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

SUPPLEMENTAL BRIEF FOR PETITIONERS

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The United States describes this case (at 3) as "highly fact-bound and case-specific," an unexceptional summary-judgment decision that does not implicate any important question of antitrust law. Nothing to see here, says the government.

It has told other courts precisely the opposite. Federal antitrust regulators are now embroiled in a series of high-profile monopolization suits against the world's largest tech companies. Because a traditional rules-based approach would make those suits more challenging, DOJ and the FTC have jettisoned it. In its place, both agencies are actively attempting to revive the

monopoly-broth theory—a relic of a bygone era that allows courts to sidestep established Section 2 tests any time a plaintiff alleges an "anticompetitive course of conduct." ECF No. 149, at 6, *FTC* v. *Amazon.com, Inc.*, No. 2:23-cv-1495 (W.D. Wash. Feb. 6, 2024). The decision below is the lone modern authority on that point, and the United States has seized on it from the moment it was handed down. The FTC filed a supplemental-authority letter in *Amazon* within the week, arguing that the Fourth Circuit announced a "legal standard" that requires courts to consider a defendant's conduct "as a whole." ECF No. 267, *Amazon*, *supra*. The next month, DOJ opposed Apple's motion to dismiss by citing the decision below nine times, largely for the proposition that "specific conduct tests [are] too rigid" "for a complex or atypical exclusionary campaign." ECF No. 106 at 9-10, 19, 23, 25, *United States* v. *Apple*, No. 2:24-cv-4055 (D.N.J. Sept. 12, 2024).

The government does not mention its position in these cases and others. Nor does it mention that lower courts have already understood the panel decision to establish a new rule of law, dividing the Fourth Circuit from its peers. *See, e.g.*, *American President Lines, LLC* v. *Matson, Inc.*, 775 F. Supp. 3d 379, 402 (D.D.C. 2025) (contrasting the Fourth Circuit's course-of-conduct standard with "the D.C. Circuit's more granular approach"); *Reiss* v. *Audible, Inc.*, 2025 WL 1654643, at *7 n.4 (S.D.N.Y. June 11, 2025) (describing the Fourth Circuit as the "one Court of Appeals" that applies a course-of-conduct theory). Nor does it mention the en banc concurrence and dissent, which battled over the proper reading of this Court's instruction in *Pacific Bell Telephone Co.* v. *linkLine Communications, Inc.*, 555 U.S. 438, 452 (2009), that "plaintiffs

may not take claims that fail [doctrinal] tests" and "amalgat[e] them with a 'course of conduct' label." Pet. App. 148a.

The government does not want to talk about any of that. What it wants is for this Court to deny review, so that it can continue using the panel's favorable (and wrong) legal standard to go after its chosen targets. This Court should not take the bait. The panel decision is a suitable vehicle under any fair-minded reading, it implicates a clear circuit split, and it is egregiously incorrect under this Court's modern precedents. The government and the plaintiffs' bar are attempting to roll back decades of this Court's efforts to bring structure to antitrust law. Whether that campaign is right or wrong, it merits this Court's attention.

A. The Decision Below Is An Excellent Vehicle.

The government spends most of its breath (at 12-17) manufacturing vehicle problems. It acknowledges (at 10-11) that the panel's aggregation approach disregarded both the settled *Brooke Group* predatory-pricing test and the settled *Trinko* refusal-to-deal test. But the government nonetheless contends that Duke raises the wrong question, the decision below is fact-bound, and Duke's "anti-aggregation principle" is unclear. Those contentions are meritless.

1. The government first argues (at 13) that this case is not a suitable vehicle for "reviewing the court of appeals' approach to aggregation" because Duke did not separately challenge the court's "subsidiary holdings about the inapplicability of this Court's established doctrinal categories." That argument misapprehends both the Fourth Circuit's decision and Duke's petition.

According to the panel, there was no need to apply this Court's "specific conduct tests" because NTE had

alleged "a singular, coordinated anticompetitive effort." Pet. App. 29a. The panel then relied on that aggregation holding to sidestep this Court's conduct-based tests when analyzing each of Duke's separate acts. *Id.* at 42a (predatory pricing); *id.* at 54a (refusal to deal). As that reasoning makes plain, there is no difference between the panel's "approach to aggregation" and its "subsidiary holdings": the monopoly-broth standard *was* the reason for discarding conduct-based tests. The en banc dissenters understood that, explaining that the panel's approach "allows plaintiffs to recharacterize antitrust claims not only to evade the Supreme Court's clear tests, but also to amalgamate them into a monopoly broth." *Id.* at 139a.

That is the exact problem raised in Duke's petition. Duke explained (at 19) that the Fourth Circuit had relied solely on allegations of a "coordinated anticompetitive effort" to sidestep this Court's "existing doctrinal tests." It further explained (at 28) that, if "allegations about a single bid to a single customer and an unrelated contract dispute" "are 'complex or atypical,' the same could be said of any of the cases" that have properly rejected a monopoly-broth standard. Because incanting the word "complex" cannot be enough to cast off conduct-based tests, this case is a proper vehicle for determining whether the monopoly-broth standard is correct.

2. The government next asserts (at 14) that Duke's challenge is fact-bound because the Fourth Circuit agreed that "if none of the acts challenged by the plaintiff are anticompetitive, an aggregated claim must fail." That reasoning is circular. The panel used aggregation to find the conduct "anticompetitive" in the first place. Perhaps the government believes that Duke's individual acts were anticompetitive on their own. But that is

certainly *not* what the panel held. *See, e.g.*, Pet. App. 29a (explaining that "specific conduct tests would prove too rigid" when "a court is faced with allegations of a complex or atypical exclusionary campaign").

Judges and litigants—including the government—have had no trouble understanding the panel's broad monopoly-broth holding. District courts have observed that the Fourth Circuit's aggregation standard departs from the "category-by-category approach" used in other circuits. *Matson*, 775 F. Supp. 3d at 402; *Reiss*, 2025 WL 1654653, at *7 n.4; *see 2311 Racing LLC* v. *NASCAR, LLC*, 2025 WL 3085776, at *6 (W.D.N.C. Nov. 4, 2025) (Fourth Circuit requires "aggregat[ing] two or more practices" that are "lawful individually"). And both the FTC and DOJ have relied on the panel's decision as support for a monopoly-broth "legal standard." ECF No. 267, *Amazon*, *supra*; *see* ECF No. 138, at 14, *FTC* v. *Deere & Co.*, No. 3:25-cv-50017 (N.D. Ill. Apr. 28, 2025).

3. The government also feigns ignorance (at 15-16) about Duke's "alternative to the court of appeals' approach." Duke's proposed rule is *linkLine*'s: if conduct-based tests apply, run them first. If, after doing so, a court cannot identify a single anticompetitive act, it cannot add up the failed remnants. Pet. 1, 14, 18-19, 25.

This Court announced that test in even simpler terms in *linkLine*: "two wrong claims do not make one that is right." 555 U.S. at 457. That is the test applied by other courts—including in recent, well-reasoned decisions by Judges Boasberg and Mehta. *New York* v. *Facebook, Inc.*, 549 F. Supp. 3d 6, 46-47 (D.D.C. 2021), *aff'd* 66 F.4th 288 (D.C. Cir. 2023); *United States* v. *Google LLC*, 687 F. Supp. 3d 48, 70 (D.D.C. 2023). That is the test applied by the district court here: "In simple

mathematical terms, 0 + 0 = 0." Pet. App. 88a. That is the test embraced by the en banc dissenters. *Id.* at 148a-149a. And that test would have changed the outcome here, as the panel acknowledged that it *could have* assessed Duke's actions under traditional predatory-pricing and refusal-to-deal frameworks. *Id.* at 42a, 46a; *see* Reply 9-11.

The government protests (at 15) that the petition "does not ultimately appear to endorse a categorical no-aggregation rule." But Duke clearly explained the limited context where aggregation is warranted: where an individual act is anticompetitive under the relevant conduct-based test but fails to tie up a sufficient portion of the market. Pet. 21 (discussing exclusive-dealing claims). Courts and scholars have understood the distinction. *See Facebook,* 549 F. Supp. 3d at 46-47; Daniel A. Crane, *Does Monopoly Broth Make Bad Soup?*, 76 Antitrust L.J. 663, 670-672 (2010); Areeda & Hovenkamp, *Antitrust Law* § 310c2 (5th ed. 2024) (rejecting aggregation where "no cardinal unit in one" "can be added to any unit in another to produce a meaningful sum"). Surely federal antitrust regulators from both the FTC and the Antitrust Division can likewise discern the difference between an exclusive-dealing case and a monopoly-broth standard.

B. The Decision Below Implicates An Established Circuit Split.

The panel's monopoly-broth standard "isolate[s]" the Fourth Circuit from five of its "sister circuits." App. 139a; *see* Pet. 24-28; Reply 7. The government tries (at 17-20) to close that gap in three ways. First, it narrows the cases on the long side of the split. Second, it reframes the issue at a high enough level of generality to paper over the Fourth Circuit's outlier position. Third, it argues that no other court of appeals has

yet confronted the same claim. Those objections are insubstantial.

1. The government first tries (at 18-19) to knock out the Ninth and D.C. Circuits. It argues that *Dreamstime* and *Microsoft* addressed only a situation where "the plaintiff had failed to show that any act had affected the market to which the plaintiff had 'expressly tied' its complaint." OSG Br. 18 (quoting *Dreamstime.com, LLC* v. *Google*, 54 F.4th 1130, 1143 (9th Cir. 2022)). Multiple district courts in those circuits have rejected that narrow reading—as has the D.C. Circuit itself. *Meta Platforms*, 66 F.4th at 300 n.13; *see Google*, 687 F. Supp. 3d at 70; *T-Mobile US, Inc.* v. *WCO Spectrum LLC*, 2025 WL 3247762, at *9 n.13 (C.D. Cal. Oct. 31, 2025) (citing *Dreamstime* and *Facebook* in declining to "consider [defendant's] conduct in its totality"). The government also ignores the Ninth Circuit's explanation that "[b]ecause each individual action alleged by [plaintiff] does not rise to anticompetitive conduct in the relevant market, their collective sum likewise does not." *Dreamstime*, 54 F.4th at 1143. The Fourth Circuit rejected that exact approach here. Pet. App. 29a.

The government does not even try to distinguish the remaining decisions. It simply asserts that every court of appeals would consider the "'synergistic effect'" of separate acts "where the defendant has devised a scheme through which [those] acts are intended to work together." OSG Br. 19 (citing *City of Groton* v. *Connecticut Light & Power Co.*, 662 F.2d 921, 929 (2d Cir. 1981)). Not so. The Second Circuit has rejected that overbroad reading of *Groton*, instead citing it for the proposition that "instances of misconduct that are not independently anti-competitive . . . are not cumulatively anti-competitive either." *Eatoni Ergonomics. Inc.* v. *Research in Motion Corp.*, 486 Fed. Appx. 186,

191 (2012). And *In re EpiPen Mktg., Sales Pracs. & Antitrust Litigation* squarely explained that courts must "disaggregate the exclusionary conduct into its component parts before applying the relevant law." 44 F.4th 959, 982 (10th Cir. 2022).

2. The government next widens out the lens and says (at 17) that "[a]cross the country, courts analyze the particular challenged acts, apply conduct-specific tests where appropriate, and otherwise evaluate the alleged monopolistic conduct holistically." At that level of generality, it is hard to dispute. But what matters is that no modern court has invoked the monopoly-broth theory to avoid applying "conduct-specific tests."

To support its "holistic" standard, the government cites *Conwood Co.* v. *United States Tobacco Co.*, a pre-*linkLine* decision addressing a decades-long pattern of business torts. *See* 290 F.3d 768, 778-779 (6th Cir. 2002). Other courts have rejected the government's reading of *Conwood*. *See Novell, Inc.* v. *Microsoft Corp.*, 731 F.3d 1064, 1078 (10th Cir. 2013); *Google*, 687 F. Supp. 3d at 69-70. The government's other cited cases are even less relevant. In one, the court applied the refusal-to-deal and tying tests to a defendant's conduct. *See Viamedia, Inc.* v. *Comcast Corp.*, 951 F.3d 429, 453 (7th Cir. 2020). The other involved a jurisdictional dispute focused on anticompetitive effects, not conduct. *See In re Lipitor Antitrust Litig.*, 855 F.3d 126, 147 (3d Cir. 2017). Regardless, even if these cases supported the government, a 5-4 split is no less worthy of review.

3. The government then takes the opposite tack, arguing (at 19-20) that no other court of appeals has yet

confronted a case where a plaintiff alleged that "disparate acts were parts of a common scheme."* Antitrust plaintiffs have run that popular strategy again and again, from *linkLine* to the several enforcement actions that the government is currently pursuing. Duke cited multiple decisions rejecting exactly that maneuver. *See, e.g.*, *Dreamstime*, 54 F.4th at 1142 (refusing to consider defendant's conduct "taken together as an overall scheme"); *EpiPen*, 44 F.4th at 982; *Eatoni*, 486 Fed. Appx. at 191; *Intergraph Corp.* v. *Intel Corp.*, 195 F.3d 1346, 1366-1367 (Fed. Cir. 1999); *see also* CCIA Br. 15-16; Chamber Br. 17-18.

C. The Decision Below Is Wrong.

After spending pages wringing ambiguity out of clarity, the government finally confesses: despite repeatedly pushing this Court to adopt conduct-based tests over the last 20 years, it now embraces the defunct monopoly-broth theory. The government argues (at 20-22) that Section 2 asks only whether a defendant's actions "impaired competition on some basis other than efficiency" and were "intended to work together." That position flouts this Court's decision in *linkLine* and would erode decades of Section 2 law.

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* On this point, the government takes remarkable factual liberties. Although the alleged refusal-to-deal occurred *after* Fayetteville had already accepted Duke's bid, the government claims (at 3) that both were part of a "coordinated campaign to squelch competition." The government even characterizes (at 8) Duke's post in a public database as "disastrous" for NTE, when there was zero record evidence that any potential customer ever saw it. Pet. App. 74a. That hyperbole is another sign that this is not a disinterested government brief.

1. The government first tries (at 21) to narrow *linkLine* to its facts, suggesting that this Court rejected only "a specific price-squeeze theory of antitrust liability."

That is not what the government told the Court in *linkLine*. Back then, the Solicitor General explained that "Section 2 does not condemn unilateral action that disadvantages a rival," and cautioned against new theories of Section 2 liability that would discourage "procompetitive price-cutting." OSG Br. 19, *linkLine*, *supra*, at 10, 19, 25; *see* 555 U.S. at 452-454. The government had said the same thing two years earlier, rejecting a "subjective and standardless test for Section 2 liability" as "inconsistent with this Court's Section 2 decisions more generally, which have emphasized the need for objective standards." OSG Br. 7, *Weyerhaeuser* v. *Ross-Simmons Hardwood Lumber Co.*, No. 05-381 (S. Ct.). The government even invoked *linkLine* in a recent nondelegation case. *See* Fed. Petrs. Rep. Br. 47-48, *FCC* v. *Consumers' Rsch.*, Nos. 24-354 & 24-422 (S. Ct.). Only here does the government limit *linkLine* to price squeezes.

The decision in *linkLine* cannot be so narrowed anyway. This Court emphatically rejected an attempt to challenge two lawful acts by "alchemiz[ing] them into a new form of antitrust liability." 555 U.S. at 457. It did so not because of specific concerns about price-squeeze claims but rather to preserve "clear rules" for courts and "safe harbor[s]" for businesses. *Id.* at 452-453; *see* Pet. 18. The Court's rationale forecloses any claim that aggregates lawful acts into an unlawful whole.

2. After brushing *linkLine* aside, the government argues (at 20) that courts facing "[a]n overall course of anticompetitive conduct" should consider only whether

the defendant has "exclude[d] competition on some basis other than efficiency." That amorphous standard is flawed for at least two reasons.

First, it has no modern support. The government's most recent authority is this Court's 1962 decision in *Continental Ore Co.* v. *Union Carbide & Carbon Corp.*, 370 U.S. 690, 699. (Its other citations are from 1948, 1911, and 1905.) The government fails to engage with the many authorities that have since rejected an overbroad reading of *Continental Ore*. *See, e.g.*, *EpiPen*, 44 F.4th at 982; *Google*, 687 F. Supp. 3d at 70. If *Continental Ore* actually reflected this Court's "longstanding approach," some decision from the last six decades would have said as much.

Second, the government's standard undermines this Court's work to "develop[] considerably more specific rules for common forms of alleged misconduct." *Novell*, 731 F.3d at 1072. On the government's view (at 23), the panel appropriately discarded conduct-based tests for predatory pricing and refusals to deal because NTE alleged an "atypical exclusionary campaign." But if that is all it takes to evade this Court's precedents, they will become meaningless. Monopolization cases will invariably devolve into fights about anticompetitive intent—precisely the subjective standard this Court has rejected. *See Brooke Grp. Ltd* v. *Brown & Williamson Tobacco Corp.*, 509 U.S. 209, 225 (1993) ("Even an act of pure malice by one business competitor against another" does not state a Section 2 claim).

3. Finally, the government vaguely suggests that a monopoly-broth standard is appropriate here because Duke "is a government-created monopolist." OSG Br. 22 (citing *Verizon Commc'ns Inc.* v. *Law Offs. of Curtis V. Trinko, LLP*, 540 U.S. 398, 411 (2004)). That gets *Trinko* backward. This Court cautioned that antitrust

enforcement is less needed in industries where there is already "a regulatory structure designed to deter and remedy anticompetitive harm." 540 U.S. at 412. Here, FERC approved the bid challenged by NTE and adjudicated Duke's so-called refusal-to-deal. Pet. 7-8. Watering down the standard for antitrust liability in this highly regulated industry makes no sense.

* * *

The current DOJ and FTC would obviously like to defer this Court's review of the monopoly-broth standard for as long as possible. But courts and practitioners recognize the decision below for what it is: the first of the modern era to embrace the monopoly-broth standard. If that decision stands, it will continue to sow confusion around the country and to erode this Court's Section 2 precedents.

CONCLUSION

The petition should be granted.

Respectfully submitted.

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