No. 24-591

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

PETITIONER'S REPLY BRIEF

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 29.6 of the Rules of this Court, petitioner incorporates by reference the corporate disclosure statement that appears in the petition for a writ of certiorari. No amendments are needed to make that statement current.

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PETITIONER'S REPLY BRIEF

Respondents (collectively "NSR") embrace a rule that allows an antitrust violation to continue indefinitely without challenge by the injured party, even as that violation causes repeated *new* harm, year after year. As part of this approach, NSR also insists that different statute-of-limitations rules apply to customers and competitors, so that customers who suffer new harm from continuing violations may bring suit but competitors who suffer similar harm at exactly the same time may not.

This approach draws wholly irrational distinctions that undermine antitrust enforcement and frustrate statute-of-limitations policies. NSR's approach has been rejected by courts, which hold that "a continuing conspiracy may give rise to 'continually accruing rights of action.'" *Lower Lake Erie*, 998 F.2d at 1173. It has been condemned by the U.S. Department of Justice, which recognizes that injured parties should not "forever los[e] their right to recover damages four years after the conspiracy was formed." U.S. *Giordano* Br. at 32-33. And it is the product of what the district court in this case acknowledged to be "exceedingly complex" decisional rules, such that "[e]ven within one 'type' of case, federal courts often differ as to the correct approach." Pet. App. 107a.

In defending the Fourth Circuit's holding, NSR discounts conflicting case law, misstates this Court's decisions, and mischaracterizes the rulings below. The Court should grant review.

A. The decision below undermines antitrust and statute-of-limitations law.

NSR's opposition confirms that the rule adopted below makes no sense, in two respects.

First, NSR's central defense of the decision below is its insistence that "inaction" cannot retrigger the statute of limitations, even when that inaction involves "'purposeful,' 'intentional,' and 'concerted'" maintenance of anticompetitive behavior that causes repeated new injury within the limitations period—as NSR's conduct inarguably did here. Opp. 17; see *id*. at 12-17.[1] But strikingly, NSR offers no rationale for its distinction between action and intentional, harm-causing inaction.

And there is no intelligible basis for that distinction. The Third Circuit has said exactly that, explaining that "[t]he purposeful nature of * * * inaction * * * obviously constitutes an injurious act" and "certain conspiracies * * * operate *through* inaction." *Lower Lake Erie*, 998 F.2d at 1172 (emphasis added). Moreover, there often is no discernable distinction between action and inaction, a point that certainly is true in this case, where respondents maintained the elevated NIT switch rate every day during the limitations period. See Pet. 21. Although NSR asserts that the Third Circuit did not really mean what it plainly said in *Lower Lake Erie*—a point we address below—NSR does not even attempt to explain *why* the Third Circuit's stated position is incorrect.

Instead, NSR maintains that its approach is supported by *Klehr*. Opp. 13. But NSR is wrong. This Court had no occasion in *Klehr* to address the distinction between action and inaction. Instead, *Klehr* held that "the commission of a separate new overt act generally does not permit the plaintiff to recover for the injury caused by old overt acts *outside the limitations*

[1] Notably, NSR does not deny that its conduct caused, and is still causing, new harm to CSXT every year.

period." 521 U.S. at 189 (emphasis added). As explained in the petition (at 14-15), that holding strongly *supports* our position because CSXT seeks recovery not for "old overt acts outside the limitations period," but for *new* injury that NSR inflicted *in* the limitations period by denying CSXT current access to, and new contracts involving services at, NIT.[2]

Second, in making its argument, NSR recognizes that it has a logical problem. NSR acknowledges the courts' uniform holding that customers of antitrust violators (say, purchasers from price-fixers) may bring suit more than four years after formulation of the anticompetitive practice, even if that practice (say, the fixed price demanded) has remained unchanged, so long as the plaintiff was *injured* within the limitations period. But under that rule, CSXT should prevail here: although NSR formulated its unlawful policy outside the limitations period (just like our hypothetical price-fixers), it continued implementing the policy and caused harm *in* the period (also like the price-fixers). NSR's solution is simply to assert that different statute-of-limitations rules apply to plaintiffs who are customers and those who are competitors of the defendant. Opp. 13-14.

Here too, however, NSR offers no intelligible rationale for its distinction. Its only attempt is the insistence, purportedly grounded on *Berkey*, that customers suffer injury whenever they pay an elevated price, while competitors always suffer injury at the

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[2] NSR implies, misleadingly, that *Klehr* "overturned the Third Circuit's" *Lower Lake Erie* rule. Opp. 13; see *id.* at 11. In fact, *Klehr* disapproved the Third Circuit's "'last predicate act' rule" in RICO cases. 521 U.S. at 186-189. That rule was not applied in *Lower Lake Erie* and has nothing to do with this case.

moment that an exclusionary practice is first formulated. Opp. 13-14. But that proposition—also central to the decision below—misreads *Berkey* and is wrong as a matter of logic. See Pet. 27-30. Obviously, both customers and competitors may (or may not) first suffer injury just after an anticompetitive scheme goes into effect, while sometimes both competitors and customers suffer new injuries from the scheme many years later. There is no difference between them in principle. That is why the Justice Department has rejected NSR's distinction, explaining that "different types of plaintiffs" are *not* "subject to 'different accrual rules[.]'" U.S. *Giordano* Brief at 30-31. NSR makes no response.[3]

NSR does say that customers differ from competitors because harm-causing overt acts occur whenever an anticompetitive practice results in the customer paying an elevated price within the limitations period. Opp. 15-16. But that is no distinction at all: competitors *also* are injured whenever an anticompetitive practice results in *them* losing business within the limitations period. See Pet. 29-30. NSR thus would allow CSXT to sue had it paid the anticompetitive switch rate on a given date in the limitations period; but insists that CSXT may not sue because the anticompetitive price was *so* high that the rate excluded CSXT from NIT altogether, denying it business on that same date. That distinction is irrational.

[3] NSR quotes the government's *Giordano* brief (Opp. 16), but its explanation why it finds that brief helpful is opaque.

The decision below thus sets illogical and anticompetitive antitrust rules. This Court should grant review to clarify the law.[4]

B. The circuits are in conflict.

As shown in the petition, the Fourth Circuit's decision contributes to conflict in the circuits. Pet. 16-26.

1. The decision below cannot be reconciled with the Third Circuit's ruling in *Lower Lake Erie*, as the district court acknowledged. See Pet. 19-20. The rule stated in *Lower Lake Erie* is flatly inconsistent with the holding in this case: the Third Circuit held that "[t]he purposeful nature of the inaction * * * obviously constitutes an injurious act" (998 F.2d at 1172), while the Fourth Circuit held the opposite. NSR nevertheless says that *Lower Lake Erie* is not in conflict with the decision below because "*Lower Lake Erie* stated that it was requiring the plaintiff to identify 'purposeful,' 'intentional,' and 'concerted inaction.'" Opp. 17. But the central allegation in this case is that respondents *did* engage in purposeful, intentional, and concerted inaction by maintaining the anticompetitive switch rate.

NSR also contends that, "[a]lthough the Third Circuit referred to 'inaction'"—recognizing that "'certain

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[4] NSR is wrong in asserting that lower courts "uniformly require an affirmative act within the limitations period" to retrigger that period. Opp. 18. Courts require "overt" acts in that period, but that begs the question whether inactivity may qualify as an overt act—and *Lower Lake Erie* held that it may. The decisions cited by NSR say nothing about the point. See, *e.g.*, *Z Techs. Corp.*, 753 F.3d at 598 (continuing-violation doctrine inapplicable to price increases following merger or acquisition); *Kaw Valley*, 872 F.2d at 933-35 (limitations period starts when anticompetitive policy is final and irrevocable).

conspiracies, such as boycotts, operate through inaction'" (Opp. 19 (quoting 998 F.2d at 1172))—that court *really* had an unexpressed intent to rely on active misconduct by the *Lower Lake Erie* defendants within the limitations period. *Ibid*. But that is not so. The Third Circuit found that the statute of limitations was retriggered because, in part, "dock handling rates * * * remained artificially inflated" during the limitations period—just as here, the NIT switch rate remained artificially inflated into the limitations period. 998 F.2d at 1172. NSR finds no more support in the Third Circuit's observation that the *Lower Lake Erie* jury found commission of an overt act in the limitations period. Opp. 19. The court of appeals' point was that the conspiracy continued into that period, and here there is no dispute that the anticompetitive conduct likewise continued into the limitations period (and still continues today).[5]

Nor is *Lower Lake Erie* inconsistent with *Klehr*, as NSR asserts. Opp. 19-20. As noted above, *Klehr*'s holding is that a plaintiff may not recover for *injury inflicted* outside the limitations period. That says nothing about the issue in *Lower Lake Erie*.[6]

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[5] NSR also is wrong in reading the Fifth Circuit's *Poster Exchange* decision to distinguish between activity and inactivity. Opp. 21-22. That court "simply required the plaintiff to 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 (quoting *Poster Exch.*, 517 F.2d at 128); see Pet. 22. By definition, refusal to deal is inaction.

[6] The Third Circuit did not back away from the considered "inaction" language of *Lower Lake Erie* in *West Penn Allegheny*. Opp. 20. Like *Klehr*, *West Penn Allegheny* had no occasion to address inactivity.

2. NSR does not seriously contest the existence of a circuit conflict on whether reaffirmation of an antitrust violation restarts the limitations period. See Pet. 23-26. And NSR does not even attempt to defend the merits of the "no-reaffirmation" rule applied below.

Instead, NSR argues that the conflict on reaffirmation isn't implicated here because "[t]he Fourth Circuit's reaffirmation holding was an alternative holding." Opp. 22. NSR thus purports to read the decision below as *first* holding that inaction cannot restart the limitations period, and *then* separately holding that "reaffirmations are not overt acts." Opp. 23. But NSR misstates the Fourth Circuit's analysis. As the petition shows (23-24), the court below expressly used the no-reaffirmation rule adopted by some courts as an essential prop for its embrace of the action/inaction distinction. For this reason, the Fourth Circuit quoted no-reaffirmation language from other courts in explaining that its holding on inactivity "tracks with the understanding of other circuits" on inaction. Pet. App. 17a. That was understandable because, as we also showed (Pet. 24), there doubtless is a close relationship between the concepts of inaction and reaffirmation,

NSR appears to recognize that there *is* a circuit split on reaffirmation. Opp. 22; but see *id*. at 23-24. It is wise not to deny existence of that conflict, which was acknowledged by the district court, noted by the Third Circuit, and, very recently, described by the Justice Department. See Pet. 24, 25. And that conflict is not "stale" or "overstated," as NSR would have it. NSR does not dispute that the no-reaffirmation rule governs in at least the Second, Sixth, Tenth, and now Fourth Circuits. See Pet. 23-24 (citing cases). The rule

therefore will control, and may discourage the initiation of suits, in those courts. This Court should settle the rule's validity.

C. There was no alternative basis for the decision below.

NSR argues repeatedly that review of the statue-of-limitations question presented in the petition is unwarranted because both courts below found that an alternative ground—CSXT's assertedly flawed damages model—means the case "could not go to a jury" in any event. Opp. 3; see also *id.* at 1, 4, 7, 10, 11, 25-27. But NSR protests too much; its metronomic repetition of its damages contention suggests, if anything, a lack of confidence in the strength of its other arguments against review.

In fact, the damages discussion below was not a basis for summary judgment or a reason why the case "could not go to a jury." Instead, the district-court language invoked by NSR was directed specifically, and only, at the adequacy of damages evidence relating to exclusion and delay of CSXT trains at NIT in 2015, in CSXT's capacity as customer.

The district court could not have been clearer on this. Its treatment of damages appears under the heading "2015 Conduct" (Pet. App. 113a); after finding that this conduct does not qualify as an overt act, the court concluded that CSXT also could not "present to the jury a non-speculative damages case *arising from the 2015 conduct*." *Id*. at 120a (emphasis added). Lest there be any doubt that it was not addressing CSXT's basic continuing-violation argument, the court went on to add: "In most scenarios where damages are uncertain, the lack of clarity does not rise to the level of a defect that should preclude consideration by a jury;

but here, CSX has pointed to *no* record evidence on which a jury could reasonably estimate the damages *stemming from the short-term delay of trains in 2015* (*as contrasted with the time-barred economic exclusion from NIT*)." *Id*. at 120-121a (second italics added). The court therefore made expressly clear that, if an actionable continuing violation has been established for years within the limitations period, CSXT's market-exclusion damages evidence *is* adequate. NSR distorts this language.

The same is true of NSR's treatment of the Fourth Circuit's damages discussion. That discussion appears in the court's consideration of "CSX's *alternative argument* that other overt acts *committed in 2015 and 2018* entitle it to recover damages for the injuries sustained within the limitations period." Pet. App. 21a (emphasis added). The Fourth Circuit specifically approved the district court's damages discussion *as to 2015*: "As the district court aptly put it, * * * [CSXT is unable] to present to the jury a non-speculative damages case *arising from the 2015 conduct*.'" *Id*. at 23a-24a (emphasis added). This is, manifestly, not a ground for keeping CSXT's broader case from the jury.[7]

D. NSR's remaining arguments against review lack merit.

NSR's formulaic recitation of boilerplate arguments against review add nothing to its case.

First, NSR contends that antitrust continuing-violation cases like this one rarely arise. Opp. 27-28.

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[7] And in fact, there is ample evidence in the record from which a jury could separate out recoverable from unrecoverable damages. See CA JA452 ("Exhibit 11 shows the damages estimated * * * *by year*."); JA465.

Even if that were so, it would not be a reason to deny review here, given that antitrust cases—including this one—almost invariably are massive and expensive undertakings, making it essential that the law governing such cases be clear. But in any event, NSR's assertion of rarity is *not* so. It is belied by the amount of space the district court needed to describe continuing-violation law (taking up a full 25 pages of the petition appendix, see Pet. App. 87a-112a); and by the eleven cases decided just between 2021 and 2022 that are listed in the relevant section of Areeda and Hovenkamp's 2023 treatise supplement. See Phillip Areeda & Herbert Hovenkamp, *Antitrust Law: An Analysis of Antitrust Principles and Their Application* ¶320 (2023 Supplement).

Second, NSR also is wrong in its related contention that the governing "legal principles are already clear." Opp. 27. It is not just CSXT that disagrees with NSR on this. As noted, the district court identified the "exceedingly complex" nature of the continuing-violation rules, on which "federal courts often differ as to the correct approach" (Pet. App. 107a); while Areeda and Hovenkamp recognize that "[t]he cases are inconsistent and often hypertechnical," such that "there is a tendency to bend the [statute-of-limitations] law to take account of the judge's view of the underlying merits." Areeda & Hovenkamp, *supra*, ¶ 320a.

Third, NSR is wrong that "other mechanisms" provide adequate alternatives to an antitrust suit by an injured competitor. Opp. 28. NSR says that suits by the United States are one such mechanism, but the United States itself disagrees; *it* describes such a view as "'contrary to the congressional purpose that private actions serve as a bulwark of antitrust enforcement.'" U.S. *Giordano* Br. at 32-33; see Pet. 31-32. NSR also

says that its customers could sue, but even if that were possible in theory, customers will be reluctant to sue the railroad that controls on-dock access at an essential port.

Fourth, NSR recites general statute-of-limitations policies of repose (Opp. 28-29), but ignores that imposing a limitations bar here would "improperly transform the limitations statute from one of repose to one of continued immunity." *W. Penn Allegheny*, 627 F.3d at 107-08; see Pet. 31. (Of course, repose will not be achieved if, as NSR suggests, customer suits are likely under its rule). And NSR's repeated mantra that CSXT "sat on its hands" (*e.g.*, Opp. 28) shows how *its* approach would distort statute-of-limitations goals. CSXT delayed expensive and disruptive litigation in hopes of resolving its dispute with NSR amicably. That was an especially important concern, given that freight railroads must interact with each other repeatedly when conducting business; indeed, CSXT and NSR jointly own a switching railroad constructed for the purpose of providing on-dock rail access at NIT. Pet. 4. CSXT therefore brought suit only when NSR made clear in 2018 that further overtures to reduce the NIT switch rate would be futile. See Pet. 6 n.1. Injured parties should not be put to the choice of suing prematurely or not at all.

Finally, although NSR minimizes the practical importance of this case, it denies neither the enormous amount at stake nor the documented harm that its violations are causing the broader public. Pet. 32 & n.10.

In all, the Fourth Circuit and NSR would allow harm-causing antitrust violations to continue in perpetuity, without any private remedy. The Court should grant review to reject that rule.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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