show that "an overt act occurred 'within the four years preceding the filing of the complaint,'" and "CSX may recover only for the damages arising from the *new conduct* committed within the limitations period." App. 105a. Instead, CSX showed only that it was continually *injured* by the $210 rate set in 2009. App. 118a-119a.

b. The district court concluded that summary judgment was warranted for another reason as well: CSX's "damages model is fundamentally flawed." App. 119a. CSX offered a single piece of evidence for its damages model—a report by Professor Howard Marvel—but that model gave the jury no basis to disaggregate damages from conduct for which CSX could potentially recover and conduct for which it couldn't, like lawful conduct or conduct outside the limitations period. App. 118a-119a. CSX's damages model sought damages "for *all* anti-competitive acts, regardless of when they occurred," so a jury would be unable to award damages only for the anti-competitive acts for which CSX could sue. App. 120a. Thus, the court concluded, even assuming CSX's theory of liability was valid, summary judgment was required because CSX failed to present any "admissible evidence supporting its damages claim." App. 119a.

3. The Fourth Circuit affirmed, agreeing with both the district court's untimeliness ruling and its damages-model ruling. App. 1a-24a.

a. The court of appeals first held that CSX's action was untimely. The court explained that the Sherman Act's four-year statute of limitations "starts to run 'after the cause of action accrue[s],'" App. 11a (alteration in original; quoting 15 U.S.C. § 15b), and the cause of action accrues when the "defendant commits an act that injures a plaintiff's business." App. 3a (quoting *Zenith Radio*, 401 U.S. at 338). CSX's claims "first accrued in 2009 and 2010," when Belt Line adopted the $210 rate. *Id.* The question, then, was whether the $210 rate alone could establish a continuing violation giving rise to a new cause of action within the limitations period. App. 3a-4a.

The court of appeals rejected CSX's continuing violation argument. A continuing violation restarts the limitations period, the court explained, on the ground that a cause of action accrues "each time a plaintiff is injured by an act of the defendants," meaning the plaintiff may "recover the damages caused by that act." *Id.* (quoting *Zenith Radio*, 401 U.S. at 338). Put differently, "in the case of a continuing violation … each overt act that is part of the violation and that injures the plaintiff … starts the statutory period running again." App. 12a-13a (quoting *Klehr*, 521 U.S. at 189). But the mere maintenance of the $210 rate was not an overt act that restarted the limitations period. App. 15a. Maintenance of the rate was nothing more than silence or inaction that could not restart the limitations period, "even though the allegedly unlawful conspiracy to exclude a plaintiff remains in effect." App. 15a-17a (citing *Charlotte Telecasters, Inc. v. Jefferson-Pilot Corp.*, 546 F.2d 570, 573 (4th Cir. 1976)).

That rule, the Fourth Circuit explained, was consistent with both its own longstanding precedent and "the understanding of other circuits." App. 15a-17a (citing *Charlotte Telecasters*, 546 F.2d at 573; *Lancianese v. Bank of Mount Hope*, 783 F.2d 467, 470 (4th Cir. 1986); *Z Technologies Corp. v. Lubrizol Corp.*, 753 F.3d 594, 600 (6th Cir. 2014); *Kaw Valley Electric Cooperative Co. v. Kansas Electric Power Cooperative, Inc.*, 872 F.2d 931, 934-35 (10th Cir. 1989)). Contrary to CSX's argument, the court continued, that rule aligned with the Fifth Circuit's decision in *Poster Exchange, Inc. v. National Screen Service Corp.*, 517 F.2d 117 (5th Cir. 1975). In *Poster Exchange*, the Fourth Circuit explained, the Fifth Circuit held that "a continuing-violation claim must be supported by evidence of 'some injurious act actually occurring during the limitations period." App. 18a (quoting *Poster Exchange*, 517 F.2d at 128). "Rather than supporting CSX's view of the law," the Fourth Circuit observed, "we read *Poster Exchange* to require exactly what the district court and this court have required to establish a continuing violation: an affirmative act committed within the limitations period in furtherance of the conspiracy to exclude the plaintiff from the relevant market." App. 19a.

The Fourth Circuit also rejected CSX's reliance on *Berkey Photo, Inc. v. Eastman Kodak Co.*, 603 F.2d 263, 295 (2d Cir. 1979). *Berkey Photo* involved *consumer* claims (where a consumer claims an injury each time he purchases a good at an artificially inflated price) and expressly distinguished the accrual rules for *competitor* claims (where the injury occurs at the time the competitor is driven out of the market by the allegedly anticompetitive conduct). App. 19a-20a. CSX brought suit only as a competitor of Norfolk Southern, complaining of its "exclusion at [NIT] following the Defendants' imposition of the exclusionary rate," so any injury to competition accrued outside the limitations period when the $210 rate was set. App. 20a-21a.

b. Separately, the court of appeals agreed with the district court that the flawed damages model was an independent basis for summary judgment. "As the district court aptly put it," the Fourth Circuit explained, CSX's damages model calculated damages "for *all* anti-competitive acts, regardless of when they occurred." App. 23a-24a (emphasis added). Instead of specifying damages incurred from within-limitations-period acts, the model "'bootstraps' *all* the injury CSX suffered" from all of Norfolk Southern's allegedly anticompetitive acts. App. 23a. The consequence, "a unitary theory seeking recovery for all anticompetitive acts, regardless of when they occurred, doom[ed] [CSX's] ability to present to the jury a non-speculative damages case." App. 23a-24a. That damages problem was an independent reason "[t]he district court correctly rejected CSX's claim." App. 24a.

REASONS FOR DENYING THE PETITION

This case checks none of the boxes for this Court's review. The Fourth Circuit correctly held that CSX's 2018 lawsuit based on a 2009 ratesetting fell well outside the Sherman Act's four-year statute of limitations. It correctly held that CSX could not invoke the continuing-violation doctrine because it did not point to any affirmative acts during the limitations period. And the Fourth Circuit also correctly held that summary judgment was independently warranted because CSX's damages model was fatally flawed.

Those rulings don't implicate any circuit conflict. CSX points to no decision that held that inaction *alone* restarts the limitations period, and for good reason—such a ruling would fly in the face of this Court's decisions in *Zenith* and *Klehr*. Instead, CSX points to the Third Circuit's 1993 decision in *Lower Lake Erie*, claiming that the Third Circuit there blessed inaction within the limitations period as sufficient. But that argument is incorrect, as later Third Circuit precedent, following *Klehr*'s lead, makes clear. *Lower Lake Erie* required an overt act within the limitations period, and the court found several examples of overt acts put before the jury. And CSX's alternative split, involving the reaffirmation of out-of-limitations acts, is not only stale and shallow on CSX's own terms, but it presents no issue the Court can resolve here, because it relates only to an alternative holding in the Fourth Circuit's opinion.

Beyond all that, this case presents no opportunity to resolve the timeliness question CSX presents anyway. That's because the Fourth Circuit affirmed summary judgment not just on the statute-of-limitations issue but also on an independent basis CSX doesn't challenge here. CSX failed to present a damages model that allowed the jury to award recoverable damages—a fatal failure of proof requiring summary judgment for Norfolk Southern and Belt Line. This problem alone justifies denying review.

Finally, the question presented isn't important. It doesn't arise frequently, and when it does, the courts of appeals all already know what to do with it. And the uniform rule (of which the Fourth Circuit's ruling provides just one example) serves important purposes, like ensuring the reliability of evidence and prompt lawsuits promoting the public good. CSX sat on its hands for nine years and has only itself to blame for the judgment against it.

I. The Fourth Circuit correctly held that inaction is not an overt act that restarts a limitation period.

The Fourth Circuit correctly held that the four-year statute of limitations for CSX's claim began to run when CSX's cause of action accrued in 2009 or 2010 when the 2009 ratesetting occurred and allegedly injured CSX's business by excluding it from NIT. App. 11a (citing *Zenith*, 401 U.S. at 338). The court likewise correctly held that CSX pointed to no overt act within the limitations period that caused it injury as a competitor. App. 21a-22a. And because "a defendant's 'silence' or failure to act" is not an overt act that accrues a cause of action, the court correctly concluded that CSX could not invoke the continuing-violation doctrine based on the continuation of the $210 rate after its adoption in 2009. App. 14a-21a.

A. CSX's claims are untimely.

The Fourth Circuit correctly held that CSX needed, but failed, to point to an unlawful act causing it harm within the Sherman Act's four-year limitations period, 15 U.S.C. § 15b. That rule, uniform across circuits, flows from the text of the Sherman Act and from this Court's ordinary accrual jurisprudence.

1. a. The Sherman Act's four-year limitations period runs from when "the cause of action accrued." *Id.* And a cause of action accrues "when a defendant commits an act that injures a plaintiff's business." *Zenith*, 401 U.S. at 338. Thus, this Court held in *Zenith*, 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." *Id.* at 339. To recover those damages, though, the antitrust plaintiff "must sue within the requisite number of years from the accrual of the action." *Id.*

The continuing-violation doctrine is simply an extension of these principles. As this Court held in *Klehr* as it overturned the Third Circuit's contrary rule, only an "overt act that is part of the violation and that injures the plaintiff … starts the statutory period running again." 521 U.S. at 189. And even when a plaintiff identifies an act within the limitations period, a plaintiff may not "recover for the injury caused by old overt acts outside the limitations period." *Id.* at 189-90. Under *Zenith* and *Klehr*, a cause of action accrues, and the statute of limitations begins to run—or, in the case of a continuing violation, restarts—only if there was an unlawful *act* within the limitations period.

b. The plaintiff's theory of harm can also affect the accrual date and thus when the statute of limitations begins to run or restarts. As noted, accrual requires act and injury, so the nature of the injury may determine when the injury occurs and thus when the limitations period begins. The key concept is the well-established distinction in antitrust law between a *customer's* injury and a *competitor's* injury. Courts therefore apply different accrual rules to customer claims and competitor claims. *See e.g.*, *Mayor & City Council of Baltimore v. Actelion Pharmaceuticals Ltd.*, 995 F.3d 123, 131 (4th Cir. 2021). As the Fourth Circuit explained, CSX sued as a competitor, so only its injury as a competitor is relevant to the timeliness inquiry.

To explain: A customer generally suffers antitrust injury each time she pays a supracompetitive price for a product. As the Second Circuit has explained (in a passage the Fourth Circuit quoted here (App. 19a-20a)), "a purchaser … is not harmed until the monopolist actually exercises its illicit power to extract an excessive price." *Berkey Photo*, 603 F.2d at 295; *see also* Phillip Areeda & Herbert Hovenkamp*, Antitrust Law: An Analysis of Antitrust Principles and Their Application* ¶ 320c4 (2023 Supplement).

A competitor, in contrast, suffers harm the moment an anticompetitive act occurs that damages its business, such as excluding it from the market. As *Berkey Photo* likewise explains, "the business of a monopolist's rival may be injured *at the time the anticompetitive conduct occurs*"—"*[a]s soon as the dominant firm commences such a[n anticompetitive] policy, other producers, who may be driven out of the market, are injured*." App. 20a (quoting *Berkey Photo*, 603 F.2d at 295).

2. The Fourth Circuit correctly applied these settled accrual principles to find that CSX's suit was untimely. CSX's primary argument is that it was injured every day by the 2009 adoption of the $210 rate. As the court of appeals correctly recognized, that single act occurred well outside the four-year statute of limitations, and the mere existence of the rate after 2009 was not an overt anticompetitive act that could restart the limitations period. The court likewise correctly rejected CSX's alternative factual arguments about episodes in 2015 and 2018, *see* App. 21a-23a, and CSX does not seek review of those rulings.

B. CSX's arguments lack merit.

CSX challenges the Fourth Circuit's ruling, but its arguments run contrary to well-established principles set out in this Court's and other courts of appeals' precedent.

1. a. CSX first claims (Pet. 12) that the limitations period restarts when a plaintiff suffers harm, even if that harm was caused by an act outside the limitations period. But *Zenith* and *Klehr* rejected that argument and expressly require an overt act causing injury within the limitations period. *See Zenith*, 401 U.S. at 338-39; *Klehr*, 521 U.S. at 189-90. The rule is the same outside of antitrust law: accrual (and thus restarting the statute of limitations) requires act *and* injury. *See Green v. Brennan*, 578 U.S. 547, 561-62 (2016); *Wallace v. Kato*, 549 U.S. 384, 388 (2007).

b. Resisting this overwhelming caselaw, CSX points only to a footnote in the Court's 1968 decision in *Hanover Shoe, Inc. v. United Shoe Machinery Corp.*, 392 U.S. 481, 502 n.15 (1968). But that footnote doesn't help CSX because it articulates how these principles apply *in the customer, not competitor* context, and thus isn't relevant here. In *Hanover Shoe*, the plaintiff's injury was paying supracompetitive prices as a customer. The plaintiff leased equipment from the defendant and argued that the defendant's lease-only policy caused it harm. *Id.* at 483-84. It sought damages in the amount of the difference between the price to lease and the price to buy. *Id.* Each refusal to sell—and there were many within the limitations period—was thus a new act that caused injury to the plaintiff in the form of a supracompetitive price.

That reasoning doesn't apply here, where CSX's only theory of injury is that Norfolk Southern and Belt Line's conduct excluded it from competing at NIT. *See supra* p. 6.

CSX challenges (Pet. 27-30) the well-established distinction between customer and competitor claims, arguing that sometimes customers are injured as soon as an antitrust scheme begins, while competitors might not be injured at the outset. But CSX simply misunderstands the fundamental accrual rule, and its hypotheticals only prove the point: In *all* cases, the plaintiff—whether customer or competitor—has a complete cause of action once both the allegedly unlawful act and the injury it caused have occurred. Identifying that time is easy for purchasing at supracompetitive prices (customers) and being excluded from a market by monopolistic practices (competitors). As the government has put it, "[c]ompetitors are often 'injured' as soon as 'the dominant firm commences' an anticompetitive policy, but sometimes consumers are not injured right away." Corrected Br. for United States as Amicus Curiae 31, *Giordano v. Saks & Co.*, No. 23-600 (2d Cir. March 13, 2024), ECF 89 (quoting *Berkey Photo*, 603 F.2d at 295). To be sure, "factual differences can lead to difference outcomes" where the injury occurs at a different time. *Id.* But the accrual rule—which requires an act plus the harm it causes—remains the same. CSX's problem is that it seeks damages only for its exclusion from NIT, not from any payment of a supracompetitive price, but its alleged exclusion began in 2009 and 2010, well outside the statute of limitations.

3. Finally, CSX points (Pet. 15) to decisions in the criminal and civil penalties contexts. But those decisions do not supply the rule for damages claims, which—as this Court's on-point decisions in *Zenith* and *Klehr* make clear—turn on accrual, meaning unlawful act causing injury, both within the limitations period. CSX fails to disclose that the criminal law contains many non-overt-act conspiracy offenses that by their nature do not require any overt act because the criminal agreement is itself the unlawful act. *See, e.g.*, *United States v. Shabani*, 513 U.S. 10, 16 (1994). Thus, the substantive criminal law does not itself require an overt act within the limitations period. But where the substantive law does "require[] proof of an overt act," and, say, provides a three-year statute of limitations, "it must be shown both that the conspiracy still subsisted within the three years prior to the return of the indictment, and that at least one overt act in furtherance of the conspiratorial agreement was performed within that period." *Grunewald v. United States*, 353 U.S. 391, 396-97 (1957). Similarly, CSX's reliance on *United States v. ITT Continental Baking Co.*, 420 U.S. 223 (1975), has nothing to do with civil damages accrual rules but rather turned on a provision allowing the Federal Trade Commission to impose penalties for the "continuing failure or neglect to obey" an FTC order, *id.* at 230-31.

II. This case doesn't implicate any circuit split.

CSX contends (Pet. 17-23) that the Fourth Circuit's decision here conflicts with the Third Circuit's 1993 decision in *Lower Lake Erie*, which CSX claims holds that inaction can restart the statute of limitations. That is wrong: *Lower Lake Erie* stated that it was requiring the plaintiff to identify "purposeful," "intentional," and "concerted inaction." *Lower Lake Erie*, 998 F.2d at 1172. And although that language is oxymoronic, the decision made clear that the plaintiff needed to identify discrete actions by the defendants within the limitations period—a requirement it found met. In short, there is no split: CSX would not prevail in the Third Circuit, because it does not identify any unlawful acts causing it harm within the limitations period.

A. The courts of appeals uniformly require an affirmative act within the limitations period. Like the Fourth Circuit here, other circuits hold that "even when a plaintiff alleges a continuing violation, an overt act by the defendant is required to restart the statute of limitations and the statute runs from the last overt act." *Z Technologies Corp.*, 753 F.3d at 598 (emphasis omitted) (quoting *Peck v. General Motors Corp.*, 894 F.2d 844, 849 (6th Cir. 1990) (per curiam)); *accord Kaw Valley*, 872 F.2d at 933; *US Airways, Inc. v. Sabre Holdings Corp.*, 938 F.3d 43, 68-69 (2d Cir. 2019); *Varner v. Peterson Farms*, 371 F.3d 1011, 1019 (8th Cir. 2004); *Xechem, Inc. v. Bristol-Myers Squibb Co.*, 372 F.3d 899, 902 (7th Cir. 2004).

B. 1. Contrary to CSX's argument, *Lower Lake Erie* does not conflict with this uniform rule. Like the decisions of other circuits, *Lower Lake Erie* required the plaintiff to point to purposeful action within the limitations period to restart the statute of limitations. That holding aligns with the Fourth Circuit's decision. And CSX's contrary suggestion runs headlong into *Klehr*'s rejection of the Third Circuit's rule that a plaintiff can use an overt act within the limitations period to recover for injuries from out-of-limitations conduct. 521 U.S. at 189-90.

In *Lower Lake Erie*, the plaintiff claimed that the defendant railroad engaged in an ongoing antitrust conspiracy among railroads and iron ore producers to eliminate competition for the transportation of iron.

998 F.2d at 1152-53. At trial, the plaintiff introduced evidence that the defendant railroads rebuffed its efforts to lease property, refused requests to lower rates, and coerced iron producers to prevent them from using other shippers—all within the limitations period. *Id.* at 1172. The jury concluded on the verdict form that the defendants "took some overt action in furtherance of the conspiracy" within the limitations period. *Id.* at 1173.

The Third Circuit affirmed, holding that to restart the limitations period, a plaintiff must identify "purposeful," "intentional, [and] concerted inaction" within the limitations period. That requirement flowed from *Zenith*, which "limit[s] recovery to damages resulting 'from injury-causing overt acts.'" *Id.* at 1172 (emphasis omitted). The court found sufficient evidence for the jury's finding of overt action in the form of the three activities described above. *Id.*

Although the Third Circuit referred to "inaction," it did so because "certain conspiracies, such as boycotts, operate through inaction" when viewed at a high level. *Id.* But that language does not suggest that a plaintiff can fail to identify overt acts within the limitations period or that silence is sufficient.

To the extent CSX reads *Lower Lake Erie* as holding that plaintiffs do not need to identify a within-limitations-period overt act to restart the clock, CSX's argument contravenes *Klehr*, which postdates *Lower Lake Erie*. *Klehr* rejected the Third Circuit's rule that the plaintiff did not need to show an injury-producing overt act within the limitations period. 521 U.S. at 187. That rule "conflicts with a basic objective—repose—that underlies limitations periods" and would "permit plaintiffs who know of the defendant's pattern of activity simply to wait, 'sleeping on their rights,' as the pattern continues and treble damages accumulate." *Id.* (citation omitted). *Klehr*'s holding refutes whatever is left of CSX's view of *Lower Lake Erie* and *Lower Lake Erie*'s suggestion that the plaintiff need not "tie all damages to specific overt acts within the limitations period," 998 F.2d at 1172.

It's not surprising, then, that after *Klehr*, the Third Circuit doesn't read *Lower Lake Erie* the way CSX does. After quoting *Klehr*, the Third Circuit's decision in *West Penn Allegheny Health System, Inc. v. UPMC*, 627 F.3d 85, 107 (3d Cir. 2010) (emphasis added), described *Lower Lake Erie* as "reasoning that the [plaintiff's] claims were timely because the railroads' exclusionary *conduct*, including refusing to lease dock property and overcharging for use of the railroads, had continued into the limitations period."

The bottom line is that no circuit—not even the Third Circuit—has adopted CSX's view of *Lower Lake Erie*, which is wrong after *Klehr* in any event. In other words, the Third Circuit, like the Fourth Circuit here, requires affirmative conduct in the limitations period, even if that conduct is what implements a boycott, which can be described as "inaction" because it results in the refusal to transact. CSX elides the within-limitations-period acts from *Lower Lake Erie* and fixates on the "inaction" language, thus ignoring the Third Circuit's alignment with the other courts of appeals.

2. CSX's forays beyond *Lower Lake Erie* lack merit, too.

CSX claims that a 1984 D.C. Circuit decision and a 1975 Fifth Circuit decision show "confusion in the courts." Pet. 22. Even putting aside CSX's failure to cite any decisions supposedly showing confusion within the last four decades, those decisions don't help CSX. In *National Souvenir Center, Inc. v. Historic Figures, Inc.*, 728 F.2d 503 (D.C. Cir. 1984), the court addressed a conspiracy brought by a franchise alleging a series of artificially inflated rent payments within the limitations period. But injury occurs when an inflated rent payment is made, *id.* at 513-14; that doesn't mean there is any conflict with decisions articulating how accrual rules apply to competitors' antitrust claims. *See supra* pp. 13-14.

Poster Exchange is no better for CSX. There, the plaintiff alleged that the defendants refused to deal with them. 517 F.2d at 119. As the Fourth Circuit here explained (App. 18a-19a), the Fifth Circuit held that a "newly accruing claim for damages must be based on some injurious act actually occurring during the limitations period, not merely the abatable but unabated consequences of some pre-limitations action." *Poster Exchange*, 517 F.2d at 128. The Fifth Circuit thus required the plaintiff to "demonstrate some act of the defendants during the limitations period" furthering the conspiracy, and it remanded for the plaintiff to identify "a triable issue of fact as to the occurrence of any specific act or word … during the statutory period." *Id.* at 128-29. The Fourth Circuit here, in turn, correctly interpreted *Poster Exchange* as requiring "an affirmative act committed within the limitations period in furtherance of the conspiracy to exclude the plaintiff from the relevant market." App. 19a. Indeed, as the Fifth Circuit itself has recently explained, the remand in *Poster Exchange* was necessary "to determine whether there was a specific act or word of refusal contributing to the antitrust conspiracy during the limitations period." *Academy of Allergy & Asthma* *in Primary Care v. Quest Diagnostics, Inc.*, 998 F.3d 190, 197 (5th Cir. 2021).

In short, CSX points to nothing more than fact-bound disputes resolved by applying the same rule: A plaintiff must identify an act within the limitations period that causes injury. Whether the plaintiff did so determined the result in *Poster Exchange*, *National Souvenir*, and *Lower Lake Erie*. It also determined the result here: CSX failed to identify any act within the limitations period, meaning the court of appeals correctly found its claims untimely. The rule and result don't conflict with any decision of another court of appeals.

C. CSX's alleged backup split (Pet. 23-26) concerns whether the "reaffirmation" of an out-of-limitations-period act restarts the limitations period. But that stale, overstated split isn't implicated here, because it relates only to an alternative holding in the Fourth Circuit's opinion.

1. The Fourth Circuit's reaffirmation holding was an alternative holding, meaning this case doesn't present the Court with an opportunity to address any disagreement on the issue. The court of appeals held that Norfolk Southern and Belt Line's "silence" after Belt Line adopted the $210 rate "doesn't qualify as an act sufficient to extend the statute of limitations." App. 15a. Only then did the Fourth Circuit reach the reaffirmation issue in the alternative. "[E]ven accepting" CSX's argument that maintaining the $210 rate was an affirmative act, the court explained, CSX's argument would still fail "because it hasn't shown that such conduct inflicted *new* harm causing *new* injury to it within the limitations period." App. 20a. That is, even if CSX had identified any overt acts from within the limitations period (and it hadn't), those acts would not qualify as sufficient to restart the limitations period because they were mere reaffirmations of the initial $210 ratesetting.

CSX contends that the Fourth Circuit's reaffirmation reasoning was "central to its holding." Pet. 23. But the Fourth Circuit's opinion speaks for itself: "a defendant's 'silence' or failure to act after committing the initial antitrust violation … doesn't qualify as an act sufficient to extend the statute of limitations." App. 15a. Only after reaching that conclusion did the court note that *even if* CSX had introduced evidence of a daily reaffirmation of the $210 rate, that still wouldn't be sufficient, because reaffirmations are not overt acts. *See* App. 20a-21a. And while CSX claims in a footnote that the Fourth Circuit "doubled down" on the reaffirmation theory when it rejected CSX's argument that Norfolk Southern and Belt Line committed an overt act in 2018 when Belt Line "maintain[ed] the elevated rate," Pet. 23 n.6, CSX didn't seek review of that ruling, *see* Pet. at i, so the Fourth Circuit's holding as to 2018 conduct isn't at issue.

2. What's more, CSX overstates any split on reaffirmation, which is minimal and stale even on the reading most favorable to CSX. CSX cites two decisions that it says adopted the rule that a reaffirmation of an out-of-limitations period action *is* an overt act that restarts the limitations period: *West Penn* and *Poster Exchange*. But neither decision squarely held that the reaffirmation of an outside-of-limitations-period act could restart a limitations period.

Start with *West Penn*. There, one hospital system sued another hospital system and an insurance company, alleging that the defendants engaged in an antitrust conspiracy. *West Penn*, 627 F.3d at 91-94. The plaintiff alleged that during the limitations period the insurance company leaked confidential information to the defendant hospital system, cut the plaintiff off from financial support, discriminated against the plaintiff in awarding certain grants, and "repeatedly refused to increase" the rate by which the insurance company would reimburse the plaintiff. *Id.* at 92-94. The insurance company argued that the reimbursement rate claim was time-barred, but the Third Circuit disagreed, because the plaintiff "allege[d] that the defendants performed injurious acts in furtherance of the conspiracy within the limitations period," including, for example, "refus[ing] to increase [the plaintiff's] reimbursement rates in 2006." *Id.* at 106. *West Penn* rejected the insurer's argument that its refusals were "merely manifestations of decisions made … outside the limitations period." *Id.* That doesn't help CSX, because the Third Circuit relied on multiple within-limitations-period events to find the action timely.

Poster Exchange doesn't help CSX for the same reason. As discussed (at 21-22), the Fifth Circuit remanded for the plaintiff to prove "some specific act" "during the period sued upon" showing the refusal to deal. *Poster Exchange*, 517 F.2d at 128-29. But CSX's theory here is that *inaction* restarts the limitation period.

Tellingly, CSX doesn't have anything outside of one 1975 Fifth Circuit decision and one 2010 Third Circuit decision supposedly creating a split on the reaffirmation issue. Those decisions don't create a split for the reasons just noted. But even if they did, it would be a stale, shallow split involving issues that rarely recur—not the kind of thing that could warrant the Court's intervention.

III. This case is not a vehicle for resolving the question presented anyway, because CSX lost on an independent basis—the failure of its damages model—that it doesn't challenge here.

Even assuming CSX's question presented implicated a certworthy circuit split, this case would not be a suitable vehicle for resolving it. The reason is that the Fourth Circuit found CSX's case fatally flawed for an independent reason: CSX also failed to present a viable damages model, because the model would give the jury no way to determine damages flowing from unlawful, within-limitations-period conduct (as distinct from damages flowing from lawful or outside-of-limitations-period conduct). CSX doesn't challenge that ruling here, meaning CSX has reached the end of the line.

A. Start with the Fourth Circuit's affirmance of summary judgment to Belt Line and Norfolk Southern on the independent basis of CSX's failure to show damages. The Fourth Circuit held that "even if we accept that the Defendants committed [an overt] act within the limitations period in furtherance of a conspiracy, CSX has failed to prove the second continuing-violation requirement: 'the damages caused by that act'—which are the only damages it can 'recover.'" App. 4a. Indeed, the Fourth Circuit agreed with the district court's "apt[]" analysis, explaining that CSX failed to provide any evidence that specified the damages CSX suffered from within-limitation-period acts. App. 23a-24a. Instead, CSX bootstrapped "*all* the injury CSX suffered since Defendants' initial, pre-limitations violation." App. 23a.

The district court's ruling, which was an independent basis for summary judgment, drives the point home. "[E]ven if" CSX could point to a new act, causing new injury, within the limitations period, the court explained, "the record still supports entry of summary judgment on damages." App. 119a. CSX's only damages evidence was its expert report, but that report was "fundamentally flawed" because it failed to disaggregate harm caused by outside-limitations-period conduct from harm caused by within-limitations-period conduct. *Id.*

B. Those rulings are correct, and CSX doesn't challenge them here. That is a fatal choice, and it means this case is not a vehicle for resolving the question presented. To invoke the continuing-violation doctrine, a plaintiff must identify an overt act that causes harm "over and above the harm that the earlier acts caused." *Klehr*, 521 U.S. at 190. While a plaintiff need not present, at summary judgment, an exact damages calculation, it cannot ask the jury to perform "'speculation or guesswork' in determining the amount of damages to award." *Magnetar Technologies Corp. v. Intamin, Ltd.*, 801 F.3d 1150, 1159 (9th Cir. 2015); *see also* Areeda & Hovenkamp, *supra*, ¶ 338a. And a damages model that fails to disaggregate conduct for which a plaintiff can recover from conduct for which a plaintiff cannot recover does just that: it leaves the jury with no basis for awarding damages. If the model aggregates conduct that is lawful with conduct that is unlawful, or pre-limitations-period conduct and within-limitations-period conduct, the model gives a jury no basis upon which to award damages for only the unlawful, within-limitations-period conduct. *See United States Football League v. National Football League*, 842 F.2d 1335, 1378-79 (2d Cir. 1988). That rule ensures that a plaintiff will recover only for "an injury for which the antitrust laws provide relief." *Matsushita Electric Industrial Co. v. Zenith Radio Corp.*, 475 U.S. 574, 584 n.7 (1986).

Its merits aside, that ruling is terminal for CSX because CSX doesn't challenge it before this Court. CSX thus will lose even if this Court grants cert and resolves the question presented in its favor. There would be no reason to remand, because the summary judgment in Norfolk Southern and Belt Line's failure on damages grounds would remain.

IV. The question presented doesn't otherwise warrant this Court's intervention.

A. Splitlessness and lack of merit aside, CSX's petition doesn't warrant this Court's attention because the question presented isn't important, either. Simply put, the question presented rarely arises, and when it does, courts know what to do because the legal principles are already clear. Just consider the dated decisions CSX cites: even the decisions on the majority side of the "split" (like *Kaw Valley* from 1989 and *Z Technologies* from 2014) are more than a decade old. And CSX hasn't pointed to any subsequent appellate decision endorsing its reading of the Third Circuit's 1993 decision in *Lower Lake Erie*—which is not surprising, given *Klehr*'s intervening clear holding. That makes sense: the legal principles are well-established, including by this Court's decisions in *Zenith* and *Klehr*, and courts apply them consistently and uniformly. *See supra* p. 18. For that same reason, this Court's review would not assist the lower courts.

B. CSX's counterarguments are unpersuasive. *First*, CSX says that "questions about the doctrine arise with great frequency." Pet. 30. But CSX hasn't pointed to a single case from another court of appeals case that presents the question whether inaction *alone* is sufficient to restart a limitations period. Even CSX's favorite case, *Lower Lake Erie*, featured several overt acts within the limitation period. *Supra* pp. 18-20.

Second, CSX claims (Pet. 31) that the Fourth Circuit's opinion undermines the "goals of the antitrust laws." CSX is wrong here too. For one thing, the law provides other mechanisms to ensure that antitrust violations can be rectified even where an injured rival sits on its hands for more than four years. The United States can sue for injunctive relief without being subject to any statute of limitations. *See* 15 U.S.C. § 26. A *customer* could sue following each purchase at supracompetitive prices. *See supra* pp. 13-14. And in cases involving railroads, the Surface Transportation Board can initiate a rate proceeding on its own authority, 49 U.S.C. § 11701(a), or after receiving a complaint, *id.* § 11701(b). In those proceedings, the Board assesses whether the charged rate is "reasonable," *id.* § 10702, and if the rail carrier has "market dominance," *id.* § 10707.

What's more, there are important principles on the other side of the ledger. "Statutes of limitations are not simply technicalities." *Board of Regents of the University of the State of New York v. Tomanio*, 446 U.S. 478, 487 (1980). To the contrary, statutes of limitations "promote justice by preventing surprises," *Order of Railroad Telegraphers v. Railway Express Agency, Inc.*, 321 U.S. 342, 348-49 (1944), and provide "security and stability to human affairs," *Wood v.*

Carpenter, 101 U.S. 135, 139 (1879), by encouraging plaintiffs to sue before evidence becomes stale and memories fade. Those principles are particularly important in antitrust cases, where "tests of legality are often rather vague, where many business practices can be simultaneously efficient and beneficial to customers but also challengeable as antitrust violations, where liability doctrines change and expand, where damages are punitively trebled, and where duplicate treble damages for the same offense may be threatened." Areeda & Hovenkamp, *supra*, ¶ 320a.

Balancing those principles, Congress set a four-year limitations period. Injured rivals cannot sit on their hands for years, with full knowledge of the unlawful action. That would make no sense for an enforcement scheme that relies in part on private attorneys general: It would be "strange to provide an unusually long basic limitations period that could only have the effect of postponing whatever public benefit [private enforcement] might realize." *Rotella v. Wood*, 528 U.S. 549, 558 (2000).

Finally, CSX points to the "hundreds of millions of dollars" at stake in this case. Pet. 32. But that inflated estimate is a problem of CSX's own making. CSX was aware, in 2009, that Belt Line set the rate at $210. CSX threatened to sue, but it did nothing for nine years. And when CSX finally sued, it failed to present a damages model that would allow the jury to award it damages. CSX's claim for outsized harm exists only because it stood idly by for nearly a decade without filing suit.

Beyond all that, CSX's claims lack merit anyway. Belt Line set the $210 rate at cost, and CSX's apparent determination that the $210 price was uneconomical for CSX turned on CSX's own choices to prioritize infrastructure investments at ports other than the Port of Virginia. CSX may regret its choices, but they don't provide any basis for this Court to intervene in a matter that the Fourth Circuit has correctly resolved and that does not implicate any circuit conflict.

CONCLUSION

The petition should be denied.

Respectfully submitted.

James Long
Chapman, IV
W. Ryan Snow
CRENSHAW WARE
& MARTIN, PLC
150 W. Main St.,
Ste. 1923
Norfolk, VA 23510

Counsel for Respondent Norfolk & Portsmouth Belt Line Railroad Co.

Shay Dvoretzky
Counsel of Record
Parker Rider-Longmaid
Steven Marcus
SKADDEN, ARPS, SLATE,
MEAGHER & FLOM LLP
1440 New York Ave. NW
Washington, DC 20005
202-371-7000
shay.dvoretzky@skadden.com

Counsel for Respondent Norfolk Southern Railway Co.

March 17, 2025