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.,
Respondents.

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

BRIEF OF PROFESSORS DANIEL A. CRANE AND HERBERT HOVENKAMP AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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INTEREST OF *AMICI CURIAE*[1]

Daniel A. Crane is the Richard W. Pogue Professor of Law at the University of Michigan and a scholar of antitrust law. His article *Does Monopoly Broth Make Bad Soup*, 76 Antitrust L. J. 663 (2010), was cited by the Fourth Circuit dissent from the denial of rehearing *en banc* to explain why the majority misapplied the "monopoly broth" theory of liability under Section 2 of the Sherman Act. *Duke Energy Carolinas, LLC v. NTE Carolinas II, LLC*, 122 F.4th 120, 124-25 (4th Cir. 2024) (Quattlebaum, J., dissenting). Professor Crane's article and approach to "monopoly broth" claims have been applied in several other lower court opinions, including *FTC v. Facebook, Inc.*, 560 F. Supp. 3d 1, 22 (D.D.C. 2021), *New York v. Facebook, Inc.*, 549 F. Supp. 3d 6, 25 (D.D.C. 2021), *aff'd*, 66 F.4th 288 (D.C. Cir. 2023), and *3Shape Trios A/S v. Align Tech., Inc.*, C.A. No. 18-1332, 2019 WL 3824209, at *11 (D. Del. 2019).

Herbert Hovenkamp is the James G. Dinan University Professor at the University of Pennsylvania Carey School of Law, a Fellow of the American Academy of Arts and Sciences, and the surviving author of Areeda & Hovenkamp, *Antitrust Law: An Analysis of Antitrust Principles and Their Application* (formerly with Phillip E. Areeda and Donald F. Turner) (22 vols., Aspen 2008-2024). The Fourth Circuit's panel decision cited the Areeda-

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

Hovenkamp treatise six times in support of its position, and the dissenting opinion from the denial of rehearing *en banc* cited it five times in support of the opposing position. The treatise has been cited over 2,000 times in lower court opinions, and over sixty times in opinions of this Court.

Professors Crane and Hovenkamp submit that the Fourth Circuit panel applied the "monopoly broth" theory in ways inconsistent with this Court's precedents. They further submit that there is considerable confusion in the lower courts on this issue that warrants this Court's intervention.

INTRODUCTION AND SUMMARY OF ARGUMENT

This Court has "emphasized the importance of clear rules in antitrust law" and rejected the "amalgamation" of meritless claims to manufacture a violation of Section 2 of the Sherman Act. *Pac. Bell Tel. Co. v. linkLine Commc'ns, Inc.*, 555 U.S. 438, 452 (2009). The Fourth Circuit's decision represents a significant departure from each of these principles. In stark contrast to the Circuit majority, the Fourth Circuit embraced a "monopoly broth" theory that permits plaintiffs to cobble together a firm's disparate and lawful acts into a single, viable Section 2 claim. That decision conflicts with this Court's conduct-based tests and threatens to chill competitive practices that are vital to a thriving market economy.

The panel's core error lies in distorting the aggregation principle this Court articulated in *Continental Ore Co. v. Union Carbide & Carbon Corp.*, 370 U.S. 690 (1962). There, the Court concluded that a firm's disparate conduct can be considered collectively for Section 2 purposes—but

only when the legality of the underlying acts turns on whether they foreclose a large enough share of the market, as in the exclusive dealing (and tying) contexts. The Fourth Circuit disregarded this crucial limitation, thereby undermining Section 2's well-established conduct-based tests—here, for predatory pricing, refusals to deal, and sham litigation. These tests are designed to ensure that courts do not impose antitrust liability on conduct that is independently lawful and socially beneficial. So in adopting a broad "monopoly broth" theory that rejects those tests, the Fourth Circuit effectively outlawed *lawful* and *procompetitive* conduct. This erroneous approach to Section 2 threatens to turn standard business practices into antitrust violations, stifling "innovation and economic growth" and harming consumer welfare. *See Verizon Commc'ns Inc. v. Law Offs. of Curtis V. Trinko, LLP*, 540 U.S. 398, 407 (2004) ("To safeguard the incentive to innovate, the possession of monopoly power will not be found unlawful unless it is accompanied by an element of anticompetitive *conduct*.").

The Fourth Circuit is not alone in misreading *Continental Ore*. Its decision repeats the same flawed logic of the Third Circuit's decision in *LePage's Inc. v. 3M*, 324 F.3d 141 (3d Cir. 2003) (en banc), a decision that has since drawn significant criticism from other Circuits, the Antitrust Modernization Commission, scholars, the United States—and, more recently, the Third Circuit itself. *LePage's* nevertheless continues to be cited nationwide—a troubling trend that is likely to accelerate after the Fourth Circuit's decision.

The Court should grant certiorari and reverse the judgment below. In doing so, it should make the following clear: Section 2 liability may not rest on the

cumulative effect of independently lawful conduct, such as below-cost prices, lawful unilateral refusals to deal, or non-sham lawsuits. Instead, a defendant's separate conduct may be amalgamated to determine whether it collectively produces an anticompetitive effect only when the legality of the contracts or practices at issue turns on whether they foreclose a substantial share of the market. Similarly, when the defendant engages in independently wrongful acts, such as torts or crimes, the cumulative effect of those independently wrongful acts may be considered in determining whether, together, they produce the requisite anticompetitive effect for a Section 2 claim. The Fourth Circuit's decision is nowhere close to either of those narrow categories. Certiorari is warranted to correct the panel's serious error and resolve the widespread confusion in the lower courts.

ARGUMENT

I. The Decision Below Misapplied This Court's Section 2 Jurisprudence

A. This Court Employs Conduct-Based Tests For Determining Whether Business Practices Violate Section 2

This Court has established clear conduct-based tests to evaluate monopolization claims under Section 2. That includes tests for each of the three types of behaviors at issue in this case—predatory pricing, refusals to deal, and the filing of sham lawsuits.

- <u>Predatory pricing</u>. First, a firm's predatory pricing violates Section 2 only when "'(1) 'the prices complained of are below an appropriate measure of its rival's costs'; and (2) there is a 'dangerous probability' that the defendant will be able to recoup its 'investment' in below-cost

prices." *Pacific Bell Tel. Co. v. linkLine Commc'ns, Inc.*, 555 U.S. 438, 451 (2009) (quoting *Brooke Grp. Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209, 222-24 (1993)).

- Refusal to deal. Second, a firm's unilateral refusal to deal with its rivals can give rise to antitrust liability only when it "unilateral[ly] terminat[es] . . . a voluntary (*and thus presumably profitable)* course of dealing . . . to forsake short-term profits to achieve an anticompetitive end." *Verizon Commc'ns Inc. v. Law Offs. of Curtis V.Trinko, LLP*, 540 U.S. 398, 409 (2004).
- "Sham" litigation. Third, a firm's "sham" litigation can give rise to Section 2 liability, if two preconditions are satisfied: (1) "[N]o reasonable litigant could realistically expect success on the merits" of the lawsuit; and (2) "the baseless lawsuit conceals 'an attempt to interfere *directly* with the business relationships of a competitor.'" *Pro. Real Est. Invs., Inc. v. Columbia Pictures Indus., Inc.*, 508 U.S. 49, 60-61 (1993) (quoting *E. R.R. Presidents Conf. v. Noerr Motor Freight, Inc.*, 365 U.S. 127, 144, (1961)).[2]

These conduct-based tests are tailored to the competitive circumstances of the practice in question.

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[2] Whether the filing of "sham" lawsuits can give rise to antitrust liability is an application of *Noerr-Pennington* immunity. 508 U.S. at 51. However, the filing of such "sham" litigation "merely deprives the defendant of [*Noerr-Pennington*] immunity; it does not relieve the plaintiff of the obligation to establish all other elements of his claim." *Id.* at 61.

Take predatory pricing. For obvious reasons, a firm's low-cost pricing is typically *pro*competitive. So in evaluating allegations of predatory pricing, courts must be wary of penalizing conduct that may well benefit consumers. Thus, *linkLine* requires a specific test for liability—pricing below costs *and* a serious probability that a defendant will be able to recoup its investment. The failure to establish both prongs implies, if not outright confirms, that the firm's pricing advances consumer welfare. *See infra* at 9. This test, like those for unilateral refusals to deal and sham litigation, provides "clear rules" that enable antitrust defendants to conform their conduct, and it ensures that procompetitive conduct is not unnecessarily penalized. *linkLine*, 555 U.S. at 452.

At the same time, this Court has indicated that a firm's distinct acts can be evaluated "as a whole" (i.e. amalgamated) when their legality turns on, and they, cumulatively, have the effect of, foreclosing a substantial share of the relevant market. *See Cont'l Ore Co. v. Union Carbide & Carbon Corp.*, 370 U.S. 690, 698-700 (1962). As this Court explained in *Continental Ore*, viewing the monopolist's conduct synergistically in these circumstances is important because "tightly compartmentalizing" its disparate acts obscures their combined effect. *Id.* at 699. But that principle has limits. When the disparate practices do not collectively contribute to foreclosure of a large enough share of the market, or when their legality does not turn on such foreclosure, amalgamation is improper. *See infra* at 8-15.

B. The Panel Decision Departs From This Court's Precedents

The Fourth Circuit's decision flouted these core principles of antitrust law. *See Duke Energy Carolinas, LLC v. NTE Carolinas II, LLC*, 111 F.4th 337, 355 (4th Cir. 2024). The panel began by acknowledging that "when anticompetitive conduct is alleged to be typical predatory pricing [or] refusing to deal . . . the case law has developed tests for analyzing such claims." *Id.* at 354. But the court believed that "when a court is faced with allegations of a complex or atypical exclusionary campaign, the individual components of which do not fit neatly within pre-established categories, its application of such specific conduct tests would prove too rigid." *Id.* Without explaining when allegations qualify as "complex or atypical" (as many arguably do), the court held that "'[a]ggregation is appropriate' when individual acts are all 'part of the same scheme to perpetuate dominance or drive the plaintiff from the market.'" *Id.* at 354-55 (quoting Phillip E. Areeda & Herbert Hovenkamp, *Antitrust Law: An Analysis of Antitrust Principles and Their Application* ¶ 310c7 (4th & 5th eds. 2024)). The court thus allowed a party's claims to proceed when the alleged conduct "do[es] not fit neatly within pre-established categories," even though those same claims fail the requirements for established categories of antitrust claims, such as refusals to deal, predatory pricing, or the filing of lawsuits that do not meet the established standards for being "a sham." *Id.* at 354.

Applying this broad rule of aggregation, the panel concluded that the court erred when it found that NTE had not shown an actionable violation of Section 2. Believing this result compelled by

Continental Ore, the panel explained that it was "a misapplication of antitrust doctrine for a court to treat a plaintiff's allegations of anticompetitive conduct 'as if they were five completely separate and unrelated lawsuits,' effectively 'tightly compartmentalizing the various factual components and wiping the slate clean after scrutiny of each.'" *Duke Energy*, 111 F.4th at 355 (citing *Continental Ore*, 370 U.S. at 698-99). The panel further held that "[j]ust as the '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,' so too must a firm's exclusionary efforts be considered in their totality." *Id.* (quoting *Continental Ore*, 370 U.S. at 699).

C. This Court Should Grant Certiorari to Clarify When Amalgamation Is Appropriate Under Section 2

The panel misunderstood and misapplied *Continental Ore*. In seeking to avoid "dismembering" Section 2 claims, the panel ignored this Court's clear stance against stirring up a "monopoly broth" of liability when the disparate conduct is independently lawful and its legality does not turn on market foreclosure. This Court should grant certiorari to clarify the limited circumstances when amalgamation is appropriate and explain why this case is not one of them.

1. Amalgamation Is Generally Improper

The panel mistakenly leapt from the correct observation that aggregation can be appropriate to the false conclusion that "monopoly broth" of alleged anticompetitive actions—at least in "complex" or "atypical" cases—should be handed to the fact-finder

to determine whether its cumulative effect is anticompetitive. This broad-brush take on Section 2 liability undermines this Court's conduct-based tests for antitrust liability. The panel decision also overlooks that certain behavior is lawful because it holds social value and, accordingly, is *protected* by this Court's precedents. The three types of behaviors at issue in this case—unilateral price cuts, refusals to deal, and the filing of non-sham lawsuits—exemplify this key principle of antitrust law.

First, as noted above, this Court's precedent underscores that a firm's choice to set low prices is protected unless it meets two predatory pricing criteria: pricing below cost and a likely chance of recouping losses. *Brooke Grp. Ltd.*, 509 U.S. at 222-24. This is because above-cost pricing rarely harms competition and price-cutting is a socially beneficial practice that deserves legal protection. *Id.* at 226 ("'[T]he mechanism by which a firm engages in predatory pricing—lowering prices—is the same mechanism by which a firm stimulates competition; because "cutting prices in order to increase business often is the very essence of competition . . . [;] mistaken inferences . . . are especially costly, because they chill the very conduct the antitrust laws are designed to protect."'" (alterations in original) (quoting *Cargill, Inc. v. Monfort of Colo., Inc.*, 479 U.S. 104, 122 n.17 (1986))); *see also Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 594 (1986).

Second, this Court has safeguarded a monopolist's unilateral refusal to deal (except for a few narrow exceptions) to protect its drive to make socially vital investments. *Trinko*, 540 U.S. at 407-08 ("Compelling such firms to share the source of their advantage is in

some tension with the underlying purpose of antitrust law, since it may lessen the incentive for the monopolist, the rival, or both to invest in those economically beneficial facilities."). Even dominant firms can refuse to deal with their rivals—not because such refusals cannot exclude competitors, but because they are essential to recouping investments, which are critical to the smooth operation of our free-market system. *Id.* at 407 ("The opportunity to charge monopoly prices—at least for a short period—is what attracts 'business acumen' in the first place; it induces risk taking that produces innovation and economic growth."). As Chief Judge Boasberg recently and succinctly put, this Court's refusal-to-deal cases "'are not premised on the view that [monopolist refusals to deal] are incapable of harming competition'; [because,] obviously, 'refusals to aid new entrants can indeed' have that effect." *New York v. Facebook, Inc.*, 549 F. Supp. 3d 6, 25 (D.D.C. 2021) (first alteration in original) (citation omitted), *aff'd*, 66 F.4th 288 (D.C. Cir. 2023). Rather, they are based on judgments that certain behaviors—even by dominant firms—should be privileged and immune from antitrust scrutiny. *Id.*

Third, the filing of a lawsuit that does not meet this Court's established criteria for being a "sham" cannot give rise to antitrust liability. *Pro. Real Estate Invs., Inc.*, 508 U.S. at 60-61. As noted above, this Court's test for sham litigation is an application of *Noerr-Pennington* immunity. *See supra* at 5 n.2. This Court "crafted the *Noerr–Pennington* doctrine—and carved out only a narrow exception for 'sham' litigation—to avoid chilling the exercise of the First Amendment right to petition the government for the redress of grievances." *Octane Fitness, LLC v. ICON*

Health & Fitness, Inc., 572 U.S. 545, 556 (2014). Under the panel's approach, Duke Energy's constitutionally-protected breach of contract lawsuit against NTE could be an active ingredient of a "monopoly broth" claim even though that lawsuit is not a "sham." That approach threatens to chill the very protected behavior that this Court has held to be immune from liability.

Unilateral price cuts, refusals to deal, and non-sham lawsuits stand apart from the exclusive dealing this Court scrutinized in *Continental Ore*. As explained below, exclusive contracts are lawful unless they collectively foreclose a large enough share of the market—thus making amalgamation to determine the scope of foreclosure a more natural extension of that conduct-based test. In contrast, below-cost pricing, unilateral refusals to deal, and non-sham lawsuits are lawful. Period. Amalgamating protected unilateral actions to create general collective anticompetitive effects ignores their inherent legality, even setting aside the absence of anticompetitive impact standing alone.

This Court has already made this principle crystal clear. In *linkLine*, the Court rejected imposing Section 2 liability for an alleged "price squeeze" that amounted to the combination of a non-actionable refusal to deal and a non-actionable unilaterally set low price. As this Court succinctly explained:

> Plaintiffs' price-squeeze claim, looking to the relation between retail and wholesale prices, is thus nothing more than an amalgamation of a meritless claim at the retail level and a meritless claim at the wholesale level. If there is no duty to deal at the wholesale level

> and no predatory pricing at the retail level, then a firm is certainly not required to price *both* of these services in a manner that preserves its rivals' profit margins.

555 U.S. at 452.

But under the panel's view here, the plaintiff's theory in *linkLine* should have been allowed because it involved "complex" or "atypical" anticompetitive conduct that "do[es] not fit neatly within pre-established categories." *See Duke Energy*, 111 F.4th at 354. *linkLine* notably did not discuss or imply any such exception, and the Fourth Circuit's decision offers no guidance on when a failed predatory pricing (or sham lawsuit or unilateral refusal to deal) claim can be repackaged into something else. The reality is that the attempt at amalgamation in this case reflects a misguided effort to combine two lawful behaviors into a "monopoly broth." This Court rejected that approach in *linkLine*, and it should do so again here.

2. Amalgamation Is Proper Under Limited Circumstances Not Present Here

At the same time, *amici* believe that in certain circumstances, the synergistic effect of separate conduct by the defendant can be considered to determine whether that conduct results in an adverse effect on competition in violation of Section 2. That was the case in *Continental Ore*, where the defendant, Union Carbine, foreclosed a substantial share of the market through multiple exclusivity deals, then disclaimed Section 2 liability by arguing that no single deal alone was enough to exclude the rival. 370 U.S. at 697. This Court rightly rejected that argument, noting that the cumulative effect of the

exclusivity arrangements must be considered "as a whole." *Id.* at 699 (citation omitted). *Continental Ore* reflects that certain practices that have the collective impact of foreclosing a substantial share of competition in a properly defined market are as problematic as practices that individually have that effect. In short, such exclusionary practices should be analyzed "as a whole." Areeda & Hovenkamp, *Antitrust Law* ¶ 310c7.

But *Continental Ore*'s aggregation principle only extends so far. In particular, it naturally applies to other types of allegedly monopolistic behavior when that conduct's legality likewise turns on foreclosing a substantial share of the relevant market. For example, tying arrangements are not unlawful under this Court's test unless they foreclose a substantial amount of commerce. *Jefferson Parish Hosp. Dist. No. 2 v. Hyde*, 466 U.S. 2, 16 (1984).

Similarly, independently wrongful acts—torts or crimes—which do not have an anticompetitive effect standing alone, but may result in a "death by a thousand cuts"—may be considered in combination. This Court has emphasized that routine business torts should not be turned into antitrust cases, *NYNEX Corp. v. Discon, Inc.*, 525 U.S. 128, 137 (1998). But a business tort may, in unique circumstances, have such a severe effect on competition that it amounts to monopolistic conduct. Suppose a duopolist firebombs its rival's factory, eliminating its only competitor, and hence acquires power to raise prices and reduce output.[3] Such

[3] Indeed, a standard trope in antitrust law—a behavior of which Standard Oil was accused and which is universally

behavior (in addition to being criminal and tortious) would be unlawful under Section 2 of the Sherman Act. But now suppose that the company engages in a number of smaller tortious or criminal acts: The company blows up not the rival's factory, but two of the rival's delivery trucks. It blackmails three of the rival's key employees to leave their jobs and steals the rival's trade secrets. Taken together, these wrongful tactics force the rival out of business, with the same effect as blowing its factory in one fell swoop. Their synergistic effect on competition may be considered because, taken together, they foreclosed market access.

While aggregating such separate acts to determine whether a "substantial" foreclosure has occurred may be a valid exercise under *Continental Ore*, it is only valid insofar as the acts are themselves unlawful. Suppose the defendant sells customers a primary product, requires contractually that they purchase a secondary product from the defendant or third-parties it approves, and establishes a good faith approval process for third-parties. Such a third-party approval arrangement lacks the coercion to constitute a tie. Phillip E. Areeda & Herbert Hovenkamp, *Antitrust Law: An Analysis of Antitrust Principles and Their Application* ¶ 1716e (5th ed. 2024). Since there is no tie, and hence no foreclosure, *Continental Ore* cannot apply. The act simply could not be an ingredient in the plaintiff's antitrust case.

A variation of the duopolist hypothetical above further illustrates the limits to aggregation under *Continental Ore*. Suppose that the accused company

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assumed to constitute anticompetitive conduct—is "blowing up the competitor's factory."

does not blow up the competitor's delivery trucks, but acquires new ones of its own. It does not blackmail the employees, but hires them away through promises of better wages and career advancement. And it does not steal the rival's trade secrets, but carefully observes its rivals' methods from publicly available sources, and then improves on them. In concert, these lawful acts result in the rival leaving the market—perhaps because it is simply less efficient or its products less desirable. Section 2 liability cannot attach against the company. Such independently lawful acts should not be aggregated into a "monopoly broth" theory, regardless of their effect on a competitor, because their legality does not turn on foreclosing access to the relevant market. Independently lawful behavior of this kind cannot become unlawful in combination.

II. Certiorari Should Be Granted To Resolve Confusion In The Lower Courts On When Amalgamation Is Appropriate

The panel decision underscores the considerable confusion percolating in the lower courts concerning when and how to apply a "monopoly broth" theory of Section 2 liability. This Court should grant review in this case to clarify that amalgamation of Section 2 claims is appropriate under *Continental Ore* only when the legality of the independent acts depends on whether they block access to the relevant market.

To begin, as noted in the Petition for a Writ of Certiorari (at 24-27), a number of other Circuits have correctly rejected monopoly broth theories when the ingredients of the alleged broth consisted of lawful behavior like that here. *See New York v. Meta Platforms, Inc.*, 66 F.4th 288, 300 n.13 (D.C. Cir.

2023); *Dreamstime.com, LLC v. Google, LLC*, 54 F.4th 1130, 1141-42 (9th Cir. 2022); *Sanofi-Aventis U.S., LLC v. Mylan, Inc. (In re EpiPen Mktg. (Epinephrine Injection, USP), Sales Pracs. & Antitrust Litig.)*, 44 F.4th 959, 982 (10th Cir. 2022); *Eatoni Ergonomics, Inc. v. Rsch. in Motion Corp.*, 486 F. App'x 186, 191 (2d Cir. 2012); *Intergraph Corp. v. Intel Corp.*, 195 F.3d 1346, 1366-1367 (Fed. Cir. 1999); *United States v. Microsoft Corp.*, 253 F.3d 34, 58 (D.C. Cir. 2001) (en banc). Each of these decisions supports the correct proposition that when "each individual action alleged by [the plaintiff] does not rise to anticompetitive conduct . . . , their collective sum likewise does not." *See, e.g.*, *Dreamstime.com*, 54 F.4th at 1142.

The Third and now Fourth Circuits have diverged from the majority, permitting "monopoly broth" claims to go forward even when the alleged underlying conduct was independently lawful and protected. The panel decision relied on the Third Circuit's decision in *LePage's*, which affirmed liability for 3M's above-cost bundled discounts and exclusive contractual arrangements on the theory that the "relevant inquiry is the anticompetitive effect of 3M's exclusionary practices considered together." 324 F.3d at 162. Judge Greenberg, joined by then-Judge Alito, dissented from that *en banc* decision, recognizing that 3M's bundled discounts were lawful and its exclusivity arrangements did not foreclose access to enough of the market to have an anticompetitive effect. *Id.* at 169-82.

LePage's has been heavily criticized by other Circuits, the Antitrust Modernization Commission, the scholarly community, and the United States as *amicus curiae* in this Court. *See, e.g.*, *FTC v. Church & Dwight Co.*, 665 F.3d 1312, 1316 (D.C. Cir. 2011)

("*LePage's* is of course not the law of this circuit, and it has been roundly criticized."); *Cascade Health Solutions v. PeaceHealth*, 515 F.3d 883, 899-909 (9th Cir. 2008), Antitrust Modernization Comm'n, *Report and Recommendations* 94 (2007) ("The lack of clear standards regarding bundling, as reflected in *LePage's v. 3M*, may discourage conduct that is procompetitive or competitively neutral and thus may actually harm consumer welfare."); Daniel L. Rubinfeld, *3M's Bundled Rebates: An Economic Perspective*, 72 U. Chi. L. Rev. 243, 252-56 (2005); Daniel A. Crane, *Multiproduct Discounting: A Myth of Non-Price Predation*, 72 U. Chi. L. Rev. 27, 44-48 (2005); Amicus Curiae United States Br. 19, *3M Co. v. LePage's Inc.*, 542 U.S. 953 (2004), 2004 WL 1205191. Indeed, the Third Circuit itself has admitted that *LePage's* rationale has been "undermined by intervening Supreme Court precedent," *ZF Meritor LLC v. Eaton Corp.*, 696 F.3d 254, 274 n.11 (3d Cir. 2012), *cert. denied*, 569 U.S. 958 (2013), and that "it has been the subject of much criticism," *Eisai, Inc. v. Sanofi Aventis U.S., LLC*, 821 F.3d 394, 405 n.35 (3d Cir. 2016).

Despite the overwhelming criticism that *LePage's* has faced from courts and commentators alike, the decision has been cited over one hundred times in lower court opinions since the Third Circuit acknowledged its dubious standing in 2016. *See, e.g.*, *Wisconsin v. Indivior Inc. (In re Suboxone (Buprenorphine Hydrochloride & Naloxone) Antitrust Litig.)*, 622 F. Supp. 3d 22, 61 (E.D. Pa. 2022) ("Indeed, the Third Circuit has explicitly recognized that independently lawful conduct—i.e., discount programs, rebates, exclusive dealing contracts—can have an anticompetitive effect that is actionable

under antitrust law."); *Sitts v. Dairy Farmers of Am., Inc.*, 417 F. Supp. 3d 433, 470 (D. Vt. 2019) (favorably citing *LePage's*); *In re Deere & Co. Repair Serv. Antitrust Litig.*, 703 F. Supp. 3d 862, 903-04 (N.D. Ill. 2023) (similar).

This Court's repudiation of *LePage*'s understanding of *Continental Ore* will also have important consequences for Circuits that have not squarely addressed the issue. For example, the Fourth Circuit relied on decisions from two other Circuits, *Conwood Co. v. U.S. Tobacco Co.*, 290 F.3d 768 (6th Cir. 2002), and *Viamedia, Inc. v. Comcast Corp.*, 951 F.3d 429 (7th Cir. 2020), in justifying its holding that "when a court is faced with allegations of a complex or atypical exclusionary campaign, the individual components of which do not fit neatly within pre-established categories, its application of such specific conduct tests would prove too rigid." *Duke Energy*, 111 F.4th at 354. While the Sixth and Seventh Circuits have not endorsed the Fourth Circuit's approach to "monopoly broth," *Conwood* and *Viamedia* arguably reflect a lack of clarity on the legal standards applicable to such claims. *See Conwood Co.*, 290 F.3d at 783 (endorsing aggregation of defendant's business torts to demonstrate Section 2 violation because it demonstrated that defendant "began a systematic effort to exclude competition from the moist snuff market," without clarifying whether its amalgamation approach was limited to underlying conduct that is unlawful); *Viamedia, Inc.*, 951 F.3d at 453 (correctly observing that the Section 2 inquiry should focus on the defendant's harm to "'the competitive *process*,'" without deciding when amalgamation of underlying conduct is appropriate (quoting *Microsoft Corp.*, 253 F.3d at 58)); *see also*

Inline Packaging, LLC v. Graphic Packaging Int'l, LLC, 962 F.3d 1015, 1029-30 (8th Cir. 2020) (citing *LePage's*, without deciding whether to adopt its approach). Absent this Court's intervention, one or more of these Circuits may consider adopting the Fourth Circuit's erroneous approach and deepen the already entrenched Circuit conflict.

* * *

This Court should grant certiorari to clarify that a plaintiff cannot prevail on a monopolization claim by aggregating multiple distinct, protected acts into an unlawful whole. Absent this Court's intervention, the Fourth Circuit decision will wreak havoc on antitrust law by imposing unwarranted penalties on procompetitive conduct.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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