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 IN OPPOSITION FOR RESPONDENTS

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QUESTION PRESENTED

Petitioners do not challenge the Fourth Circuit's holding that a reasonable jury could find them liable for at least two independently unlawful acts: (1) exclusionary pricing and (2) an unlawful refusal to deal. The question presented is:

Whether a plaintiff is entitled to a trial on a monopolization claim under Section 2 of the Sherman Act when the defendant does not dispute that a reasonable jury could find it liable for multiple, independently unlawful acts.

RULE 29.6 STATEMENTS

Pursuant to this Court's Rule 29.6, respondents NTE Carolinas II, LLC, NTE Carolinas II Holdings, LLC, NTE Energy, LLC, NTE Southeast Electric Co., LLC, NTE Energy Services Co., LLC, and Castillo Investment Holdings II, LLC state as follows:

NTE Carolinas II, LLC is wholly owned by NTE Carolinas II Holdings, LLC, which in turn is wholly owned by Castillo Investment Holdings II, LLC. Castillo Investment Holdings II, LLC has no parent entity and is not a publicly held corporation or entity, and no entity owns 10% or more of its stock.

NTE Energy, LLC has no parent corporation and is not a publicly held corporation or entity, and no entity owns 10% or more of its stock.

NTE Southeast Electric Co., LLC has no parent corporation and is not a publicly held corporation or entity, and no entity owns 10% or more of its stock.

NTE Energy Services Co., LLC has no parent corporation and is not a publicly held corporation or entity, and no entity owns 10% or more of its stock.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

STATUTES AND RULES

ADMINISTRATIVE MATERIALS

OTHER MATERIALS

INTRODUCTION

The Fourth Circuit held that respondents have a triable monopolization case for two independent reasons. First, a reasonable jury could find multiple acts by Duke unlawful under this Court's canonical tests for predatory pricing and refusal to deal. Second, petitioners' conduct involved "a complex or atypical exclusionary campaign, the individual components of which do not fit neatly within pre-established categories." App.29a. Because this Court's specific tests for common types of monopolistic conduct do not cover all the "many different forms" of anticompetitive conduct, which "cannot always be categorized," the court below also considered Duke's course of conduct "as a whole" and found that a reasonable jury could find it anticompetitive. *Id.* (citing *Conwood Co. v. U.S. Tobacco Co.*, 290 F.3d 768, 783-84 (6th Cir. 2002)).

Duke challenges only the second holding, asking the Court to decide whether acts by an undisputed monopolist that are not unlawful when considered in isolation can trigger Sherman Act liability when considered together—in its formulation, whether 0+0=1. But that is a hypothetical question in this case, because Duke does not challenge the Fourth Circuit's holdings that a jury could reasonably find individual components of Duke's scheme unlawful. As the case comes to this Court, the question is instead whether 1+1=0. There is no reason to grant certiorari on that question, because the answer is obviously "no."

Even if the question were properly presented, the court's second holding is correct and creates no circuit split. Neither this Court nor any circuit has held that refusals to deal, predatory pricing, and other common forms of anticompetitive behavior for which this Court has established specific tests are the *only* unlawful acts under Section 2. To the contrary, this Court

recognized in *Trinko* that such tests cannot be exhaustive because "the means of illicit exclusion, like the means of legitimate competition, are myriad." *Verizon Commc'ns Inc. v. Law Offs. of Curtis V. Trinko, LLP*, 540 U.S. 398, 414 (2004). This Court's recent monopolization precedents do not obliterate the fundamental principle—enacted by the Sherman Act and adopted by courts and commentators alike—that a monopolist violates Section 2 when it uses monopoly power to exclude competition from a more efficient rival. It is Duke's position—not respondents'—that would roll back decades of settled precedent.

As petitioners eventually acknowledge, they actually seek error correction. This Court rejects myriad petitions each year claiming that a fact-bound decision contradicts Supreme Court precedent. Duke's hyperbole (at 14) that the Fourth Circuit "would roll back 30 years of antitrust doctrine" and create open season on monopolists is no different. Stripped of its manufactured conflicts and old-hat rhetoric, the petition presents a pedestrian complaint that the court of appeals misapplied the summary-judgment standard in a monopolization case—one that, as the Fourth Circuit held, involved particularly egregious evidence of anticompetitive intent, conduct, and effects. The decision below is correct and does not warrant this Court's intervention.

STATEMENT

A. Factual Background

1. More than 100 years ago, the government awarded Duke the exclusive right to supply the Carolinas with electricity. App.6a, 8a. Duke—a vertically integrated monopolist—generated power at plants it owned; transmitted the power to wholesale customers (like cities) over its high-voltage lines; and then

distributed the power to retail customers over low-voltage lines it also owned. App.6a. Legally, Duke had no competition.

In the 1980s, that changed. *See* FERC, *Energy Primer: A Handbook of Energy Market Basics* 38-39 (Apr. 2020). Regulators forced utilities to separate generation and transmission so that independent power producers ("IPPs") could bring power to market. C.A.App.4450, 4456-4457, 4496. The Federal Energy Regulatory Commission ("FERC") required incumbent monopolists to make their transmission lines available to IPPs on equal terms through standardized interconnection agreements. App.6a. Those agreements cannot be terminated without FERC's permission. App.18a-19a, 21a.

Congress left to antitrust regulators and private enforcement, not FERC, the task of remedying anti-competitive conduct. *See* 16 U.S.C. § 824k(e)(2) (Federal Power Act does not "modify, impair, or supersede the antitrust laws"). In FERC's words: "[W]e are not an antitrust court, and our responsibilities are not those of the Department of Justice." Final Rule, Promoting Wholesale Competition Through Open Access Non-Discriminatory Transmission Services by Public Utilities, 61 Fed. Reg. 21,540, 21,568 (May 10, 1996). Today, Duke still controls more than 90% of the Carolinas wholesale power market. App.6a.

2. Respondent NTE is an IPP. App.5a. NTE's power plants require 28% less fuel than Duke's to generate the same amount of electricity at 30% lower cost. App.10a; C.A.App.4471-4472. When NTE made its Carolinas debut in 2014, the market responded enthusiastically. App.6a-7a, 12a. Nine former Duke customers switched to a new plant NTE constructed in Kings Mountain, North Carolina. App.7a. The

reason: Duke's offer was "simply uneconomic" compared to NTE's. *Id.* (quoting NTE customer).

NTE's inroads caught Duke by "total surprise." App.6a (quoting Duke email). When Duke first learned of NTE's Kings Mountain plant, Duke's Vice President of Wholesale Power Sales "thought it was very doubtful that the threat of Duke customers switching to NTE was real." *Id.* (cleaned up). But when customers started defecting to NTE, Duke executives grew alarmed and started keeping tabs on NTE. *Id.* Their observations confirmed what Duke feared: NTE was Duke's "biggest threat" and had put Duke's "Carolinas Business at Risk." App.9a; C.A.App.4593-4594, 4888. Duke lost only one customer to another generator in the time it lost nine customers to NTE. App.7a. "[B]ut for" NTE's competitive threat, Duke's Carolinas portfolio was "stable." App.9a.

Duke asked itself, "Why are we not competitive?" C.A.App.4484, 7273. It answered: "high system costs" and noncompetitive "[c]apacity cost[s]." *Id.* On Duke's math, its rate "compares unfavorably against IPPs (e.g. NTE)" and its capacity charges "far exceed NTE's." App.13a; *see*, *e.g.*, App.12a (Duke's cost "delta" is "25 to 30 percent"). Moreover, Duke's "competitive disadvantage was not going away soon." App.9a (cleaned up); *see id.* (citing Duke document projecting that Duke's rates would remain much higher than NTE's through at least 2025). The rub: Duke "couldn't chase the price competition and earn a reasonable return." App.7a (cleaned up).

3. Duke's "largest customer risk" was the City of Fayetteville. App.9a (cleaned up). Fayetteville had been a century-long Duke customer and was under a 20-year contract with Duke that would expire in 2032. App.8a. But Fayetteville was considering switching to

NTE—which had announced plans to build a second plant in Reidsville, North Carolina. App.9a. NTE had a narrow window to win Fayetteville's business because Fayetteville's contract with Duke gave Fayetteville the right to terminate in 2024 (rather than 2032), upon notice to Duke in 2020. App.8a.

Given Fayetteville's huge demand (approximately 500 MW) and the timing of its exit option, NTE had a rare opportunity to achieve the scale it needed to compete seriously. App.8a-9a. Duke knew this. Its other large customers were locked into long-term contracts not expiring anytime soon. App.11a. Duke therefore considered Fayetteville its "biggest upcoming battle." *Id.*

4. Unable to compete with NTE on the merits, Duke instead crafted a series of "[c]ombat [s]trategies" to prevent NTE from competing—in Duke's words, to "stop" the "NTE train" and to "ruin NTE's plans." App.12a; C.A.App.5390, 5733, 5906. These strategies fell into two general categories.

Exclusionary Pricing. Duke's first strategy was to leverage its monopoly profits under Fayetteville's existing contract. App.13a-14a. Because Duke previously had no meaningful competition, Duke was charging Fayetteville supracompetitive prices. App.13a, 38a. Even if Fayetteville exercised its early-termination option, it was stuck paying Duke's supra-competitive prices through 2024. App.13a. Duke exploited that leverage to offer something no competitor could—a $42 million discount on Fayetteville's *existing* contract. *Id.* The catch: to obtain that retroactive discount, Fayetteville had to stick with Duke at rates higher than NTE's rates after 2024. *Id.* Internally, Duke said this conditional discount strategy (labeled "blend-and-extend") would allow it to charge "higher prices than offered by the competition." App.13a-14a.

As additional inducement, Duke agreed to *quadruple* the price it paid under Fayetteville's existing contract for excess power capacity from Fayetteville's outdated Butler-Warner plant—which ran for only 14 hours in 2020. App.14a, 19a; C.A.App.4416 n.48. To avoid regulatory scrutiny, Duke omitted the Butler-Warner deal from its FERC rate filings. App.19a, 45a. With the Butler-Warner sweetener, Duke's total discount to Fayetteville was a whopping $325 million. App.13a.

Duke did not plan to bear these costs itself. Instead, it devised a plan to recoup them by raising prices on its *other* wholesale and retail customers—a strategy laid out in an internal whitepaper prepared for Duke's CEO and Board of Directors. App.18a. Only Duke, as the incumbent monopolist, could obtain that cross-subsidization.

Duke's "blend-and-extend" scheme worked. Fayetteville's consultants highlighted Duke's unique ability to "provide[] savings prior to 2024" as the first and largest benefit of sticking with Duke. App.14a. As intended, Duke's offer induced Fayetteville to sign a non-binding letter of intent in May 2019 to stay with Duke past 2024. App.15a.

Foreclosing NTE's Access to Duke's Transmission. Duke knew that Fayetteville's letter of intent was non-binding and that NTE was still courting Fayetteville. C.A.App.6977. So Duke schemed to drive another "nail in NTE's coffin" by interfering with NTE's rights under its FERC-approved interconnection agreement. C.A.App.5062. That agreement required NTE to pay $59 million in installments for Duke to connect NTE's Reidsville plant to the power grid. App.51a. Although NTE would pay for the interconnection infrastructure, Duke would own it. *Id.*

FERC also required Duke to list the project's status on OASIS, an online database informing the public (including customers and investors) about interconnection projects. App.16a.

Duke ginned up a pretextual contract dispute as an excuse to terminate the agreement and kick Reidsville out of the OASIS queue, effectively killing the project. Duke first instructed NTE not to send any more payments under the agreement unless Duke first sent an invoice. App.12a-13a. Duke then skipped two invoices, so NTE (following Duke's instructions) sent no payments. App.12a-13a, 15a. Duke then accused NTE of breaching the agreement,[1] sent letters to NTE falsely stating it had sent the invoices when it hadn't, unilaterally terminated the agreement without FERC's approval, sued NTE for breach of contract, and changed the OASIS status of Reidsville to "canceled." App.16a-19a, 22a. This was a ploy to preclude NTE from competing. One Duke manager sarcastically said he was "so sorry so sad" and asked if Duke could now "kick NTE Reidsville out of the queue." C.A.App.6246. Another was blunter: "breach! breach! punt em!" App.16a.

Duke refused to correct its false OASIS posting until FERC ruled (months later) that Duke's termination was unlawful. App.21a. Duke also intervened in what is ordinarily a rubber-stamp proceeding before the

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[1] Duke's petition says (at 7) that "NTE began to miss payments," but misleadingly omits that Duke instructed NTE not to make payments without invoices, that Duke failed to send invoices, and that Duke later lied about having sent invoices. It also falsely says (at 8) that NTE had to pay the "roughly $7 million in missed payments" before it could suspend the Reidsville project. As the court below recognized, those were "security payments," but NTE needed to pay only actual costs incurred "prior to the suspension." App.15a-16a.

North Carolina Utilities Commission ("NCUC") regarding NTE's permits for the Reidsville plant and falsely reported that NTE lacked customers, even though NTE already had several (including former Duke customers). App.20a.

Duke's actions worked as intended to undermine NTE before its customers, investors, and regulators. One business partner informed NTE that "Reidsville sounds like a good project but we can't make any commitment until the interconnection issues are resolved." *Id.* (cleaned up). Another expressed alarm at Duke's false OASIS posting, asking "[i]s there any way to get the que[ue] back at Reidsville?" C.A.App.7283.

B. Procedural Background

1. Duke sued NTE in North Carolina state court in September 2019, asserting breaches of the interconnection agreement and related claims. App.75a. NTE removed and counterclaimed that Duke monopolized, or attempted to monopolize, the Carolinas wholesale energy market, in violation of the Sherman Act, 15 U.S.C. § 2. App.75a-76a.

The district court granted summary judgment to Duke on NTE's counterclaims. The court found a triable issue of fact as to monopoly power, citing Duke's "durably high market share" "together with the realities of the structure of the relevant market." App.80a-85a. But it found that Duke's conduct was not anticompetitive. App.85a-110a. To reach that conclusion, the court isolated the parts of Duke's overall campaign (the blend-and-extend pricing, termination of the interconnection agreement, sham litigation, and false claims and statements against NTE), pigeonholed each into a discrete theory of liability (refusal to deal, predatory pricing, sham litigation, and defamation), and then determined that none of Duke's actions,

viewed separately, was an independent antitrust violation. App.88a.

2. A unanimous Fourth Circuit panel (Niemeyer, J.) reversed, holding that "many genuine disputes of material fact" precluded summary judgment, regardless of whether Duke's conduct is analyzed in pieces or as a whole. App.57a.

The Fourth Circuit held that a reasonable jury could conclude that several individual components of Duke's scheme were independently unlawful. *First*, "Duke's own documents, paired with NTE's experts' discussions of their anticompetitive effects, leave open a genuine factual dispute as to whether the structure of Duke's Fayetteville offer"—an upfront discount on Fayetteville's *existing* contract together with Duke paying "extraordinarily high prices" to buy power from the obsolete Butler-Warner plant, all conditioned on Fayetteville paying higher prices in the future—"was designed to cut out a more efficient competitor *at consumers' expense*." App.34a-40a. The district court erred by "overlook[ing] altogether" NTE's argument that "the *structure* of Duke's offer was exclusionary," and instead analyzing only the "pricing levels." App.34a-35a.

Second, the price level of Duke's offer could be anticompetitive. App.42a-43a. The district court erred by overlooking that "NTE's expert calculated that Duke's offer fell below its average system cost, which in this case converges with its marginal cost," given the "extremely high fixed costs and very low variable costs . . . characteristic of the wholesale power market." App.42a. The panel observed that "[t]he parties' experts dispute whether the $60 million that Duke earned from Fayetteville in its renewal contract is properly considered 'profit' or is rather a partial

recovery of its marginal costs." App.43a. And it held that this "price-cost allocation dispute should be given to the factfinder to resolve." *Id.*

Third, Duke's interference with NTE's effort to connect its Reidsville plant to Duke's transmission could be anticompetitive. App.46a. Here, too, the district court overlooked "numerous" material factual disputes. App.52a-57a. Among them: Duke claimed that it terminated the interconnection agreement, publicly reported the project was "canceled," and filed a lawsuit to recover money it was owed, only after NTE breached. App.56a. But NTE presented evidence (including Duke's instructions to NTE to withhold payment until Duke sent invoices) that Duke's conduct was pretext to "kick NTE Reidsville out of the queue" to "stop" the "NTE train." App.52a-56a.

The Court concluded: "[I]f a jury were to resolve all factual disputes in NTE's favor, it could reach the conclusion that Duke, like the defendant in *Aspen Skiing [Co. v. Aspen Highlands Skiing Corp.*, 472 U.S. 585 (1985)], 'forsook short-term profits to achieve an anticompetitive end' by unilaterally terminating the Reidsville Interconnection Agreement." App.50a-51a (quoting *Trinko*, 540 U.S. at 409) (cleaned up). By forgoing a $59 million arrangement with NTE that it conceded was "profitable"—with the expectation of recovering its losses through price hikes on captive customers—a reasonable jury could find that Duke unlawfully refused to deal under *Trinko*.

The Fourth Circuit also held that a jury could find Duke's conduct anticompetitive by considering it holistically as "a single campaign to foreclose competition in the Carolinas wholesale power market." App.32a. It stressed that NTE presented evidence from which a reasonable jury could conclude that the

"*combined effect*" of Duke's conduct was to "foreclos[e] a more efficient rival from competing"—just as Duke hoped and planned in its internal documents. App.29a-32a, 45a. The panel also stressed the narrowness of its reasoning, explaining that the facts present "a complex or atypical exclusionary campaign" where it makes sense to view the plaintiff's allegations as a whole (as well as individually) because not all the allegations "fit neatly within pre-established categories" of anticompetitive conduct. App.29a. Still, the Fourth Circuit cautioned that "while courts must not dismember the individual acts of an exclusionary campaign when those acts are interconnected, they also must take care not to aggregate acts that are procompetitive to produce only a semblance of an exclusionary effect when considered together." App.32a.

3. Duke petitioned for rehearing en banc, which the Fourth Circuit denied over a two-judge dissent. App.129a-155a. Judge Niemeyer, writing in support of the denial, emphasized that "numerous material facts were disputed and needed to be resolved before a court could determine" Duke's liability under Section 2. App.130a. Judge Niemeyer warned: "To draw legal conclusions from facts not yet established would be tentative and inefficient, amounting to a speculative use of judicial resources." *Id.* To that end, Judge Niemeyer criticized his dissenting colleagues for not "even recogniz[ing] that facts are disputed" and also for "fail[ing] to address some of the most critical facts for determining § 2 liability, such as the undisputed fact that Duke Energy itself projected that its all-in costs were 30% higher than NTE's, thus making NTE more competitive." App.130a, 136a.

REASONS FOR DENYING THE PETITION

I. THIS CASE DOES NOT PRESENT THE QUESTION PETITIONERS ASK THE COURT TO ANSWER

Contrary to the premise of Duke's question, the panel held that a reasonable jury could find *multiple* individual components of Duke's scheme unlawful. Duke does not ask the Court to review those fact-bound conclusions. Thus, as the case reaches this Court, the question presented is purely hypothetical, and any opinion on it would be advisory. At bottom, the petition is a thinly disguised request for fact-bound error correction.

A. Duke Does Not Seek Review of the Fourth Circuit's Holdings That a Reasonable Jury Could Find Multiple Components of Duke's Scheme Independently Unlawful

The Fourth Circuit found that a reasonable jury could find at least two components of Duke's scheme independently unlawful. And the facts support at least a third:

(1) Duke's renewal to Fayetteville was anticompetitive for two independently sufficient reasons: (a) because its "*structure*" was "exclusionary" and (b) because the price was predatory under the price-cost test of *Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209 (1993). App.42a.

(2) "Duke's unilateral termination of the Reidsville Interconnection Agreement and attendant disruption of NTE's place in the OASIS queue was anticompetitive conduct." App.52a.

(3) Duke falsely told the NCUC "that NTE had breached the Reidsville interconnection agreement" and that the project lacked "wholesale customers." App.133a (Niemeyer, J., supporting denial of rehearing en banc); *accord* App.20a.

Each of those unchallenged conclusions is a fact-bound application of unchallenged legal principles to the summary-judgment record.

1. A reasonable jury could find that Duke's renewal offer to Fayetteville was anti-competitive

a. The Fourth Circuit held that "disputed facts persist regarding whether *the structure* of Duke's" Fayetteville offer "was exclusionary," separate from the "price level" alone. App.42a.

A reasonable jury could conclude that the "structure of Duke's offer was anticompetitive in at least three respects." App.36a. *First*, only Duke could offer a retroactive rebate to induce Fayetteville to accept its supracompetitive renewal prices, impairing "a new entrant's ability to compete on *the basis of efficiency*." *Id.* *Second*, Duke designed its strategy "with the intent of foreclosing any new entrant from ever competing with it as the incumbent monopolist on the merits." App.38a. Duke could repeat the blend-and-extend strategy indefinitely: "The higher Duke set its prices, the more flexibility it would enjoy to cut those prior prices through a conditional retroactive discount," thereby allowing "Duke to perpetually lock out upstart competitors." *Id.* *Third*, Duke's offer would "'shift' the cost of the massive discount 'back to retail and wholesale customers'" in a "cross-subsidization" scheme that would enable Duke to recoup its discounts almost immediately. App.39a. Duke's "packaging structure" therefore resembled a "package discount" and excluded

NTE despite "its superior efficiency" and lower renewal-period pricing. App.35a-36a (citing *LePage's Inc. v. 3M*, 324 F.3d 141, 155 (3d Cir. 2003) (en banc)).

As the panel held, and as Duke does not challenge, *Brooke Group*'s price-cost test does not foreclose a challenge to the *structure* of an exclusionary pricing scheme. The "price-cost test" is "inapposite" when "price itself [i]s not the clearly predominant mechanism of exclusion," such as in cases like this one involving "long-term agreements" with conditional rebates. *ZF Meritor, LLC v. Eaton Corp.*, 696 F.3d 254, 277 (3d Cir. 2012); *see also Spirit Airlines, Inc. v. Northwest Airlines, Inc.*, 431 F.3d 917, 951-53 (6th Cir. 2005) (an offer's structure could be anticompetitive even if "prices exceeded an appropriate measure of average variable costs"). Where challenged conduct "has a significant nonprice exclusionary element, particularly one resembling tying . . . , the appropriate focus . . . is not on whether the price was below cost, but whether the challenged practice as a whole is unreasonably exclusionary." Phillip E. Areeda & Herbert Hovenkamp, *Antitrust Law* ¶ 749a (updated Sept. 2024). The Fourth Circuit held that a reasonable jury could find Duke's conditional discount exclusionary under that unchallenged standard.

b. The Fourth Circuit also concluded that "even . . . on a strict predatory pricing theory, a factual dispute would remain as to whether Duke's pricing was indeed predatory." App.42a.[2] Under that theory, a price is predatory if (1) it is "below an appropriate measure of

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[2] The Fourth Circuit commented that it "*need* not assess whether the price level . . . , standing alone, amounted to a violation of § 2 under a strict predatory pricing theory." App.42a (emphasis added). But it did so anyway and concluded that a material dispute existed for "the factfinder to resolve." App.43a.

. . . costs" and (2) there is "a dangerous probability[] of recouping." *Brooke Grp.*, 509 U.S. at 222, 224.

This Court has never held that there is just one appropriate measure of costs. *See id.* at 222 n.1 ("[W]e again decline to resolve the conflict among the lower courts over the appropriate measure of cost."). Here, the panel determined that average system cost "could be an appropriate measure in markets"—like the wholesale power market—"with extremely high fixed costs and very low variable costs." App.42a-43a; *see also* IIIB Areeda & Hovenkamp ¶ 786, at 376 (4th ed. 2015) ("[A] common characteristic of public utilities is extremely high fixed costs accompanied by very low variable costs. As a result," other measures of costs "may give the public utility defendant too much leeway."). In such markets, "average system cost . . . converges with . . . marginal cost." App.42a. Again, Duke does not challenge that fact-bound conclusion.

Applying that unchallenged standard to the summary-judgment record, the panel concluded that a reasonable jury could find that Duke's offer was below its average system cost, as NTE's expert determined. *Id.* Duke's expert offered a contradictory calculation, App.43a, but the panel correctly held that this fact dispute about "price-cost allocation" is for "the factfinder to resolve." *Id.*

Finally, as the panel held, and Duke (again) does not here challenge, a reasonable jury could conclude that Duke had a dangerous probability of recouping its investment in below-cost pricing. "Duke's internal documents t[old] of a plan . . . to raise prices on other of Duke's wholesale and retail customers to make up for the profit it lost on the Fayetteville deal." App.39a. Those documents show that Duke assumed "costs no longer recovered from Fayetteville" would "shift back to retail and wholesale customers." *Id.* (cleaned up).

2. A reasonable jury could find that Duke engaged in an unlawful refusal to deal

Duke does not ask this Court to resolve any question relating to the legal standard for refusals to deal. The panel's legal analysis on this issue is unchallenged. As the panel recognized, the common thread in this Court's refusal-to-deal precedents is whether the refusal to deal is motivated by anticompetitive malice. *See*, *e.g.*, *Trinko*, 540 U.S. at 409 (no liability where "conduct sheds no light upon *the motivation* of [defendant's] refusal to deal—upon whether [the refusal was] prompted not by competitive zeal but *by anticompetitive malice*") (emphases added); *Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*, 472 U.S. 585, 610-11 (1985) (liability where "Ski Co. was not *motivated* by efficiency concerns," but by "a perceived long-run impact on its smaller rival") (same); *Otter Tail Power Co. v. United States*, 410 U.S. 366, 378 (1973) (liability where "refusals . . . were solely *to prevent municipal power systems from eroding [defendant's] monopolistic position*") (same); *Eastman Kodak Co. v. Southern Photo Materials Co.*, 273 U.S. 359, 375 (1927) (liability where "refusal to sell . . . was *in pursuance of a purpose* to monopolize") (same). Evidence of anticompetitive malice may come from profit sacrifice, *see*, *e.g.*, *Trinko*, 540 U.S. at 409 (forgoing a "*presumably profitable*[] course of dealing suggested a willingness to forsake short-term profits to achieve an anticompetitive end" and "revealed a distinctly anticompetitive bent"), as well as from other sources, *see* IIIB Areeda & Hovenkamp ¶ 772d3, at 233 (*Trinko* left "open the possibility that 'anticompetitive malice' could be established by [other] means").

Applying that unchallenged legal standard to the record, the panel found ample evidence of anti-

competitive intent. In refusing to deal with NTE, Duke forwent more than $50 million in capital improvements that NTE would pay for and Duke would own. A reasonable jury could find that forsaking free infrastructure evinces anticompetitive intent.

The record also contains direct evidence of Duke's anticompetitive intent. Duke admitted internally that it was at a "competitive disadvantage" against NTE that was "not going away soon." App.9a (cleaned up). Duke's employees cheered the possibility of an NTE "breach" so that Duke could "punt em!" from the queue. App.16a. Duke asserts it justifiably could "punt" NTE because of the "missed" payments Duke never invoiced. But the panel concluded that "a reasonable jury could find" this reason pretextual because "Duke actually instructed NTE not to pay those bills and ultimately walked NTE into an apparent breach." App.51a-52a. Duke's very act of manufacturing a breach evinces its anticompetitive intent. *Id.* Duke does not ask this Court to review that fact-bound determination.

3. A reasonable jury could find that Duke engaged in sham litigation against NTE

Duke's scheme comprised conduct beyond exclusionary pricing and refusing to deal. For example, the panel concluded that the evidence also supports finding that Duke lied to the NCUC during the Reidsville permit proceedings. That Duke intervened in the proceedings at all was atypical. App.20a, 133a. Worse, Duke told the NCUC that the Reidsville project lacked "wholesale customers," App.20a, and "that NTE had breached the Reidsville interconnection agreement," App.133a.

Duke knew those statements were false. "Duke knew that [Reidsville] had won the business of some

of Duke's own [wholesale] customers." App.20a. And Duke itself "manufactured" the "sham breach" of the interconnection agreement. App.132a.

A reasonable jury could find that Duke's deceitful behavior constituted sham litigation (though the panel did not apply that test). Litigation is a sham if it is both objectively and subjectively baseless. *See Professional Real Estate Invs., Inc. v. Columbia Pictures Indus., Inc.*, 508 U.S. 49, 60 (1993) ("*PREI*"). Sham litigation is exclusionary conduct if its "purpose [is] to suppress competition." *Otter Tail*, 410 U.S. at 380.

Duke's intervention in the Reidsville licensing proceedings was objectively baseless because "no reasonable litigant could realistically expect success on the merits." *PREI*, 508 U.S. at 60. Duke knew the Reidsville project had customers. And the evidence shows that Duke invited NTE's alleged breach:

- Duke *instructed* NTE not to make any security payments without invoices.
- Duke *admits* it sent no timely invoices.
- Duke then sued NTE for not making the payments for which it sent no invoices.

A reasonable jury could conclude that Duke's participation was subjectively baseless because its express purpose was to kill the Reidsville project to "stop" the "NTE train." App.12a, 16a.

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Because Duke does not challenge these predicate conclusions, granting certiorari would result in an advisory opinion. *See Conway v. California Adult Auth.*, 396 U.S. 107, 109-10 (1969) (per curiam) (petition seeks advisory opinion when "the actual facts simply do not present the issue for which certiorari"

is sought). Here, Duke's question assumes each component of its scheme was lawful ("0+0=1"). But, based on the extensive record discussed above, a jury could find multiple individual components *unlawful*. Therefore, granting certiorari would put the Court "in the unfortunate posture of addressing a situation that does not exist." *Id.* at 110. That is reason enough for the Court to "decline to adjudicate this case." *Id.*

B. Duke's Petition Disguises a Request for Fact-Bound Error Correction

Duke eventually acknowledges (at 31) that it asks the Court to "[c]orrect[] the panel's error." But "error correction . . . is outside the mainstream of the Court's functions and . . . not among the 'compelling reasons' that govern the grant of certiorari." Stephen Shapiro et al., *Supreme Court Practice* § 5.12(c)(3), at 352 (10th ed. 2013). In particular, this Court does not review lower courts' routine applications of the summary-judgment standard to a particular (and, here, unusual) set of facts. *See*, *e.g.*, *Tolan v. Cotton*, 572 U.S. 650, 661 (2014) (Alito, J., concurring in judgment) ("whether the relevant evidence, viewed in the light most favorable to the nonmoving party, is sufficient to support a judgment for that party" is an "utterly routine" question unworthy of certiorari).

Petitioners' error-correction request is especially unworthy because it "seeks [the Court's] intervention before the litigation below has come to final judgment." *Virginia Mil. Inst. v. United States*, 508 U.S. 946, 946 (1993) (Scalia, J., respecting denial of certiorari). The Court "generally await[s] final judgment in the lower courts before exercising [its] jurisdiction." *Id.* Indeed, the question presented is likely to become moot based on further proceedings. Duke could win at trial. Or the jury could find that Duke engaged in one or more individually unlawful acts. There is no

compelling reason for this Court to engage in premature fact-bound error correction when these scenarios would moot Duke's question presented. Indeed, "[t]o draw legal conclusions from facts not yet established would be tentative and inefficient, amounting to a speculative use of judicial resources." App.130a.

Duke complains (at 33) that "[m]onopolization trials . . . impose substantial costs on defendants." But Duke has annual revenues of ***$30 billion*** and can easily afford to defend its conduct at trial. More generally, "juries dispose[] of just 0.53% of filed federal civil disputes,"[3] so Duke's argument would swallow the rule disfavoring review of interlocutory orders.

Contrary to Duke's suggestion (at 31-32), a decision in Duke's favor would not "end [the case] entirely" or even "completely reshape this suit." Again, Duke does not challenge the panel's conclusions that individual components of Duke's scheme may be unlawful. Therefore, ruling in Duke's favor on the question presented would not avoid the need for trial or even materially change the evidence at trial, all of which is relevant to one or more of NTE's other liability theories.

II. THE DECISION BELOW IS CORRECT

A. Duke Misreads This Court's Monopolization Precedents

Certiorari is not warranted because the Fourth Circuit correctly applied this Court's precedents. As this Court has long held—and Duke does not deny—a monopolist can impose textbook anticompetitive harm through a multi-pronged scheme. Sometimes,

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[3] Richard L. Jolly et al., *The Civil Jury: Reviving an American Institution*, Berkeley Law: Civil Just. Rsch. Initiative 4 (Sept. 2021), https://civiljusticeinitiative.org/wp-content/uploads/2021/09/CJRI_The-Civil-Jury-Reviving-an-American-Institution.pdf.

individual components of that scheme will fit neatly into categories for which this Court has developed specific conduct rules. Other times, they won't. Because "the means of illicit exclusion . . . are myriad," *Trinko*, 540 U.S. at 414, some cases will involve "a complex or atypical exclusionary campaign, the individual components of which do not fit neatly within pre-established categories," App.29a. This Court has never held that its specific tests exhaust the universe of unlawful monopolizing conduct.

Duke's petition rests heavily on misreading *Pacific Bell Telephone Co. v. linkLine Communications, Inc.*, 555 U.S. 438 (2009). *See* Pet.19 (urging the "*linkLine* approach"). Duke reads into *linkLine* the broad holding that all anticompetitive conduct must always fit into one of the categories identified in past cases. *linkLine* never made such a sweeping holding. *See* App.137a-138a (*linkLine* "did not suggest . . . that only illegal refusals to deal and predatory pricing could violate § 2"). Rather, as the Fourth Circuit correctly held, *linkLine* refused to recognize a particular "price-squeeze" theory.

Nor does *linkLine*'s reasoning foreclose holistic consideration of petitioners' course of conduct in this case. *linkLine*'s "two wrong claims do not make a right" comment referred to the fact that the plaintiff's "price squeeze" claim was merely an amalgam of a predatory-pricing claim and a refusal to deal in two related markets. Because both components of the price squeeze fit neatly into those pre-established categories, the whole was no more than the sum of its parts. In this case, by contrast, the Fourth Circuit held that the evidence shows a course of conduct for which "the individual components . . . *do not* fit neatly within pre-established categories." App.29a (emphasis added). Nothing in *linkLine* forecloses

liability in that situation based on an evaluation of the entire course of conduct, its purpose, and its effects.

Consistent with *Trinko*'s recognition that anti-competitive conduct comes in "myriad" forms, this Court has not disturbed lower-court decisions finding that anticompetitive conduct need not be crammed into categories already identified in this Court's prior cases. *See Conwood*, 290 F.3d at 783-84, *cert. denied*, 537 U.S. 1148 (2003); *Viamedia, Inc. v. Comcast Corp.*, 951 F.3d 429, 440 (7th Cir. 2020), *cert. denied*, 141 S. Ct. 2877 (2021); App.29a (discussing those cases). In *Conwood*, this Court left undisturbed a Section 2 verdict against U.S. Tobacco—"a conceded monopolist" with 77% market share—based on evidence of U.S. Tobacco's "concerted effort, directed from the highest levels of a national monopoly, to shut [the plaintiff-competitor] out from effective competition." 290 F.3d at 774, 784, 788-89. Likewise, in *Viamedia*, this Court declined to review the Seventh Circuit's holistic assessment that Comcast's scheme to "eliminat[e] . . . its only competitor" violated Section 2. 951 F.3d at 434-35; *see also LePage's*, 324 F.3d at 155, *cert. denied*, 542 U.S. 953 (2004).

In those cases, this Court denied certiorari when faced with evidence of "individual acts [that] [we]re all 'part of the same scheme to perpetuate dominance or drive the plaintiff from the market.'" App.32a (quoting II Areeda & Hovenkamp ¶ 310c7, at 236 (4th ed. 2014)). Here, likewise, Duke "sought to eliminate . . . competition" in that single market "not with greater efficiency, but with deliberately anticompetitive conduct that was designed to exclude NTE" and prevent NTE from "offer[ing] customers in the relevant market lower prices." App.138a. "This is a standard monopolization claim" that does not warrant this Court's review. *Id.*

Duke's reading of *linkLine* not only is wrong on its own terms but contradicts more than a century of this Court's precedents emphasizing that the Sherman Act protects the public from unlawful monopolies even in atypical cases. The Court first established this rule—and explicitly rejected Duke's proposed rule—in *Swift & Co. v. United States*, 196 U.S. 375 (1905). There, the government alleged "a single connected scheme" to monopolize that consisted of "several acts." *Id.* at 395-96. The defendants, like Duke here, argued that each of "the several acts charged [was] lawful," and so they were not unlawful in combination. *Id.* at 396. The Court unanimously disagreed: "[W]hatever we may think of [the constituent acts] separately, . . . they are bound together as the parts of a single plan. *The plan may make the parts unlawful*." *Id.* (emphasis added). And, because the "unity of the plan embraces all the parts," the "scheme as a whole" could be "within reach of the law" even if the individual components were not. *Id.*

The Court (again unanimously) reaffirmed that holding in *Continental Ore*. There, the plaintiffs alleged five separate episodes of anticompetitive behavior. *See Continental Ore Co. v. Union Carbide & Carbon Corp.*, 370 U.S. 690, 698 (1962). The Court called it "improper" to treat the plaintiffs' claims "as if they were five completely separate and unrelated lawsuits." *Id.* at 698-99. Instead, the Court counseled to give plaintiffs "the full benefit of their proof *without tightly compartmentalizing the various factual components and wiping the slate clean after scrutiny of each*." *Id.* at 699 (emphasis added). That holistic analysis is necessary because the "character and effect of a [scheme] are not to be judged by dismembering it and viewing its separate parts, but only by looking at it as a whole." *Id.*

Continental Ore also reaffirmed that a scheme may be unlawful even though its constituent parts are lawful in isolation: "it is well settled that *acts which are in themselves legal lose that character when they become constituent elements of an unlawful scheme*." *Id.* at 707 (citing *Swift*, 196 U.S. at 396; *American Tobacco Co. v. United States*, 328 U.S. 781, 809 (1946); *Steele v. Bulova Watch Co.*, 344 U.S. 280, 287 (1952); *Georgia v. Pennsylvania R.R. Co.*, 324 U.S. 439, 457-58 (1945)) (emphasis added). *linkLine* did not overturn all of these cases *sub silentio*.

Contrary to Duke's contention (at 22, 27), the decision below is consistent with the Areeda & Hovenkamp treatise. "[A]ggregation is appropriate," the treatise says, when the defendant's actions are "part of the same scheme to perpetuate dominance or drive the plaintiff from the market." II Areeda & Hovenkamp ¶ 310c7, at 236. Here, the Fourth Circuit found just that—Duke's conduct comprised one united scheme to drive NTE from the market and perpetuate Duke's dominance.[4] Duke contends (at 22, 27-28) that the treatise's statement that "[t]he dominant conduct causing the plaintiff's injuries must still be found to be unlawful" means that at least one component of a scheme must be unlawful on its own. Not true. That passage is about *causation* and does not gainsay that liability may attach to an

[4] Professor Hovenkamp's *amicus* brief acknowledges that "amalgamation ***is proper*** under limited circumstances," including when some of the underlying conduct is "independently wrongful" under laws *other* than the antitrust laws. Profs. Crane & Hovenkamp Br. 12-13 (emphasis added; capitalization altered). That standard is met here. For example, FERC held that Duke acted unlawfully when it terminated the interconnection agreement and removed Reidsville from the OASIS queue.

anticompetitive scheme without independently unlawful components.

B. This Case Exemplifies Why Holistic Analysis Is Appropriate

The Fourth Circuit correctly recognized that holistic analysis was appropriate on the atypical facts of this case. To start: Duke is no ordinary antitrust defendant. It is "a longtime monopolist holding more than 90% of the [Carolinas] wholesale power market." App.6a. Thanks to its past as a government-backed monopolist, Duke today owns both power plants and transmission lines and serves both wholesale and retail customers. *Id.* Duke therefore has a captive customer base *and* power to stymie rivals' access to the Carolinas wholesale power market.

Entering that market is unusually difficult even without an entrenched monopolist's interference. Barriers to entry are high, as rivals must secure significant upfront financing for capital projects with no short-term payoff. App.81a. And rivals cannot seriously compete unless they achieve minimum efficient scale—hence NTE's need for an "anchor" customer like Fayetteville. App.8a, 54a.

Opportunities to scale are scarce. By design, Duke's contracts with wholesale customers have long terms (20+ years) and staggered expiration dates, and they require several years' notice to terminate. App.7a. As the panel recognized, this allows Duke "to perpetually lock out upstart competitors like NTE with well-timed discounts without seriously threatening its bottom line long term." App.38a. Further, by discounting the *existing* contract of a key customer up for renewal and then recovering that discount through price hikes on other customers, Duke (and only Duke) is uniquely poised to nip *future* competition in the bud. Given these unusual facts, the case should not be limited

exclusively to the tests for mine-run predatory pricing or refusals to deal.

Instead, the Fourth Circuit correctly concluded that, assessing Duke's conduct holistically, a reasonable jury could find Duke engaged in "a single campaign to foreclose competition in the Carolinas wholesale power market" through "the *combined effect* of two main components—Duke's interference with NTE's effort to obtain Fayetteville's business and Duke's disruption of NTE's interconnection efforts." App.32a.

Two categories of evidence provide additional support for this conclusion.

First, Duke's own documents expose Duke's plan to "stop" the "NTE train"—Duke's only serious competitor—because Duke believed it was at a "competitive disadvantage" efficiency-wise, which was "not going away soon." *See supra* pp. 5-8 (describing evidence of Duke's anticompetitive malice); App.57a ("[S]ummary procedures should be used sparingly in complex antitrust litigation where motive and intent play leading roles."). Second, NTE presented evidence of the "*consequences* of Duke's *campaign as a whole*—namely, reduced consumer choice, higher prices in the long term, and market foreclosure." App.28a.

This Court routinely denies certiorari when faced with such evidence. *Conwood* is again informative. As here, *Conwood* involved a defendant's anticompetitive plan to "eliminat[e]" the competition because it could not compete on "efficiency." 290 F.3d at 786-89. And, as here, the components of the defendant's anticompetitive plan (including making misleading statements to retailers and abusing its position as "category manager" to foreclose rivals from distribution) together produced clear anticompetitive effects despite not fitting neatly into pre-existing doctrinal categories. *See id.* at 783-88.

In short, the Fourth Circuit correctly applied this Court's precedents in holding that the conduct tests are not exhaustive. Instead, they leave some flexibility to holistically evaluate "uncommon" forms of anticompetitive conduct that do not fit into pre-existing categories. *See supra* pp. 20-25. No reason exists to review the Fourth Circuit's application of that standard to the facts of this case.

III. THERE IS NO CIRCUIT SPLIT ON PETITIONERS' QUESTION

Even treating the question presented as properly raised, Duke's claim (at 4) of a "5-1 split" is inaccurate. In reality, the circuits are unanimously (8-0) aligned with the decision below in holding that holistic review of anticompetitive conduct is appropriate in cases that do not fit neatly into prescribed categories. No circuit has interpreted *linkLine* to mean that this Court's conduct tests are exhaustive.

A. Seven Circuits Agree with the Fourth That Anticompetitive Schemes Require Holistic Analysis, Not Individually Unlawful Components

Duke's petition ignores *seven* circuits that agree with the Fourth that anticompetitive schemes do not require individually anticompetitive components.

Second Circuit. In *City of Groton v. Connecticut Light & Power Co.*, 662 F.2d 921, 928-29 (2d Cir. 1981), the Second Circuit held that courts must analyze a defendant's conduct holistically to determine "whether, qualitatively, there is a 'synergistic effect'" among the various components of the scheme.[5] It did

[5] *Northeastern Telephone* adopted the same standard despite its fact-specific determination that the plaintiff lacked any evidence at all for certain conduct. *Northeastern Tel. Co. v. AT&T Co.*, 651 F.2d 76, 95 n.28 (2d Cir. 1981).

not require schemes to have individually unlawful components.[6]

Third Circuit. In *LePage's*, the en banc Third Circuit affirmed Section 2 liability because "[t]he relevant inquiry is the anticompetitive effect of 3M's exclusionary practices considered together," not in isolation. 324 F.3d at 162.

Fifth Circuit. In *Associated Radio Service Co. v. Page Airways, Inc.*, 624 F.2d 1342 (5th Cir. 1980), the Fifth Circuit held that disparate and individually lawful acts can combine to create Section 2 liability: "Probably no one of the instances of improper conduct, standing alone, would lead to section 2 liability. Taken together, however, they show a pattern of exclusionary behavior sufficient to support the jury's verdict." *Id.* at 1356.

Sixth Circuit. In *Conwood*, the Sixth Circuit rejected U.S. Tobacco's argument that it engaged in "isolated and sporadic" business torts that did not individually or collectively violate Section 2. 290 F.3d at 783-84.

Seventh Circuit. In *City of Mishawaka v. American Electric Power Co.*, 616 F.2d 976, 986 (7th Cir. 1980), the Seventh Circuit affirmed Section 2 liability even though it "might agree . . . that no one aspect" of the defendant's anticompetitive scheme "standing alone is illegal" because "[i]t is the mix of the various ingredients . . . in a monopoly broth that produces the unsavory flavor." *Id.*; *see also Viamedia*, 951 F.3d at 453 ("the purpose of identifying . . . categories of

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[6] Duke contends (at 26-27) that *Eatoni Ergonomics, Inc. v. Research in Motion Corp.*, 486 F. App'x 186 (2d Cir. 2012), states the Second Circuit's actual position. But *Eatoni* is "an unpublished decision," Pet.26, with no "precedential effect," 2d Cir. Loc. R. 32.1.1(a).

conduct" is merely "to help determine the presence or absence of harmful effects"—"the reason for any antitrust concern") (cleaned up).

Ninth Circuit. In *City of Anaheim v. Southern California Edison Co.*, 955 F.2d 1373, 1376 (9th Cir. 1992), the Ninth Circuit stated that, while it is "much more difficult to find overall wrongdoing" in a Section 2 case if "all we are shown is a number of [individually] perfectly legal acts," it is possible. And, while the court found no Section 2 violation in that particular case, it "emphasize[d]" that it had reached that conclusion only after "also ruminat[ing] upon the effect of combining" the individual components of the alleged scheme. *Id.*

The petition ignores *City of Anaheim* and attempts to manufacture a conflict by mischaracterizing *Dreamstime.com, LLC v. Google LLC*, 54 F.4th 1130 (9th Cir. 2022). Duke misquotes the Ninth Circuit's statement that, "'because each individual action alleged by Dreamstime does not rise to anticompetitive conduct . . . , their collective sum likewise does not.'" Pet.24 (quoting *Dreamstime.com*, 54 F.4th at 1142) (cleaned up). Duke selectively omits the words covered by the ellipsis: "in the relevant market." *Dreamstime.com*, 54 F.4th at 1142. In so doing, Duke conceals the Ninth Circuit's actual holding, which was that "assessing the anticompetitive effect of Google's predatory acts taken together as an overall scheme" did not change the outcome, because none of the plaintiff's allegations asserted "anticompetitive conduct *in the online search advertising market*." *Id.* at 1140-42 (emphasis added). The plaintiff's problem was that it "expressly disclaimed" another market (general online search) in which it *had* plausibly pleaded anticompetitive harm. *Id.* at 1140. Far from rejecting a holistic

analysis, *see* Pet.24, *Dreamstime* applied one and found that "the alleged actions (individually and taken together) did not harm competition in" the only market the plaintiff alleged. *Dreamstime.com*, 54 F.4th at 1140-41.

Tenth Circuit. In *Aspen Highlands Skiing Corp. v. Aspen Skiing Co.*, 738 F.2d 1509 (10th Cir. 1984), *aff'd*, 472 U.S. 585 (1985), the Tenth Circuit affirmed a jury verdict finding unlawful monopolization where the defendant engaged in a six-part anticompetitive scheme. The defendant—like Duke here—argued that "none of [the six components] created an issue for the jury because none w[as] anti-competitive" on its own. *Id.* at 1517. The Tenth Circuit disagreed: "It is enough that *taken together they are sufficient* to prove the monopolization claim." *Id.* at 1522 n.18 (emphasis added).[7]

Duke mistakenly argues (at 21, 24) that *In re EpiPen Marketing, Sales Practices & Antitrust Litigation*, 44 F.4th 959 (10th Cir. 2022), conflicts with the decision below. But *EpiPen* asked a "simple question"—"Can a plaintiff present a triable issue of monopolization without offering any evidence of actual or threatened consumer harm?"—and answered it "no." *Id.* at 964. The Tenth Circuit found "uncontroverted" evidence that the defendants' conduct was actually procompetitive and resulted in the *plaintiff* gaining majority market-share. *Id.* at 964, 989-90, 999. Further, the defendants' actions comprised "common

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[7] This Court affirmed and cited approvingly this portion of the Tenth Circuit's analysis. *See Aspen Skiing*, 472 U.S. at 599 ("[T]he Court of Appeals considered the record 'as a whole' and concluded that it was not necessary for Highlands to prove that each allegedly anticompetitive act was itself sufficient to demonstrate an abuse of monopoly power.").

forms" of conduct "of little antitrust concern" like "short, easily terminable exclusive agreements," which the plaintiff's own expert conceded *lowered* consumer prices. *Id.* at 982, 988-89. By contrast, the Fourth Circuit found Duke engaged in "atypical" conduct and emphasized the anticompetitive "*consequences* of Duke's *campaign as a whole*—namely, reduced consumer choice, higher prices in the long term, and market foreclosure." App.28a, 29a.[8]

B. Duke Mischaracterizes D.C. and Federal Circuit Precedent

Contrary to Duke's assertion (at 25-26), the D.C. and Federal Circuits do not require anticompetitive schemes to contain individually unlawful components.

Duke misreads *United States v. Microsoft Corp.*, 253 F.3d 34 (D.C. Cir. 2001) (en banc) (per curiam). There, the plaintiffs argued that "a monopolist's unilateral campaign of acts intended to exclude a rival that in the aggregate has the requisite impact warrants liability even if the acts viewed individually would be lawful." *Id.* at 78 (cleaned up). But the D.C. Circuit declined to address that argument because the only act the district court identified was "Microsoft's expenditures in promoting its browser." *Id.* "Because the District Court identifie[d] no other specific acts," there was no "course of conduct" to analyze. *Id.* In other words, the D.C. Circuit found no course of

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[8] Even if *Dreamstime.com* and *EpiPen* conflicted with the earlier holdings in *City of Anaheim* and *Aspen Highlands Skiing*, that would at most create intra-circuit conflicts unworthy of review. In the Ninth and Tenth Circuits, a later panel may not overrule a prior panel. *See Miller v. Gammie*, 335 F.3d 889, 899 (9th Cir. 2003) (en banc); *United States v. Mason*, 84 F.4th 1152, 1155 (10th Cir. 2023). So *City of Anaheim* and *Aspen Highlands Skiing*—which agree with the decision below—govern.

conduct as a factual matter and therefore declined to consider the legal point.

Duke also relies on two recent district court opinions. Pet.25-26 (citing *New York v. Facebook, Inc.*, 549 F. Supp. 3d 6 (D.D.C. 2021), and *United States v. Google LLC*, 687 F. Supp. 3d 48 (D.D.C. 2023)). But district court decisions do not create circuit splits. Nor does footnote 13 of the D.C. Circuit's opinion affirming *Facebook*. *See New York v. Meta Platforms, Inc.*, 66 F.4th 288, 300 n.13 (D.C. Cir. 2023). That footnote was part of a laches analysis explaining why "a course of conduct that remains ongoing" did not excuse New York's failure to challenge Meta's "Instagram and WhatsApp acquisitions" for many years; it was not a rejection of "course of conduct" liability. *Id.* (cleaned up).

The Federal Circuit likewise does not conflict with the decision below. *Intergraph Corp. v. Intel Corp.*, 195 F.3d 1346 (Fed. Cir. 1999), supports NTE, not Duke. There, the plaintiff wanted to assign numerical values to each of its legal theories with the idea that they could add up (mathematically) to a claim. *Id.* at 1366-67. The Federal Circuit disagreed, holding that courts should not assign fractional value to "pieces of legal theory" to be "added up." *Id.* The decision below agrees. It did not assign fractional liability to NTE's refusal to deal, predatory pricing, and anticompetitive structure theories and add them together. Instead, the panel concluded that a reasonable jury could find that Duke's singular scheme caused anticompetitive effects and excluded a more efficient competitor.

IV. PETITIONERS' PARADE OF HORRIBLES IS NO REASON TO ENGAGE IN ERROR CORRECTION

Duke trots out the same defense playbook that monopolists have employed for decades: malign ordinary-course antitrust enforcement as a threat to business and a boon to the plaintiffs' bar. The Court routinely rejects petitions premised on far-fetched parades of horribles, and it should do so again here. The facts here are exceptional: clear and repeated anticompetitive acts by an undeniable monopolist resulting in customers across the Carolinas paying supracompetitive prices for wholesale electricity. The Fourth Circuit's holding that this evidence at least creates a triable dispute will not cause the sky to fall.

Indeed, the Fourth Circuit emphasized the tough road that plaintiffs still face in monopolization cases, acknowledging this Court's "specific rules for *common* forms of alleged misconduct." *Novell, Inc. v. Microsoft Corp.*, 731 F.3d 1064, 1072 (10th Cir. 2013) (emphasis added). What Duke refuses to acknowledge, however, is this Court's equally important caveat that those rules cannot be exhaustive, because "the means of illicit exclusion, like the means of legitimate competition, are myriad." *Trinko*, 540 U.S. at 414; *accord Conwood*, 290 F.3d at 783-84. The Fourth Circuit's holding that this case is one of those "atypical," App.29a, "uncommon," App.32a, cases is merely an application of settled law, not the opening of any floodgate.

Duke's assertion, Pet.29, that the Fourth Circuit's decision will "harm consumers and businesses" recycles the tired rhetoric of all defense cries for fact-bound error correction. Plaintiffs will not survive motions to dismiss and for summary judgment merely by incanting "monopoly broth." Plaintiffs still must

plausibly plead or present evidence of a concerted scheme, as well as harm to competition and other requisites of Section 2 liability. Prohibiting multi-pronged schemes with explicitly anticompetitive ends and effects is necessary to avoid exempting the worst monopolists from liability for conduct that harms competition and consumers.

Duke's assertion of "serious due process concerns about fair notice" is not credible. Pet.30. Monopolists have had decades' notice that conduct is anticompetitive if "a firm has been 'attempting to exclude rivals on some basis other than efficiency.'" *Aspen Skiing*, 472 U.S. at 605 & n.33 (quoting Robert H. Bork, *The Antitrust Paradox* 138 (1978)); *see* Richard A. Posner, *Antitrust Law* 194-95 (2d ed. 2001) (conduct is anti-competitive if it "is likely in the circumstances to exclude from the defendant's market an equally or more efficient competitor"). The decision below merely reaffirms decades of precedent judging monopolists' conduct holistically when they do not fit neatly into pre-established categories.

Finally, the Fourth Circuit's legal standard is not "utterly unworkable" "[f]or courts and juries." Pet.30. Courts and juries have adjudicated monopolization claims for decades under this Court's longstanding precedents and the unanimous case law of the circuits permitting holistic evaluation of monopolistic courses of conduct. There has been no tidal wave of meritless monopolization lawsuits (much less verdicts). Indeed, Duke's petition says so. Pet.2 ("Before the decision below, that maneuver failed every time.").

Ultimately, Duke asks this Court to review what it views as an aberrant interlocutory decision applying settled law to a particularly egregious summary-judgment record. Consistent with its usual practice, this Court should reject that plea.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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