No. 24-917

IN THE

Supreme Court of the United States

DUKE ENERGY CAROLINAS, LLC, ET AL.,
Petitioners,

v.

NTE CAROLINAS II, LLC, ET AL.,
Respondents.

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

BRIEF OF THE COMPUTER & COMMUNICATIONS INDUSTRY ASSOCIATION, ACT | THE APP ASSOCIATION, CHAMBER OF PROGRESS, INCOMPAS, CONNECTED COMMERCE COUNCIL, CONSUMER TECHNOLOGY ASSOCIATION, DEVELOPERS ALLIANCE, NETCHOICE, SOFTWARE & INFORMATION INDUSTRY ASSOCIATION, AND TECHNET AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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INTEREST OF THE *AMICI CURIAE*[1]

The Computer & Communications Industry Association (CCIA) is an international, not-for-profit association representing a broad cross-section of communications, technology, and Internet industry firms that collectively employ more than 1.6 million workers, invest more than $100 billion in research and development, and contribute trillions of dollars in productivity to the global economy. For more than 50 years, CCIA has promoted open markets, open systems, and open networks. CCIA believes that open, competitive markets and original, independent, and free speech foster innovation.

ACT | The App Association (App Association) is a global policy trade association for the small business technology developer community. Its members are entrepreneurs, innovators, and independent developers within the app ecosystem that engage with verticals across every industry. The value of the ecosystem the App Association represents—which it calls the app economy—is valued at approximately $1.8 trillion and is responsible for 6.1 million American jobs, while serving as a key driver of the $8 trillion "internet of things" ("IoT") revolution. Our members lead in developing innovative applications and products across consumer and enterprise use cases, driving the adoption of IoT. App Association members have a strong interest in the appropriate application of antitrust law.

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[1] No counsel for any party authored this brief in whole or in part and no entity or person, aside from *amici curiae*, their members, or their counsel, made any monetary contribution intended to fund the preparation or submission of this brief. All parties received timely notice of *amici*'s intent to file this brief.

Chamber of Progress is a tech-industry coalition devoted to a progressive society, economy, workforce, and consumer climate. Chamber of Progress backs public policies that build a fairer, more inclusive country in which the tech industry operates responsibly and fairly, and in which all people benefit from technological leaps. Chamber of Progress seeks to promote innovation and economic growth, and to empower technology customers and users.

COMPTEL d/b/a INCOMPAS, the Internet and competitive networks association, is the preeminent national industry association representing Internet content companies and competitive communications networks, including providers in the broadband Internet access service marketplace using wired, wireless, and satellite networks. INCOMPAS also represents companies that are providing business broadband services to schools, libraries, hospitals and clinics, and businesses of all sizes; regional fiber providers; transit and backbone providers that carry Internet traffic; and online content companies that offer video programming over BIAS to consumers in addition to other online content such as social media, cloud services, and voice and messaging services. INCOMPAS advocates for procompetitive policies in the U.S., asserting that consumers will be better served by a competitive communications marketplace with more investment and innovation.

The Connected Commerce Council (3C) is a nonprofit organization with a single goal: to promote small businesses' access to digital technologies and tools. 3C provides small businesses with access to the market's most effective digital tools available, provides coaching to optimize growth and efficiency, and cultivates a poli-

cy environment that considers and respects the interests of today's small businesses.

The Consumer Technology Association™ (CTA) is the trade association representing the $535 billion U.S. consumer technology industry, which supports more than 18 million U.S. jobs. CTA's membership is over 1,300 American companies—80% of which are small businesses and startups. CTA also owns and produces CES®, the world's most powerful technology event.

The Developers Alliance advocates on behalf of software developers, the companies they lead, and the industries that depend on them to support the people building the digital future. The Developers Alliance helps policymakers and stakeholders understand the unique and specific needs of the developer workforce and the industries they drive, and advocates for policies that responsibly advance the tech industry, rather than stifle it.

NetChoice is a national trade association of online businesses that works to protect free expression and promote free enterprise online. Toward those ends, NetChoice is actively engaged in litigation, *amicus curiae* work, and political advocacy. NetChoice currently has four active federal lawsuits over state laws that chill speech or stifle commerce on the Internet. At both the federal and state levels, NetChoice fights to ensure that the Internet stays innovative and free.

The Software & Information Industry Association (SIIA) is the principal trade association for the software and digital information industries. SIIA's membership includes nearly 400 software companies, search engine providers, data and analytics firms, and digital publishers that serve nearly every segment of

society, including business, education, government, healthcare, and consumers. It is dedicated to creating a healthy environment for the creation, dissemination, and productive use of information.

TechNet is the national bipartisan network of technology industry chief executive officers and senior executives that promotes the growth of the innovation economy by advocating a targeted policy agenda at the federal and 50-state level. TechNet's diverse membership includes dynamic American companies ranging from startups to the most iconic companies on the planet. These companies represent more than 4.5 million employees and countless customers in the fields of information technology, artificial intelligence, e-commerce, the sharing and gig economies, advanced energy, transportation, cybersecurity, venture capital, and finance.

INTRODUCTION AND SUMMARY OF ARGUMENT

The Fourth Circuit upended established antitrust doctrine by holding that multiple lawful business practices, when combined, can somehow violate the Sherman Act. This "monopoly broth" theory contradicts this Court's precedent and creates the specter of treble damages liability for entirely lawful actions. Left uncorrected, the decision will chill the very procompetitive conduct the antitrust laws were designed to encourage. This Court should grant certiorari to restore the predictability that businesses need to compete vigorously without fear of bet-the-company liability for lawful actions.

For decades, this Court has provided businesses with clear rules to distinguish legitimate competition

from unlawful anticompetitive conduct. A firm may lawfully lower prices, unless they are below cost and constitute predatory pricing. *Brooke Grp. Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209, 222-224 (1993). It may refuse to deal with rivals in all but the rarest circumstances. *Verizon Commc'ns Inc. v. Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398, 407-414 (2004). And it may petition government bodies without antitrust scrutiny unless the petition is objectively baseless. *Pro. Real Estate Invs., Inc. v. Columbia Pictures Indus., Inc.*, 508 U.S. 49, 60-61 (1993). If a business practice does not transgress any of the clear, well-established antitrust standards, then it is lawful—period. A company cannot be held liable under some amorphous "scheme" theory when each challenged practice independently passes muster under this Court's precedent.

The Fourth Circuit ignored this fundamental principle, holding that Duke's price discounts and contract termination could, in combination, violate the Sherman Act, even though neither violated the Sherman Act independently. This Court has expressly rejected such alchemy: "'Two wrong claims do not make one that is right.'" *Pac. Bell Tele. Co. v. linkLine Commc'ns, Inc.*, 555 U.S. 438, 457 (2009). The Fourth Circuit's "monopoly broth" theory resurrects precisely the kind of "amalgamation" of lawful conduct that this Court forbade in *linkLine*. *Id.* at 452.

If left standing, the lower court's decision will chill legitimate competition and innovation nationwide, and it will deter companies from undertaking procompetitive conduct for fear of exposing themselves to the Sherman Act's treble-damage liability. This uncertainty also will deter investment, hamstringing business

growth and harming consumers in the process. And because of the liberal venue rules for antitrust suits, *see* 15 U.S.C. § 22, plaintiffs are likely to increasingly pursue antitrust actions in the Fourth Circuit, subjecting companies that transact any business within the region to the lower court's ill-advised approach to monopoly conduct. Accordingly, this Court should grant review now to prevent the Fourth Circuit's misguided "monopoly broth" theory of antitrust liability from setting the national standard.

ARGUMENT

I. The Fourth Circuit Got It Wrong: Lawful Business Practices Do Not Become Unlawful Merely Through Addition.

The Fourth Circuit incorrectly held that combining *lawful* conduct with other *lawful* conduct can give rise to an *unlawful* anticompetitive scheme under Section 2 of the Sherman Act. That holding defies logic and this Court's precedent. The answer to whether one can create something out of nothing is the same in antitrust law as it is in arithmetic: Zero plus zero equals zero. This Court should grant the petition and correct the Fourth Circuit's sweeping expansion of Sherman Act liability.

A. Section 2 of the Sherman Act prohibits monopolizing or attempting to "monopolize, or combine or conspire … to monopolize any part of the trade or commerce among the several States." 15 U.S.C. § 2. This prohibition is both "broad and general" and "does not … precisely identify the conduct which it proscribes." *United States v. U.S. Gypsum Co.*, 438 U.S. 422, 438, 439 (1978).

To give boundaries to this capacious language and avoid deterring procompetitive conduct, this Court has developed rules-based frameworks for evaluating when efforts to compete vigorously and win market share cross the anticompetitive line. For example, "[t]o avoid chilling aggressive price competition," the Court has "carefully limited the circumstances under which plaintiffs can state a Sherman Act claim by alleging that prices are too low"—the price must be "below … cost[]" and there must be a "dangerous probability" that the business can "recoup its 'investment' in below-cost prices." *linkLine*, 555 U.S. at 451 (quoting *Brooke Grp.*, 509 U.S. at 222-224). Similarly, a company's act of petitioning the government for a decision that would disfavor its competitor will support antitrust liability only if the request is "objectively baseless," because a purely "subjective standard would utterly fail to supply 'real intelligible guidance.'" *Pro. Real Estate Invs., Inc.*, 508 U.S. at 60-61 (citation omitted). And the Court has also carefully cabined the circumstances in which the "refusal to cooperate with a rival" could give rise to antitrust liability, recognizing that "[e]nforced sharing" "is in some tension with the underlying purpose of antitrust law" to reward competitive acumen. *Trinko*, 540 U.S. at 407-408.

The Court's creation of these fixed standards for Section 2 liability carries a clear implication: if the conduct at issue does *not* satisfy the criteria set by this Court's precedent, then it does not violate Section 2—period. And that remains true, even if the plaintiff alleges that the defendant engaged in multiple actions that also do not independently constitute anticompetitive conduct under this Court's standards: "Nothing plus nothing times nothing still equals nothing." *Zenith Radio Corp. v. Matsushita Elec. Indus. Co.*, 513 F.

Supp. 1100, 1311 (E.D. Pa. 1981), *aff'd in part, rev'd in part sub nom. In re Japanese Elec. Prods. Antitrust Litig.*, 723 F.2d 319 (3d Cir. 1983).

This Court held as much in *linkLine*. In that case, linkLine sought to allege a novel "price squeeze" claim under Section 2 by cobbling together allegations of two existing theories of Section 2 liability: (1) a refusal to deal, and (2) predatory pricing. 555 U.S. at 443-444, 451-452. The trouble for linkLine, though, was that it did not allege conduct that could satisfy this Court's demanding standards for antitrust liability under either theory: Pacific Bell "ha[d] no obligation under the antitrust laws to deal with [linkLine]" and linkLine had failed to allege that Pacific Bell's price reductions "met either of the *Brooke Group* requirements" for a predatory-pricing claim. *Id.* at 449, 451. Therefore, linkLine's "price squeeze" claim was "nothing more than an amalgamation of" two "meritless claim[s]." *Id.* at 452. And having failed to allege either form of anticompetitive conduct *individually*, the Court refused to allow linkLine to mold a viable Section 2 claim out of those two failed theories *collectively*: "Two wrong claims do not make one that is right." *Id.* at 452, 457.

That principle aligns with common sense and is necessary to ensure the conduct standards set by this Court have teeth. That is presumably why, as Petitioners recount, every other court of appeals to examine this issue has had no difficulty recognizing that a plaintiff cannot forge a viable antitrust claim by melding together multiple *non*viable theories. *See* Pet. 23-27 (discussing courts of appeals decisions). The leading treatise on antitrust law has likewise explained that a plaintiff cannot rely on a "monopoly broth theory" to aggregate lawful conduct into a scheme—in all in-

stances, "[t]he dominant conduct causing the plaintiff's injury must still be found to be unlawful." Areeda & Hovenkamp, *Antitrust Law* ¶ 310c7 (5th ed. 2021).

B. The Fourth Circuit's decision departs from this common-sense principle, and in doing so, vitiates the lines for regulating unilateral business conduct drawn by this Court. *See* Pet. 19-20.

The Fourth Circuit held that NTE's first theory of liability—based on Duke's discount-pricing to entice Fayetteville to renew its long-term contract—could support Section 2 liability even if that conduct does not qualify as predatory pricing under this Court's precedent. According to the court of appeals, it "need not assess whether the price level of the 2019 Power Supply Agreement …, standing alone, amounted to a violation of § 2 under a strict predatory pricing theory of liability." Pet. App. 42a; *see also id*. at 45a (holding that a "factual dispute exists concerning whether the structure and price level of Duke's offer, *taken together*, had the effect of foreclosing a more efficient rival from competing" (emphasis in original)). Similarly, the court held that it "need not determine, as a matter of law, whether" Duke's termination of the Reidsville Interconnection Agreement "in isolation amounted to a § 2 violation under a refusal-to-deal theory of liability." Pet. App. 54a. Why? Because NTE "claim[ed] that this conduct was but a part of a larger scheme" in combination with Duke's discount-price offer. *Id*. The lower court thus did precisely what this Court in *linkLine* held it may not: transform lawful conduct into a Section 2 violation by "amalgamat[ing]" two independently "meritless" claims. 555 U.S. at 452.

That error is particularly puzzling here, since the Fourth Circuit acknowledged that "the method relied

on by the district court—that 0 + 0 = 0—is a proper approach." Pet. App. 29a. Nonetheless, the panel refused to apply that principle on the belief that (in the panel's view) it governs only when "the alleged conduct falls within … well-defined categories" of business conduct, such as "typical predatory pricing, refusing to deal, price fixing, or dividing markets." *Id.* But NTE itself situated its allegations within such "well-defined categories," and, in any event, such a "typicality" exception completely guts the rule. As the Petition explains, this Court's decisions have rejected the argument that a new case must be an exact factual replica of a prior one before existing doctrinal tests govern. *See* Pet. 17 (discussing cases). If alleging slight factual variations in a purported "scheme" were sufficient to jettison all specific conduct tests as "too rigid" in favor of an amorphous "monopoly broth" theory of liability, Pet. App. 29a, the careful lines established by this Court would be easily evaded.

Contrary to the Fourth Circuit's conclusion (Pet. App. 30a), its aggregation theory finds no support in *Continental Ore Co. v. Union Carbide & Carbon Corp.*, 370 U.S. 690 (1962). In that case, the defendants allegedly engaged in a series of actions to monopolize the market for a certain mineral. *Id.* at 693-694. The court of appeals "assumed that [the defendants] committed the alleged violations of the Sherman Act," *id.* at 697-698, but overturned the jury's verdict of liability by reviewing each of the alleged anticompetitive actions "seriatim" and determining none was independently sufficient to establish *causation*. *Id.* at 698-699. *That* determination is what this Court rejected when it reversed the court of appeals—the disaggregation of *anticompetitive* conduct to avoid a finding of causation. *See id.* at 700 ("Our review of the record

discloses sufficient evidence for a jury to infer *the necessary causal connection* between respondents' antitrust violations and petitioners' injury." (emphasis added)). Nothing in *Continental Ore* suggests that a plaintiff may combine *lawful* conduct to create a Section 2 claim. *See* Pet. 20-21.

This Court's subsequent cases confirm the point. Indeed, just a few years after *Continental Ore*, this Court held that (at least certain) conduct that does *not* violate the antitrust laws under a specific conduct test may not be used to support Section 2 liability, even when lumped together with other actions. In *United Mine Workers of Am. v. Pennington*, 381 U.S. 657 (1965), the plaintiff alleged a conspiracy between a labor union and large coal companies to alter the flow of coal to their advantage. *Id.* at 660-661. "The union" and its "large compan[y]" co-conspirators "agreed not to lease coal lands to nonunion operators" or "to sell or buy coal from such companies," and they also petitioned the Secretary of Labor and the Tennessee Valley Authority for decisions that would harm the large coal companies' competitors. *Id.* After deciding that the defendants' petitioning activity was "not illegal" under the antitrust laws—even if it was "intended to eliminate competition," *id.* at 670—the Court held that the lawful petitioning activity *also* could not be used "as part of a broader scheme [that was] itself violative of the Sherman Act." *Id.*

The lesson from this Court is clear: A plaintiff cannot rely on conduct that is not anticompetitive under the relevant doctrinal test as a basis for establishing liability merely by lumping it together with other *lawful* conduct: 0 + 0 = 0.

II. The Fourth Circuit's "Monopoly Broth" Theory Will Chill Legitimate Business Activity And Create Unpredictable Antitrust Risk In Every Sector Of The Economy.

The Fourth Circuit's decision not only misapplies the law, it undermines the very purpose of the antitrust laws. That purpose—to encourage and preserve vigorous competition—depends on the predictability and certainty that this Court has sought in recent decades to infuse into its antitrust jurisprudence. Unless this Court acts now, the Fourth Circuit's decision will serve as a roadmap for future plaintiffs seeking to bypass the carefully calibrated frameworks this Court has adopted for judging, in the antitrust context, the lawfulness of well-known business activity.

This Court has "repeatedly emphasized the importance of clear rules in antitrust law." *linkLine*, 555 U.S. at 452. That clarity, however, has been hard won, as the Court has, over time, given content to Section 2's "broad and general" language. *U.S. Gypsum Co.*, 438 U.S. at 439; *see Cantor v. Detroit Edison Co.*, 428 U.S. 579, 598-599 (1976) (acknowledging the "oft-repeated criticism" that the "imprecise language of the Sherman Act" makes it "difficult[]" for businesses to "predict[] with certainty its application to various specific fact situations"). The Court has recognized that, absent more precise guidance, "it is sometimes difficult to distinguish robust competition from conduct with long-run anti-competitive effects." *Copperweld Corp. v. Indep. Tube Corp.*, 467 U.S. 752, 767-768 (1984). And that is a significant problem because uncertainty can "chill" businesses from engaging in the kind of vigorous

competition that "the antitrust laws are designed to protect." *Trinko*, 540 U.S. at 414.

This Court's rules-based tests for assessing the lawfulness of common business practices thus provide much-needed clarity—enabling businesses engaged in the rough-and-tumble of legitimate competition to determine in advance whether their practices likely will subject them to the Sherman Act's draconian liability. Pet. 29-30. Indeed, in rejecting the plaintiffs' "price squeeze" claim in *linkLine*, the Court explained that the plaintiffs' "two wrong claims" approach would undermine the certainty created by this Court's clear rules for predatory-pricing claims, which enable "firms [to] know they will not incur liability as long as their retail prices are above cost." 555 U.S. at 453 (citing *Brooke Grp. Ltd.*, 509 U.S. at 223); *see* Pet. 30 (discussing due process concerns created by the Fourth Circuit's decision).

If the Fourth Circuit's decision is allowed to stand, it will have the same forbidden effect as the "price squeeze" claim this Court rejected. By discarding this Court's tried-and-true tests for predatory pricing and refusals to deal, the Fourth Circuit rejected clear standards in favor of an *ad hoc* "monopoly broth" theory not governed by *any* discernable test that would allow regulated parties to know—or even guess—when multiple instances of independently lawful conduct will be deemed to cross the antitrust-liability line. Pet. App. 29a-32a, 34a-35a, 41a-42a, 45a, 54a. As *linkLine* recognized, an approach to antitrust liability that hinges on "the *interaction*" between two different sets of conduct is particularly damaging to predictability, because it requires "courts [to] aim[] at a moving target." 555 U.S. at 453.

In the end, American consumers will be the ones made to suffer. By "promot[ing] robust competition," *N.C. State Bd. of Dental Exam'rs v. FTC*, 574 U.S. 494, 502 (2015), the antitrust laws "safeguard the incentive to innovate," *Trinko,* 540 U.S. at 407, which benefits the public by fostering the production of superior products at lower prices. The cloud of uncertainty generated by the Fourth Circuit's decision throws a wrench in that incentive structure—deterring businesses from engaging in innovative and procompetitive conduct for fear of unwittingly transgressing the federal antitrust laws. It is well accepted in longstanding antitrust jurisprudence that consumers benefit from vigorous competition and that such conduct is not unlawful even if it destroys a rival. *See Brooke Grp. Ltd.*, 509 U.S. at 224 (that business practice "may impose painful losses on its target is of no moment to the antitrust laws if competition is not injured"). The Fourth Circuit's decision creates the specter of treble-damage liability for businesses that undertake independently lawful acts in pursuit of the very competition the antitrust laws are designed to protect. Worse, it does so without clear guidance on when or how that aggregation somehow crosses the line into unlawful conduct giving rise to antitrust liability.

This Court should grant certiorari to prevent these harms from proliferating nationwide. And the risk of that contagion is high. Plaintiffs have routinely sought to impose antitrust liability by aggregating multiple distinct theories of liability into a single monopoly broth claim, and those challenges have implicated a plethora of industries and business contexts, including

the pharmaceutical industry,[2] retail advertising,[3] and power generation.[4]

Many cases, too, have involved antitrust claims against telecommunications and internet companies—for example, allegations that a technology company monopolized the market for "QWERTY smartphone products" through the *combination* of refusing to deal, denying access to an essential facility, and patent infringement. *See Eatoni Ergonomics, Inc. v. Rsch. in Motion Corp.*, 486 F. App'x 186, 190-191 (2d Cir. 2012). More recently, the federal government urged a federal district court to find Google in violation of the Sherman Act by "aggregat[ing] the anticompetitive effects of Google's conduct—*including conduct that is not anti-competitive on its own*." *United States v. Google LLC*, 687 F. Supp. 3d 48, 66-67 (D.D.C. 2023) (emphasis added); *see also* Pet. 25-26.

Before the Fourth Circuit's decision, these attempts to rely on the combination of defective conduct theories typically failed. But the Fourth Circuit's decision is sure to embolden plaintiffs driven by the hope of a treble damages award to advance the same monopoly broth theory. Indeed, as the Petition explains, plaintiffs are already using the Fourth's Circuit's decision to

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[2] *In re EpiPen (Epinephrine Injection, USP) Mktg., Sales Pracs., & Antitrust Litig.*, 44 F.4th 959 (10th Cir. 2022), *cert denied sub nom. Sanofi-Aventis U.S., LLC v. Mylan, Inc.*, 143 S. Ct. 1748 (2023).

[3] *Valassis Commc'ns, Inc. v. News Corp.*, No. 17-cv-7378, 2019 WL 802093 (S.D.N.Y. Feb. 21, 2019).

[4] *City of Groton v. Conn. Light & Power Co.*, 662 F.2d 921 (2d Cir. 1981).

urge district courts across the country to do exactly that. *See* Pet. 29 (collecting cases).

Moreover, the Clayton Act provides what is effectively nationwide venue for Sherman Act cases, broadly allowing suit to be brought in any district where a company "may be found or transacts business." 15 U.S.C. § 22; *see also United States v. Scophony Corp. of Am.*, 333 U.S. 795, 807 (1948) (describing the breadth of this provision). Thus, unless this Court intervenes, courts within the Fourth Circuit could quickly become a magnet for antitrust plaintiffs seeking to challenge vigorous efforts at competition free from the disciplining effects of this Court's rules for evaluating claims of anticompetitive conduct. At a minimum, companies with a national reach will face the risk of being hauled into court within the Fourth Circuit and being subjected to the monopoly broth theory of liability endorsed by the court below. This Court should grant review to ensure that those harms do not take root.

CONCLUSION

The Court should grant the petition for a writ of certiorari.

Respectfully submitted.

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