No. 24-917

# In the Supreme Court of the United States

DUKE ENERGY CAROLINAS, LLC, DUKE ENERGY CORPORATION, DUKE ENERGY PROGRESS, LLC, PETITIONERS,

*v.*

NTE CAROLINAS II, LLC, ET AL.

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

## REPLY BRIEF FOR PETITIONERS


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## REPLY BRIEF FOR PETITIONERS

In the decision below, the Fourth Circuit held that a plaintiff can establish a Section 2 monopolization claim even if none of the defendant's actions was independently unlawful. That is what NTE argued to the panel, that is how the panel explained its decision, that is what the en banc court divided over, and that is how several courts have already understood the decision below. That is also why this Court's review is needed to bring the Fourth Circuit in line with modern antitrust law.

NTE mostly avoids the actual question presented. Instead, it argues (at 12) that the question is "purely hypothetical" because "multiple individual components" of Duke's conduct were unlawful on their own. But that is not what the Fourth Circuit actually held.

And despite spending pages describing all the ways NTE thinks it would win without the panel's monopoly-broth holding, NTE cannot identify a single theory for which the panel fully applied this Court's conduct-based tests. The Fourth Circuit can do so on remand, once this Court makes clear what the proper Section 2 analysis should look like.

NTE's remaining arguments are unfounded. On the merits, NTE argues (at 2) that a defendant should be liable any time it "exclude[s] competition from a more efficient rival" with "anticompetitive intent." But that general standard cannot be squared with this Court's specific conduct-based tests for monopolization. On the division among the courts of appeals, NTE argues that monopoly-broth claims have been permitted in at least seven circuits for decades. NTE's supposed consensus rests exclusively on decisions before 2003, which addressed monopoly-broth claims without the benefit of *Pacific Bell Telephone Co.* v. *linkLine Communications, Inc.*, 555 U.S. 438 (2009). Virtually all of NTE's outdated circuit precedents have been either outright overruled or substantially narrowed.

Finally, NTE dismisses (at 33) as "tired rhetoric" the widespread concern about the decision below. It is anything but. Other plaintiffs have already latched onto the panel's opinion to restyle routine Section 2 cases as "complex and atypical" schemes free from conduct-based tests. Courts across the country have already grappled with the Fourth Circuit's all-things-considered reasoning. And leading scholars—including one who literally wrote the book on antitrust—have called the decision "a significant departure" from established precedent. Crane & Hovenkamp Br. 2.

## I. The decision below is wrong.

A. The decision below conflicts with this Court's precedents in two ways. First, it embraces the monopoly-broth reasoning directly rejected by *linkLine*. 555 U.S. at 457. Second, it "evade[s] the Supreme Court's doctrinal tests" under Section 2, Pet. App. 147a, which set out clear rules for refusal-to-deal and predatory-pricing claims. NTE has no answer to either problem.

1. NTE argues (at 21) that *linkLine* announced a narrow rule rejecting price-squeeze claims because "both components" of a price-squeeze "fit neatly into pre-established categories." Neither *linkLine's* language nor its reasoning is so limited. *linkLine* rejected the plaintiffs' attempt to "alchemize" a meritless predatory-pricing claim and a meritless refusal-to-deal claim into "a new form of antitrust liability never before recognized." 555 U.S. at 457. It did so because of "the importance of clear rules in antitrust law," the need to provide "safe harbor[s]," and the risk of positioning courts as "'central planners.'" *Id.* at 452-453 (quoting *Verizon Commc'ns Inc.* v. *Law Offs. of Curtis V. Trinko, LLP*, 540 U.S. 398, 408 (2004)). That reasoning applies to any combination of failed Section 2 theories. *See, e.g.*, *In re EpiPen Mktg., Sales Pracs. & Antitrust Litig.*, 44 F.4th 959, 982 (10th Cir. 2022); *see also* U.S. Br. 23, *FCC* v. *Consumers' Rsch.*, No. 24-354 (Mar. 13, 2025) (citing *linkLine* in a constitutional case for the proposition that "[t]wo wrong claims do not make one that is right"). In any event, this case falls comfortably within NTE's limited reading of *linkLine*. The panel here combined the same two claims at issue in *linkLine*: predatory pricing and refusal to deal. Pet. App. 32a.

2. NTE never engages with the other fundamental problem with the Fourth Circuit's reasoning: that it would negate various conduct-based tests. Pet. 17-18. NTE parrots (at 33) the Fourth Circuit's empty promise that this suit is "atypical" and will "not open[] any floodgate." But the claims here are no more "atypical," Pet. App. 29a—and, indeed, are less interrelated—than those in *linkLine* or any other Section 2 case. To underscore the point, NTE spends six pages (at 13-19) arguing that its allegations *do* fit within the established tests that the panel refused to apply, including for predatory pricing, refusals to deal, and sham litigation.

NTE also harps (at 26) on evidence of Duke's supposed "anticompetitive malice," but that does not distinguish this case from any other. Pet. 31. If monopoly broth works here, it works anywhere.

B. With no support in this Court's recent precedents, NTE turns to three other sources: (1) denials of certiorari; (2) the Court's oft-distinguished *Continental Ore* and *Swift* decisions; and (3) a treatise whose author is on Duke's side. None justifies the decision below.

NTE first argues (at 22) that this Court has tacitly endorsed monopoly broth by *not* granting certiorari in cases where antitrust plaintiffs have prevailed. That barely merits a response. Denials of certiorari say nothing about the proper standard for monopolization claims. Moreover, none of the petitions NTE cites presented the question here, for the simple reason that no modern court has so fully embraced the monopoly-broth standard.

Next, NTE falls back (at 23-24) on *Swift & Co.* v. *United States*, 196 U.S. 375 (1905), and *Continental Ore Co.* v. *Union Carbide & Carbon Corp.*, 370 U.S. 690

(1962). Duke already explained the many problems, all of which have been identified by other courts, with NTE's reliance on those decisions. *See* Pet. 21-22; *see, e.g.*, *United States* v. *Google*, 687 F. Supp. 3d 48, 70 (D.D.C. 2023); *see also* Software Industry Br. 10-11; Crane & Hovenkamp Br. 13. But even if NTE offered a plausible alternative reading of those decisions, any confusion in the lower courts heightens the need for review.

Finally, NTE continues to invoke the Areeda & Hovenkamp treatise (at 24) for the proposition that "aggregation is appropriate" any time acts are alleged to be part of the "same scheme." The treatise's author disagrees, explaining that "the attempt at amalgamation in this case reflects a misguided effort to combine two lawful behaviors into a 'monopoly broth.'" Crane & Hovenkamp Br. 12; *see* Pet. 22.

**II. There is an established circuit split.**

NTE insists that the monopoly-broth standard has been the law in at least seven circuits since the 1960s, with none squarely rejecting it. That count rests on NTE's uncritical reliance on outdated decisions and its bad misreading of more recent ones. As Judges Quattlebaum and Richardson pointed out below, the Fourth Circuit has "elected to chart [its] own path in conflict with . . . all our sister circuits that have addressed these issues post-*linkLine*." Pet. App. 153a. There might be room to haggle over whether the Fourth Circuit is on the short side of a 5-1 split, or whether some older decisions make it a 5-2 or 5-4 split, but this Court's review is needed either way.

A. NTE cites (at 27-32) seven circuits that supposedly endorsed the monopoly-broth standard before 2003. That timing is no accident. The following year,

this Court issued *Trinko*, 540 U.S. 398, which discarded open-ended monopolization standards in favor of clear, conduct-based rules. By the time *linkLine* was decided five years later, monopolization law had changed (for the clearer). *See* 555 U.S. at 452.

That doctrinal shift disposes of four of the seven decisions on which NTE relies. The Second, Ninth, and Tenth Circuits have since addressed monopoly-broth claims with the benefit of *linkLine* and decisively rejected them. *See Dreamstime.com, LLC* v. *Google, LLC*, 54 F.4th 1130, 1141-1142 (9th Cir. 2022); *Epipen*, 44 F.4th at 982; *Eatoni Ergonomics*, *Inc* v. *Research in Motion Corp.*, 486 Fed. Appx. 186, 191 (2d Cir. 2012). As for the Seventh Circuit's decision in *City of Mishawaka* v. *American Elec. Power Co.*, 616 F.2d 976 (1980)—which originated the phrase "monopoly broth," *id.* at 986—it recognized a price-squeeze claim directly rejected by *linkLine*, 555 U.S. at 457.

Two of NTE's remaining authorities have nothing to do with this case. Instead, they addressed when "business torts will be violative of § 2." *Conwood Co.* v. *U.S. Tobacco Co.*, 290 F.3d 768, 784 (6th Cir. 2002); *see Retractable Techs, Inc.* v. *Becton Dickinson & Co.*, 842 F.3d 883, 891 (5th Cir. 2016) (explaining that "[t]here has been no Fifth Circuit case since *Page Airways* in which a congeries of business torts was found so egregious as to constitute actionable predatory or exclusionary conduct") (citing *Associated Radio Serv. Co.* v. *Page Airways, Inc.*, 624 F.2d 1342 (1980)); *see also* Crane & Hovenkamp Br. 18.

That leaves NTE with only *LePage's Inc.* v. *3M*, 324 F.3d 141 (3d Cir. 2003), which is among the most criticized decisions in antitrust law. Pet. App. 152a; *see*

Crane & Hovenkamp Br. 16 ("*LePage's* has been heavily criticized by other Circuits, the Antitrust Modernization Commission, [and] the scholarly community."). Although *LePage's* is hard to parse, even it never stated that two lawful acts could be combined to make out a single monopolization claim. *See* 324 F.3d at 154-159 (separately analyzing defendants' loyalty rebates and exclusive-dealing arrangements).

B. When NTE gets around to modern decisions, it argues (at 27) there is no split because every circuit conducts a "holistic review" of the evidence in Section 2 cases. That is wrong, at least to the extent it equates the legal standard applied below with the standard applied in other circuits post-*linkLine*. Pet. App. 139a. The difference among those courts' reasoning is fundamental: the Fourth Circuit first adopted a monopoly-broth standard, then refused to consider whether each act alleged by NTE was unlawful on its own. Pet. App. 29a-32a. By contrast, other courts have first asked whether each of the defendant's acts violated an established test, then refused to add up multiple lawful acts to make out a monopoly-broth claim. *See New York* v. *Meta Platforms*, 66 F.4th 288, 300 n.13 (D.C. Cir. 2023); *Dreamstime.com*, 54 F.4th at 1141-1142; *EpiPen*, 44 F.4th at 982; *Eatoni Ergonomics*, 486 Fed. Appx. at 191; *Intergraph Corp.* v. *Intel Corp.*, 195 F.3d 1346, 1366-1367 (Fed. Cir. 1999).

NTE also claims that the D.C. and Second Circuits have yet to reject monopoly-broth claims in published decisions. The D.C. Circuit did so two years ago in *Meta Platforms*, 66 F.4th at 300 n.13. NTE discounts *Meta* (at 32) because it addressed monopoly broth in "a laches analysis." But that analysis turned entirely on the plaintiff's attempt to establish an "overall course of

monopoly-maintaining conduct"—the exact theory pressed by NTE. 549 F. Supp. 3d at 48. As for the Second Circuit, *Eatoni Ergonomics* is indeed unpublished, but it recited the longstanding rule that monopolization requires more than "a fraction of validity [for] each of the [plaintiff's] basic claims." 486 Fed. Appx. at 191 (quoting *City of Groton* v. *Connecticut Light & Power Co.*, 662 F.2d 921, 928 (2d Cir. 1981)). That is the rule the Fourth Circuit rejected when it freed NTE of the burden of proving any single monopolization claim. Pet. App. 32a.

NTE tries to peel off the remaining circuits by pointing to irrelevant factual differences. It notes (at 30) that the Tenth Circuit in *EpiPen* relied on evidence showing that the defendant's conduct increased competition. But that review of the evidence came *after* the court held that, "[f]or the sake of accuracy, precision, and analytical clarity," it would "evaluate" the defendants' "allegedly exclusionary conduct separately." 44 F.4th at 982. NTE also discards (at 29) the Ninth Circuit's *Dreamstime.com* decision because the plaintiff there put on evidence in one market rather than another. That fact, however, was unrelated to the portion of the opinion rejecting the monopoly-broth standard. *See* 54 F.4th at 1142. Finally, NTE claims (at 32) that the Federal Circuit in *Intergraph* rejected only "assign[ing] fractional liability" to different Section 2 theories. The monopoly-broth theory does the same thing; it just uses the metaphor of ingredients rather than fractions. *See Google LLC*, 687 F. Supp. 3d at 69 (citing *Intergraph*, 195 F.3d at 1346).

**III. This case is an ideal vehicle.**

A. To manufacture a vehicle problem, NTE spends much of its opposition arguing that the question presented is "hypothetical" (at 1, 12), not actually presented (at 12), or even a request for an "advisory opinion" (at 18). No matter the formulation, the sentiment is wrong. The parties litigated the question presented, NTE C.A. Br. 30-44; the court below decided the question across seven pages of analysis, Pet. App. 26a-32a; the en banc court divided over the question, Pet. App. 139a; and resolving the question matters here, Pet. 31-33. True enough, the court of appeals could conclude on remand that some portion of NTE's suit is cognizable under established antitrust tests. But the whole point of resolving the question presented is to require the court to *do the work* of applying those tests, instead of evading them by finding one amalgamated "anticompetitive course of conduct." Pet. App. 136a.

Requiring courts and juries to apply established tests will have at least two obvious effects in this case. First, removing the threat of aggregate liability will reshape any trial. As amici have explained, one of the key weaknesses of the monopoly-broth concept is the amorphous question it asks juries to decide. *See* Chamber Br. 15-16. Removing that question focuses any trial on actual legal tests, even if every individual theory of liability in the case remains. Second, every individual theory of liability should not remain. NTE identifies (at 13-19) four antitrust theories that the court below supposedly blessed. Each one was tainted by the panel's monopoly-broth analysis and would require a far more rigorous analysis on remand.

1. *Structure of Duke's Fayetteville bid*. NTE argues (at 13-14) that the panel allowed a jury to conclude

that the "structure of Duke's offer was anticompetitive." Pet. App. 36a. So it did. But that is because the panel did not feel bound by *Brooke Group Ltd.* v. *Brown & Williamson Tobacco Corp.*, 509 U.S. 209 (1993), claiming that it "does not provide a one-size-fits-all" framework for pricing claims. Pet. App. 41a. On remand, the panel would be required to assess this theory under *Brooke Group*—and it would fail that test. *See* Duke C.A. Br. 32-46; Areeda & Hovenkamp ¶ 749e.

2. *Price of Duke's Fayetteville bid*. NTE argues (at 14-15) that a jury could find that Duke's prices were below-cost under a novel total-system-costs standard the panel waved through. Pet. App. 42a-43a. But the panel never applied the second half of *Brooke Group*'s test: whether there is a "dangerous probability" that the defendant could recoup lost profits by charging higher prices in the future. 509 U.S. at 224. Instead, the panel stated that NTE's allegations were "similar but not identical to 'recoupment' under a traditional predatory pricing framework," which was sufficient when considering Duke's bid as "part of a singular, coordinated anticompetitive effort." Pet. App. 32a, 39a. On remand, the panel would be required to actually apply *Brooke Group*'s recoupment prong—and this theory, too, would fail. *See* Duke C.A. Br. 40-43.

3. *Termination of interconnection*. NTE next invokes a refusal-to-deal theory, arguing (at 16-17) that the panel already found Duke's "anticompetitive malice." But *Trinko* requires more than malice, and the panel expressly disclaimed the need to find that NTE had established *Trinko*'s prerequisites. Instead, it explained that, because of its aggregation standard, it "need not determine" whether Duke's conduct "in

isolation amounted to a § 2 violation under a refusal-to-deal theory." Pet. App. 54a.

4. *Sham litigation*. NTE also speculates (at 17-18) that a jury could find that Duke engaged in sham litigation. But the panel never even mentioned the conduct-based test for sham-litigation claims, which requires objective baselessness. *See Professional Real Est. Invs., Inc.* v. *Columbia Pictures Indus., Inc.*, 508 U.S. 49, 60-61 (1993). Duke's claims could not be objectively baseless when *NTE confessed judgment* on the parties' contract dispute.

All told, it is doubtful that anything would remain of NTE's case without the panel's aggregation theory. What matters for present purposes, however, is that the court below did not feel constrained to apply the applicable conduct-based tests. If this Court reverses, the court of appeals will be required to do so.

B. The decision below is neither "fact-bound" nor "pedestrian," as NTE suggests (at 2). The petition identified several litigants that are already invoking the decision's novel reasoning. Pet. 29; *see* Chamber Br. 5. The importance of the question presented has only grown since then. Last month, one court cited the decision below nine times in a closely watched antitrust case. *See United States* v. *Google LLC*, 2025 WL 1132012 (E.D. Va. Apr. 17, 2025). Another noted the Fourth Circuit's break from its sister circuits. *See American President Lines, LLC* v. *Matson*, 2025 WL 870383, at *10 (D.D.C. Mar. 19, 2025) (rejecting the Fourth Circuit's monopoly-broth standard because the court was "bound to follow the D.C. Circuit's more granular approach"). And plaintiffs have continued to invoke the decision below to press monopoly-broth claims outside the Fourth Circuit. *See, e.g.*, Doc. 76,

*Avangrid Inc.* v. *NextEra Energy, Inc.*, No. 3:24-cv-30141 (D. Mass. Mar. 17, 2025).

C. The only plausible vehicle problem that NTE identifies (at 19-20) is this case's interlocutory posture. But virtually all of this Court's antitrust docket arises from interlocutory decisions. Pet. 33. NTE protests (at 20) that Duke can "easily afford to defend its conduct at trial." This Court does not check earnings reports before granting cases. Instead, prompt review is necessary in the antitrust arena because juries are so unpredictable (particularly under "monopoly broth" instructions) that litigants rarely risk trial; some legal issues are squarely presented and do not benefit from further factual development; and drawn-out uncertainty wastes party and judicial resources. That is all true here.

## CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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