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.

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

BRIEF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA, NC CHAMBER LEGAL INSTITUTE, AND BUSINESS ROUNDTABLE AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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STATEMENT OF INTEREST*

The Chamber of Commerce of the United States of America is the world's largest business federation. It represents approximately 300,000 direct members and indirectly represents the interests of more than

* Pursuant to this Court's Rule 37.6, counsel for *amici* states that no counsel for any party authored this brief in whole or in part, and no person or entity, aside from *amici*, their members, or their counsel made any monetary contribution intended to fund this brief's preparation or submission. Counsel of record received timely notice of *amici*'s intent to file this brief under this Court's Rule 37.2.

three million companies and professional organizations of every size, in every industry sector, and from every region of the country. An important function of the Chamber is to represent the interests of its members in matters before Congress, the Executive Branch, and the courts. To that end, the Chamber regularly files *amicus curiae* briefs in cases, like this one, that raise issues of concern to the nation's business community. The Chamber, together with the NC Chamber Legal Institute, filed an *amicus* brief in support of Petitioners at the panel stage in the Fourth Circuit proceedings below, as well as an *amicus* brief in support of rehearing en banc.

The NC Chamber Legal Institute is a nonpartisan, nonprofit affiliate of the North Carolina Chamber, the leading business advocacy organization in North Carolina, and provides a medium through which North Carolina persons and companies can promote their common business interests by, *inter alia*, advocating for job providers on precedent-setting legal issues with broad business climate, workforce development, and quality of life implications before state and federal courts.

Business Roundtable is an association of chief executive officers of America's leading companies. The CEO members lead U.S.-based companies that support one in four American jobs and almost a quarter of U.S. gross domestic product. Business Roundtable was founded on the belief that businesses should play an active and effective role in the formulation of public policy, and Business Roundtable members develop and advocate for policies to promote a thriving U.S. economy and expanded opportunity for all. Business

Roundtable participates in litigation as *amicus curiae* when important business interests are at stake.

INTRODUCTION AND SUMMARY OF ARGUMENT

In *Pacific Bell Telephone Co. v. linkLine Communications, Inc.*, 555 U.S. 438 (2009), this Court held that plaintiffs cannot establish a meritorious antitrust claim by simply aggregating a series of independently merit*less* antitrust claims. There, the plaintiffs had alleged that a defendant violated Section 2 of the Sherman Act by "squeezing" plaintiffs' profit margins through high wholesale prices and low retail prices. *linkLine*, 555 U.S. at 442. Addressing the constituent parts of that claim, this Court first found that the plaintiffs could not satisfy the antitrust standards that applied to either the defendant's wholesale practices (the refusal-to-deal doctrine) or its retail practices (the predatory-pricing doctrine). *Id.* at 449–52. The Court then held that the plaintiffs' "price-squeeze claim" necessarily failed as well, because it presented just "an amalgamation of a meritless claim at the retail level and a meritless claim at the wholesale level." *Id.* at 452. In antitrust, as in life, "[t]wo wrong claims do not make one that is right." *Id.* at 457.

That elementary proposition is vital to American businesses. Over the last several decades, this Court has "fashioned rules of presumptive legality for certain forms of conduct that experience teaches almost never harm consumers." *Novell, Inc. v. Microsoft Corp.*, 731 F.3d 1064, 1073 (10th Cir. 2013) (Gorsuch, J.). Those rules are designed to "give[] a degree of

predictability to judicial outcomes and permit[] reliance by all market participants." *Id.* They also ensure that businesses do not shy away from the pro-consumer actions "the antitrust laws are designed to protect"—such as reducing prices or competing vigorously with rivals—out of fear that those actions might later result in treble damages or even criminal antitrust liability under post-hoc application of I-know-it-when-I-see-it judicial tests. *Verizon Communications Inc. v. Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398, 414 (2004) (citation omitted); *see id.* (explaining the "costly" consequences for pro-competitive activity of "[m]istaken inferences and the resulting false condemnations" under antitrust theories (citation omitted)). But the Court's "emphasi[s on] the importance of clear rules in antitrust law," *linkLine*, 555 U.S. at 452, means little if plaintiffs can overcome those rules by stitching together multiple deficient claims into a Frankenstein's monster theory of "anticompetitive scheme" liability. Pet. App. 5a.

Yet the panel's decision below allowed just that. The district court had correctly determined that "[a]dding up several instances of lawful conduct cannot total unlawful conduct," observing that "[i]n simple mathematical terms, 0 + 0 = 0." *Id.* at 88a. But the panel concluded that while that rule reflects "a proper approach" for simple cases under *linkLine*, *id.* at 29a (citing *linkLine*, 555 U.S. at 449), its "0 + 0 = 0" math is "too rigid" for cases in which a plaintiff makes "complex" allegations that "do not fit neatly within pre-established categories," *id.*

The problem with that approach should be obvious. To say that plaintiffs need not comply with this

Court's general antitrust standards in "complex" antitrust cases is, in practical terms, to say that plaintiffs just need not comply with this Court's general antitrust standards at all. As the Court has observed, even "[u]nder the best of circumstances, applying the requirements of § 2 'can be difficult' because 'the means of illicit exclusion, like the means of legitimate competition, are myriad.'" *Trinko*, 540 U.S. at 414 (citation omitted). Telling plaintiffs' lawyers that they will get a more favorable standard if their allegations are "complex" and "do not fit neatly within pre-established categories," Pet. App. 29a, virtually guarantees that the application of Section 2 will become more difficult and less predictable. After all, following the decision below, what lawyer worth her salt would present a straightforward predatory-pricing or refusal-to-deal claim if she could instead spin the claim as part of a broader "anticompetitive scheme," *id.* at 5a, that only a jury can sort out?

The results have been predictable. In just a few short months, the decision below has already been cited dozens of times in briefs and decisions across the country as plaintiffs urge lower courts to disregard this Court's discrete doctrinal standards in favor of "holistic" analyses. *In re: Essar Steel Minnesota LLC*, No. 24-cv-1117, 2025 WL 507914, at *5–6 (D. Del. Feb. 14, 2025); *see* Pet. 29. Allowing the panel's decision to stand would supercharge that trend, with the antitrust plaintiffs' bar flocking to the Fourth Circuit with complaints of "complex" anticompetitive schemes that cannot satisfy this Court's clear tests and would therefore be dead on arrival in the rest of the country.

The Court should step in now before the circumvention of its precedent goes any further.

ARGUMENT

A. THIS COURT'S PRECEDENTS REQUIRE AT LEAST ONE UNLAWFUL ACT TO SUPPORT A MONOPOLIZATION CLAIM.

1. Section 2 of the Sherman Act makes it unlawful to "monopolize" or "attempt to monopolize." 15 U.S.C. § 2. This Court has long recognized, however, that "mere possession of monopoly power" is "not unlawful," and is indeed "an important element of the free-market system" because "[t]he opportunity to charge monopoly prices . . . induces risk taking that produces innovation and economic growth." *Trinko*, 540 U.S. at 407. "To safeguard the incentive to innovate," the Court has therefore held that "the possession of monopoly power will not be found unlawful unless it is accompanied by an element of anticompetitive *conduct*." *Id.*

This Court's decision in *linkLine* establishes that plaintiffs cannot avoid Section 2's requirement of anticompetitive conduct by aggregating disparate lawful acts. 555 U.S. at 452. In *linkLine*, the plaintiffs advanced a "price squeeze" theory in which the anticompetitive conduct was alleged to have involved the combination of two things—charging the plaintiffs too much in the wholesale market and charging consumers too little in the retail market. *See id.* at 442. The plaintiffs claimed that those separate prices were part of an overall scheme in which the defendants "squeez[ed]" the plaintiffs' profit margins in order to drive them out of the market. *Id.* at 443–44. The

Court rejected that theory and ruled for the defendants. *See id.* at 449–52.

In reaching its decision, the Court analyzed the two types of conduct separately. It first assessed the wholesale-market allegations as a refusal-to-deal claim, which required the plaintiffs to show that (1) the defendant had terminated a prior voluntary course of profitable dealing between the parties, and (2) no pro-competitive justification existed for the refusal to deal. *See id.* at 449–50; *see also Trinko*, 540 U.S. at 407–09. The Court then assessed the retail-market allegations as a predatory-pricing claim, which required the plaintiffs to show that (1) "the prices complained of [we]re below an appropriate measure of [the defendant's] costs," and (2) there was "a 'dangerous probability' that the defendant will be able to recoup its 'investment' in below-cost prices" by charging higher prices in the future. *linkLine*, 555 U.S. at 451 (quoting *Brooke Grp. Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209, 222, 224 (1993)). The Court determined that the plaintiffs could not satisfy either test, and it thus rejected their claim, reasoning that "[t]wo wrong claims do not make one that is right." *Id.* at 457. The plaintiffs' claim, as the Court put it, consisted of "an amalgamation of a meritless claim at the retail level and a meritless claim at the wholesale level." *Id.* at 452.

2. As Judge Quattlebaum explained in his dissent from denial of rehearing en banc below, the other courts of appeals have uniformly refused to find antitrust "scheme" or "course of conduct" liability following *linkLine* unless the plaintiff identifies at least one instance of unlawful conduct. *See* Pet. App. 153a

("[S]ince *linkLine* rejected this sort of 'alchemizing,' no court of appeals has dared to embrace this now-forbidden theory. That is, until now. With the panel's decision, we have elected to chart our own path in conflict with the Supreme Court and all our sister circuits that have addressed these issues post-*linkLine*." (brackets and citations omitted)); *see also* Pet. 23–27.

In *Dreamstime.com, LLC v. Google LLC*, 54 F.4th 1130 (2022), for example, the Ninth Circuit held that "[b]ecause each individual action alleged by [the plaintiff] does not rise to anticompetitive conduct in the relevant market, their collective sum likewise does not." *Id.* at 1142. The court therefore refused to allow the case to go forward based on an allegedly anticompetitive "synergistic result" from actions that were lawful in themselves. *Id.* (citation omitted).

Similarly, in *In re EpiPen (Epinephrine Injection, USP) Marketing, Sales Practices & Antitrust Litigation*, 44 F.4th 959 (2022), the Tenth Circuit explained that courts must "disaggregate the exclusionary conduct into its component parts before applying the relevant law." *Id.* at 982; *see New Mexico Oncology & Hematology Consultants, Ltd. v. Presbyterian Healthcare Servs.*, 994 F.3d 1166, 1173 (10th Cir. 2021) (explaining that "while anticompetitive conduct does take many forms," courts have rejected "an *ad hoc* approach" in favor of "specific rules for common forms of alleged misconduct" because "over-enforcement could actually inhibit competition").

And in *Eatoni Ergonomics, Inc. v. Research in Motion Corp.*, 486 F. App'x 186 (2012), the Second Circuit held that "[b]ecause the[] alleged instances of miscon-

duct are not independently anti-competitive, we conclude that they are not cumulatively anti-competitive either." *Id.* at 191. In doing so, the court explained that even prior to *linkLine*, it had long "reject[ed] the notion that if there is a fraction of validity to each of the basic claims and the sum of the fractions is one or more, the plaintiffs have proved a violation of section 1 or section 2 of the Sherman Act." *Id.* (quoting *City of Groton v. Conn. Light & Power Co.*, 662 F.2d 921, 928–29 (2d Cir. 1981)).

Other circuits, too, had adopted an anti-aggregation rule even before *linkLine*. Indeed, the Federal Circuit expressly embraced the Second Circuit's just-quoted *Groton* rule in *Intergraph Corp. v. Intel Corp.*, 195 F.3d 1346 (1999). There it explained that "[e]ach legal theory must be examined for its sufficiency and applicability, on the entirety of the relevant facts," and it "reject[ed] the notion that if there is a fraction of validity to each of the basic claims and the sum of the fractions is one or more, the plaintiffs have proved a violation." *Id.* at 1367 (citation omitted). And in *United States v. Microsoft Corp.*, 253 F.3d 34 (2001) (per curiam), the en banc D.C. Circuit rejected a general "course of conduct" theory of Section 2 liability based on its determination that the specifically identified alleged violations "[we]re not in themselves unlawful." *Id.* at 78. To the extent that *Microsoft* left open the possibility that *some* types of antitrust claims might be aggregated in a 0 + 0 = 1 manner, moreover, subsequent decisions have made clear that refusal-to-deal claims—like the one the Fourth Circuit considered in this case—cannot. *See New York v. Facebook, Inc.*, 549 F. Supp. 3d 6, 48 (D.D.C. 2021)

("[L]awful unilateral refusals to deal cannot be combined with other conduct, lawful or unlawful, into an overall scheme of monopoly acquisition or maintenance that can be separately challenged. If a unilateral refusal (or refusals) is to be part of such larger scheme, it must in itself be unlawful."); *New York v. Meta Platforms, Inc.*, 66 F.4th 288, 300 n.13 (D.C. Cir. 2023) (affirming and specifically adopting "the reasons the district court stated" in that portion of the opinion).

B. THE PANEL IDENTIFIED NO SOUND BASIS FOR DISREGARDING THIS COURT'S DECISIONS AND ADOPTING AN OUTLIER POSITION AMONG THE COURTS OF APPEALS.

The panel below identified no sound basis for adopting its outlier position. On the contrary, its decision runs roughshod over this Court's precedents at every turn.

To start, the panel faulted the district court for "compartmentaliz[ing]" the instances of anticompetitive conduct alleged here "and ask[ing] whether each one, *independently*, was unlawful." Pet. App. 28a (internal quotation marks omitted). But that mirrors precisely the approach taken in *linkLine*, where the Court considered whether each component of a price-squeeze theory—refusal to deal at the wholesale level and predatory pricing at the retail level—was independently unlawful. *See* 555 U.S. at 449–52. The panel also concluded that "aggregation is appropriate when individual acts are all part of the same [allegedly anticompetitive] scheme." Pet. App. 32a (internal quotation marks omitted). That, too, contradicts *linkLine*, which prohibited the "amalgamation of

[multiple] meritless claim[s]." 555 U.S. at 452. And it likewise contradicts this Court's decision in *Trinko*, which held that antitrust liability cannot be established without "an element of anticompetitive *conduct*." 540 U.S. at 407.

To get around *linkLine*, the panel purported to limit the anti-amalgamation principle to "cases where the alleged conduct falls within such well-defined categories" as "typical predatory pricing, refusing to deal, price fixing, or dividing markets." Pet. App. 29a. The concurrence in the denial of rehearing en banc further suggested that *linkLine*'s rule is limited to the "unique" claim there. *Id.* at 138a. This Court, however, in no way cabined its reasoning to the facts of *Trinko* and *linkLine*, and the Court's "institutional concerns" with allowing plaintiffs to "alchemize" claims "that cannot succeed" under existing theories of liability into "a new form of antitrust liability never before recognized by this Court" apply similarly here. *See linkLine*, 555 U.S. at 450, 452–53 (explaining that "the reasoning of *Trinko* applies with equal force to [other] claims" and outlining practical challenges for courts and businesses in the absence of an anti-amalgamation principle). And in any event, the panel's reasoning fails on its own terms because the anticompetitive conduct here *does* fall into well-defined categories. As the district court explained—and the panel acknowledged—NTE's challenge to Duke's renewal offer to Fayetteville could be characterized as a predatory-pricing claim, and its challenge to Duke's termination of the parties' interconnection agreement could be categorized as a refusal-to-deal claim. *See* Pet. App. 24a. A faithful application of

linkLine would have required the panel to assess each of those alleged violations on its own terms. Instead, the panel concluded that it "need not assess whether the price level of the [renewal offer] between Duke and Fayetteville, standing alone, amounted to a violation of § 2 under a strict predatory pricing theory of liability," *id.* at 42a, and that it "need not determine," with respect to the interconnection agreement, whether Duke's "conduct in isolation amounted to a § 2 violation under a refusal-to-deal theory of liability," *id.* at 54a.

The panel apparently believed that "the question whether two or more practices, while lawful individually, can be aggregated into a series or pattern capable of sustaining a Sherman Act § 2 offense" remained open. *Id.* at 32a (internal quotation marks omitted). But *linkLine* definitively answered that question in the negative. This Court's case law leaves no ambiguity that could justify the adoption of the panel's flawed approach—as evidenced by the consensus among the other courts of appeals, which have declined to find liability without at least one instance of unlawful conduct. *See* pp. 7–10, *supra*.

To be sure, the Court has permitted aggregation of separate acts taken in furtherance of a single multi-company conspiracy, at least where the instances of conduct being aggregated are intrinsically similar and have commensurable effects. In *Continental Ore Co. v. Union Carbide & Carbon Co.*, 370 U.S. 690 (1962), the Court considered Sherman Act claims against several related companies that had allegedly conspired to monopolize the market for vanadium (a metal used in steel production), *see id.* at 692–94. The

plaintiff had alleged that the defendants' violations frustrated five of the plaintiff's business ventures, with the cumulative effect of entirely excluding the plaintiff from the vanadium market. *See id.* at 693–94. The court of appeals ruled against the plaintiff after it "examined seriatim" each allegedly frustrated venture "and ruled separately upon the [defendants'] alleged damage to [the plaintiff] in connection with each of these episodes." *Id.* at 698. This Court reversed, holding that the lower court erred by "approach[ing] [the plaintiff's] claims as if they were five completely separate and unrelated lawsuits." *Id.* at 698. The Court explained that "[t]he character and effect of a conspiracy are not to be judged by dismembering it and viewing its separate parts, but only by looking at it as a whole." *Id.* at 699 (citation omitted).

Nothing in *Continental Ore* or any other decision of this Court, however, justifies treating a series of intrinsically distinct, individually lawful acts by a single company as an aggregate antitrust violation. For example, as noted above, *see* p. 7, *supra*, the refusal-to-deal claims at issue here ask about the voluntariness and profitability of prior agreements and the justifications for ending those agreements, whereas respondents' predatory-pricing claims ask about the defendant's costs and the likelihood of recoupment in the future. Those considerations are distinct from the conspiracy alleged in *Continental Ore*, which involved "various contracts and arrangements" that did not "individually foreclose[] the plaintiff from the vanadium market," but that "in combination resulted in a substantially foreclosed market." Daniel A. Crane, *Does Monopoly Broth Make Bad Soup?*, 76 Antitrust

L.J. 663, 671 (2010). Unlike a series of arrangements that each foreclose a different portion of the market, an alleged refusal to deal and an alleged predatory pricing practice cannot be meaningfully aggregated in any consumer-focused way. *See Facebook, Inc.*, 549 F. Supp. 3d at 47 (explaining that because unilateral refusals to deal are tolerated even when they harm competition, an inadequate refusal-to-deal claim cannot be aggregated with other independently inadequate antitrust claims to establish an overall claim that has a sufficiently negative effect on competition to support liability).

C. THE REQUIREMENT THAT PLAINTIFFS PLEAD AND PROVE AN UNLAWFUL ACT PROVIDES IMPORTANT CLARITY AND ADMINISTRABILITY IN ANTITRUST LAW.

This Court's anti-amalgamation rule plays an essential function in ensuring that antitrust law serves its intended pro-consumer purposes. Section 2 is a powerful tool, and it must be carefully calibrated to successfully deter anticompetitive conduct without unduly chilling positive business activity such as aggressive price cuts or hard-nosed negotiations with competitors. By directing courts to break antitrust cases into their component parts and assess each part under the appropriate test, *linkLine* provides parties and courts with clear guidance as to the types of conduct that do and do not run afoul of Section 2. But if allowed to stand, the gaping "complex" cases exception to *linkLine* created by the panel here will destroy that clarity—making it even more difficult for businesses to engage in robust competition while still ensuring they stay on the right side of the antitrust line.

1. This Court has "repeatedly emphasized the importance of clear rules in antitrust law." *linkLine*, 555 U.S. at 452. As then-Chief Judge Breyer explained, antitrust rules "must be clear enough for lawyers to explain them to clients." *Town of Concord v. Boston Edison Co.*, 915 F.2d 17, 22 (1st Cir. 1990). Businesses need to be able to plan their activities, their investments, their allocation of resources, and their strategies. And "simple" and "[s]trong presumptions . . . guide businesses in planning their affairs by making it possible for counsel to state that some things do not create risks of liability." Frank H. Easterbrook, *The Limits of Antitrust*, 63 Tex. L. Rev. 1, 14 (1984).

Without a requirement that a monopolization claim be grounded in at least one unlawful act, however, businesses would have to continuously assess the interlocking effects of all of their business practices on every competitor in every market in which they operate. Imagine, for example, a company that brings a reasonable but ultimately unsuccessful patent suit against a competitor. Under this Court's decision in *Professional Real Estate Investors, Inc. v. Columbia Pictures Industry, Inc.*, 508 U.S. 49 (1993), that suit could not serve as a basis for antitrust liability because it was not "objectively baseless," *id.* at 51. Now suppose that after its loss, the company decides to compete instead by slashing its prices. Under the Court's decision in *Brooke Group*, such price competition would be perfectly legal so long as the company is not charging less than its costs. *See* 509 U.S. at 223. But in the Fourth Circuit today, a prudent attorney would have to advise the company that some jury

in the future might decide that a lawful patent suit and a lawful price cut add up to an unlawful antitrust violation—and that the company should consider charging consumers more to avoid that result. And how much more should the company charge? It would be impossible for the attorney to say, given the inherent uncertainty of the panel's aggregation rule. In that circumstance, and many others like it, the decision below would effectively preclude antitrust lawyers from providing the sort of clear guidance that this Court has long sought to facilitate and encourage. Businesses' resulting hesitation to engage in procompetitive activity would risk harming consumers and cramping economic growth.

2. The panel's aggregation approach threatens concrete market harms even beyond those posed by a lack of doctrinal clarity. This Court has repeatedly cautioned that antitrust restrictions should not be applied in a manner that does more harm than good. As *Trinko* explained, courts must weigh the "benefits of antitrust intervention" against "a realistic assessment of its costs." 540 U.S. at 414. "Mistaken inferences and the resulting false condemnations 'are especially costly, because they chill the very conduct the antitrust laws are designed to protect.'" *Id.* (quoting *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 594 (1986)). Consequently, "[t]he cost of false positives counsels against an undue expansion of § 2 liability." *Id.*; *cf. Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 554 (2007) ("[W]e have previously hedged against false inferences from identical behavior at a number of points in the trial sequence.").

Allowing plaintiffs to aggregate disparate allegations into an overarching "anticompetitive scheme" would amplify those well-founded concerns. This Court has recognized, for example, that refusal-to-deal liability is a narrow exception to the general rule that the Sherman Act "does not restrict the long recognized right of trader or manufacturer engaged in an entirely private business, freely to exercise his own independent discretion as to parties with whom he will deal." *United States v. Colgate & Co.*, 250 U.S. 300, 307 (1919). If plaintiffs can circumvent the traditional constraints on a refusal-to-deal claim by alleging an amalgamated "course of conduct," however, that narrow exception will quickly balloon, forcing successful businesses to "share the source of their advantage" with competitors and potentially even "facilitat[ing] the supreme evil of antitrust: collusion." *Trinko*, 540 U.S. at 407–08.

Likewise, predatory-pricing liability sits in considerable tension with the principle that "[l]ow prices benefit consumers regardless of how those prices are set." *Atl. Richfield Co. v. USA Petroleum Co.*, 495 U.S. 328, 340 (1990). As discussed above, therefore, this Court has permitted such claims to go forward only where the plaintiff can show the existence of below-cost pricing, because above-cost pricing either "represents competition on the merits, or is beyond the practical ability of a judicial tribunal to control without courting intolerable risks of chilling legitimate price-cutting." *Brooke Grp.*, 509 U.S. at 223. Even where prices are set below cost, a defendant can be held liable only if there is "a dangerous probability" that the defendant will "recoup[] its investment" in the future,

because—absent recoupment—below-cost prices are "in general a boon to consumers." *Id.* at 224. Permitting plaintiffs to rely on a defendant's low prices as evidence of an anticompetitive "scheme" without requiring them to show that the elements of a predatory-pricing claim are met, however, risks a reduction in consumer welfare without any offsetting procompetitive benefit.

3. Beyond increasing the risk of those specific market distortions, the panel's aggregation approach would also make it substantially more difficult for courts to resolve antitrust cases in a timely and efficient manner. That difficulty itself imposes tremendous costs on business.

"It is difficult enough for courts to identify and remedy an alleged anticompetitive practice at one level, such as predatory pricing in retail markets or a violation of the duty-to-deal doctrine at the wholesale level." *linkLine*, 555 U.S. at 453. Doing both "would require courts simultaneously to police both the wholesale and retail prices to ensure that rival firms are not being squeezed." *Id.* A court might determine in one case that the defendant's conduct was lawful because the plaintiff failed to establish either a refusal to deal or predatory pricing. But the court would be required to revisit that decision in the next case—even if the plaintiff again failed to meet its burden on either component claim—because the aggregated effect of the defendant's conduct might have changed. *See id.* ("[C]ourts would be aiming at a moving target, since it is the *interaction* between these two prices that may result in a squeeze.").

The resulting uncertainty would not only make it difficult for businesses to plan their affairs in a manner that stays on the right side of the antitrust laws, but also fundamentally change the dynamics of antitrust litigation. The clear rules that this Court has established over the last several decades allow for timely resolution of claims at the motion-to-dismiss stage or at summary judgment following relatively targeted discovery into a few well-recognized issues. But if the Fourth Circuit is allowed to treat those rules as not applying to "complex" antitrust cases, Pet. App. 29a, obtaining clarity about the likely outcome of a case early in litigation will become far more difficult.

That development would place enormous pressure on defendants to settle even in cases in which there is strong reason to believe the conduct was permissible and procompetitive. For decades, courts have warned against "sending the parties into discovery" based on dubious claims, given "the costs of modern federal antitrust litigation." *Car Carriers, Inc. v. Ford Motor Co.*, 745 F.2d 1101, 1106 (7th Cir. 1984); *see Twombly*, 550 U.S. at 558 (observing the "unusually high cost of discovery in antitrust cases"); David F. Herr, *Annotated Manual for Complex Litigation* § 30 (4th ed., updated Sept. 2024) (noting that antitrust litigation can "involve voluminous documentary and testimonial evidence, extensive discovery, complicated legal, factual, and technical (particularly economic) questions, numerous parties and attorneys, and substantial sums of money"). Moreover, because the Sherman Act's treble-damages remedy can be "economically devastating," defendants often cannot realistically

risk taking a case all the way to trial. Edward D. Cavanagh, *The Private Antitrust Remedy: Lessons from the American Experience*, 41 Loy. U. Chi. L.J. 629, 633 (2010). Together, the combined effect of unavoidably large discovery costs and potentially exorbitant damages creates intense pressure to settle antitrust cases. Indeed, antitrust "[d]efendants frequently face a Hobson's choice: either pay some amount to settle, even though they believe in their innocence, or try the matter and risk uncapped liability." Edward D. Cavanagh, *Contribution, Claim Reduction, and Individual Treble Damage Responsibility: Which Path to Reform of Antitrust Remedies?*, 40 Vand. L. Rev. 1277, 1284 (1987); *see Twombly*, 550 U.S. at 559 (noting that "the threat of discovery expense will push cost-conscious defendants to settle even anemic cases before reaching" summary judgment and trial).

4. Finally, allowing plaintiffs to base their claims on the aggregation of competitive acts that are each lawful in their own right would also make it difficult for courts to devise appropriate remedies when cases do proceed all the way through trial.

This Court has warned against "requir[ing] antitrust courts to act as central planners, identifying the proper price, quantity, and other terms of dealing." *Trinko*, 540 U.S. at 408. And the Court has therefore declined to impose remedies "that it cannot explain or adequately and reasonably supervise." *Id.* at 415 (internal quotation marks omitted). But entertaining monopolization claims that rest on multiple, lawful forms of interacting conduct would require just that:

Rather than simply directing defendants to cease unlawful conduct, courts would have to direct defendants to stop engaging in *lawful* conduct because of the supposed interaction of that conduct with other also-lawful conduct. Moreover, courts would need to decide whether to require the defendant to cease all of the lawful conduct involved in an alleged scheme, or instead just some of it—and, if the latter, which parts of the scheme the defendant should cease. And no clear principle exists to guide courts in choosing which lawful conduct (and how much lawful conduct) to prohibit in order to sufficiently stifle an "anticompetitive scheme." Pet. App. 5a. That sort of discretionary judicial control of a company's core business judgments is not only a disaster from an administrability perspective but also, as this Court has recognized, foreign to our American free-enterprise system. *See Trinko*, 540 U.S. at 408.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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