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 FOR THE UNITED STATES AS AMICUS CURIAE

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QUESTION PRESENTED

Whether the court of appeals correctly denied the defendants' motion for summary judgment in a case where a rival alleged that a monopolist's exclusionary campaign violated Section 2 of the Sherman Act.

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This brief is submitted in response to the Court's order inviting the Solicitor General to express the views of the United States. In the view of the United States, the petition for a writ of certiorari should be denied.[1]

INTRODUCTION

This appeal arises out of a campaign by an established monopolist to stop a more efficient rival from disturbing its long-dominant hold over a regional energy market. Applying the established summary-judgment standard, the court of appeals concluded that this exclusionary campaign did not involve competition "on the merits," because petitioner could not compete with respondent on the basis of efficiency. Pet. App. 38a. And the court found that this campaign produced the very

[1] For clarity, this brief treats the Duke Energy entities as a single petitioner, and the NTE Carolinas entities as a single respondent.

harms the federal antitrust laws are designed to prevent—"reduced consumer choice, higher prices in the long term, and market foreclosure." *Id.* at 28a; see *id.* at 54a-57a.

Taking the current record in the light most favorable to respondent (the non-moving party), the court of appeals properly held that petitioner was not entitled to summary judgment. That fact-bound decision does not warrant further review. Nor is this case a suitable vehicle to announce any broader rule of antitrust law.

The beneficiary of a government grant more than a century ago, petitioner has controlled the wholesale-power market in the Carolinas for generations. It has maintained that position in part because many barriers to entry exist in this industry. Power plants have high startup costs, and "anchor" clients sizable enough to cover those costs are rare. By dissuading such customers from switching to a potential competitor, an entrenched monopolist can prevent new entrants from gaining a foothold in the region—without creating a better product, producing a better service, or implementing a general price cut.

The summary-judgment record would support a finding that that is exactly what happened here. Petitioner's older plants were "not competitive" with respondent's plants, which used superior technology to produce cleaner power at a far cheaper rate. Pet. App. 9a. So when respondent sought to build a new facility in the Carolinas, petitioner sought to target the competition itself. Petitioner recognized that this new plant would be viable only if respondent could sell power to the City of Fayetteville, the one sizable customer in the area whose contract was coming due. Petitioner therefore took a variety of steps intended to deter Fayetteville from switching to a new supplier.

Petitioner succeeded—and respondent presented sufficient evidence for a jury to conclude that petitioner did so through means "other than efficiency." Pet. App. 27a. For instance, petitioner "manufactured" a "sham breach" of an interconnection agreement to make it appear that respondent's plant would be "unable to transmit its power." *Id.* at 15a-19a, 132a. Likewise, petitioner restructured Fayetteville's contract to give the City a short-term discount and lump-sum payment, which petitioner would recoup through a long-term price hike on other customers. *Id.* at 45a. All told, without ever competing with respondent on the merits (*i.e.*, offering a better service), petitioner was able to prevent respondent from operating its superior facility.

The court of appeals' interlocutory decision denying petitioner's summary-judgment motion does not warrant further review. The court below held that petitioner's campaign was made up of various acts that a reasonable jury could find to be anticompetitive. And while petitioner may disagree with those subsidiary holdings, it has not sought review of those highly fact-bound and case-specific determinations.

When a monopolist engages in a coordinated campaign to squelch competition, no circuit holds that each discrete aspect of the defendant's conduct must be analyzed in isolation. Instead, courts uniformly agree, consistent with this Court's precedent, that a holistic analysis is appropriate in circumstances like these. The petition for a writ of certiorari should be denied.

STATEMENT

1. a. Petitioner is a government-created monopolist that controls more than 90% of the wholesale-power market within the Carolinas. See Pet. App. 6a, 8a. Respondent is a Florida-based company that sells wholesale power and "emerged as a threat" to petitioner's dominant position within that market. *Id.* at 140a.[2]

Respondent broke into the region in 2014 with a natural-gas facility in Kings Mountain, North Carolina. Pet. App. 6a. Its facility used a "combined-cycle" process that was more efficient than petitioner's process, and could generate cleaner energy at a far cheaper rate. *Ibid*. Starting that year, petitioner lost nine customers to respondent. *Id.* at 7a.

Petitioner's dated facilities left it unable to "chase the price competition and earn a reasonable return." Pet. App. 7a. And because of petitioner's outmoded plants, that "[c]ompetitive disadvantage" was not "going away" anytime soon. *Id.* at 9a. Internal estimates showed that petitioner's "rates would remain much higher than [respondent's] through at least 2025." *Ibid.*

b. In 2016, respondent announced a major expansion project: a plant in Reidsville, North Carolina. Pet. App. 9a. Since respondent did not have its own transmission lines, the Reidsville facility would need to use petitioner's in order to connect to the interstate grid. *Id.* at 5a. Because petitioner is a vertically integrated power company—meaning that it owns both power plants and transmission lines, and sells to both wholesale and retail customers—Federal Energy Regulatory Commission

[2] Because this appeal stemmed from the district court's grant of summary judgment, the court of appeals properly viewed the evidentiary record in the light most favorable to respondent, the nonmoving party. See Pet. App. 26a.

(FERC) regulations required petitioner to make its lines available to competitors. *Id.* at 6a. Petitioner and respondent soon entered into a standard agreement under which respondent would pay petitioner nearly $60 million to build the interconnection infrastructure for Reidsville, and would subsequently pay petitioner for the right to use those lines (which petitioner would own). *Id.* at 10a.

Shortly thereafter, three more of petitioner's customers switched to respondent. Pet. App. 10a. But to obtain sufficient scale to make the plant viable, given the high fixed costs that power-plant operations entail, respondent still needed to attract a sizable "anchor" client. *Id.* at 8a-9a, 54a. The opportunity to attract such clients rarely arises, in part due to their size, and in larger part because wholesale customers often enter into long-term contracts with power suppliers. *Id.* at 7a-9a. For Reidsville, the only potential anchor client was the City of Fayetteville. *Id.* at 8a. Fayetteville had signed a 20-year contract with petitioner in 2012, but Fayetteville had the option of terminating services as early as July 2024 if it gave notice in 2020. *Ibid.* By contrast, the area's other major customers were largely locked into long-term deals. *Id.* at 9a, 11a.

Losing Fayetteville was the "[l]argest customer risk" that petitioner faced. Pet. App. 9a. The City had been a customer for more than 100 years, had generated massive demand for electricity, and had contributed $100 million in annual net revenue. *Id.* at 8a-9a. With a "large wholesale customer" like Fayetteville, respondent could bring the Reidsville plant online, gain a real foothold in the region, and jeopardize even more of petitioner's business. *Id.* at 9a.

Petitioner's own estimates revealed that its "system costs" were "25 to 30 percent" higher than respondent's. Pet. App. 12a. And the rates it charged "compare[d] unfavorably" to respondent's. *Id.* at 13a. Petitioner therefore could not expect to retain Fayetteville's business through "superior efficiency." *Id.* at 12a.

c. Petitioner's campaign to retain Fayetteville as a customer instead involved exploiting existing leverage, rather than improving its service. That campaign had two principal components that worked in tandem: Petitioner (i) used its leverage as Fayetteville's incumbent power supplier to offer a short-term discount that no competitor could match, while (ii) making respondent appear to be an unreliable power supplier.

i. The first component was a "blend-and-extend" scheme to restructure Fayetteville's existing contract. Pet. App. 13a. Although petitioner could not compete with respondent on future pricing, petitioner was uniquely able to offer a discount on Fayetteville's "*existing arrangement*" for the remaining period that Fayetteville was committed to using petitioner's services. *Ibid.* Petitioner proposed to cut its prices by $42 million for the period between January 2021 and June 2024. *Ibid.*

This proposal, however, was not a standalone price cut. In order to receive this discount from 2021 to 2024, Fayetteville would need to accept " 'higher prices than offered by the competition' beginning in 2024." Pet. App. 13a-14a (citation omitted). This "discount-now increase-later" stratagem would allow petitioner to recover much of its short-term losses later. *Id.* at 13a. That was particularly so because, if the Reidsville plant did not commence operations, petitioner planned to "shift the cost of the discount it had offered Fayetteville back to its wholesale customers and to its retail customers in the years to come." *Id.* at 18a.

In combination with this revised price structure, petitioner also offered to quadruple the price it paid for the excess power it bought from Fayetteville's "very inefficient" Butler Warner plant. Pet. App. 8a; see *id.* at 14a. That price increase alone was worth $283 million. C.A. App. 578. In total, the discount for Fayetteville's purchases from 2021-2024, and the price increase for petitioner's purchases of power from the Butler Warner plant, amounted to an aggregate incentive for Fayetteville of $325 million—which it intended to recoup through price increases on both Fayetteville and other customers. Pet. App. 13a.

ii. Along with offering an incentive to Fayetteville, petitioner also sought to hobble and discredit respondent. As noted, petitioner and respondent had entered into an agreement allowing respondent to use petitioner's transmission lines at Reidsville. Pursuant to that agreement, respondent had paid petitioner $1.6 million by early 2019. Pet. App. 12a. In February 2019, however, petitioner departed from its prior practice and told respondent to stop sending payments until respondent received a formal invoice. *Ibid.* In the ensuing months, petitioner did not send an invoice; so as instructed, respondent did not send a payment. *Id.* at 12a-13a, 15a. During this period, petitioner's officials exchanged emails about how to "ruin [respondent's] plans" and finally "[p]ut" the Reidsville project "to bed." *Id.* at 12a.

An opportunity arose in May 2019, when respondent suspended construction on its transmission-line work. Pet. App. 15a. Such suspensions are "common in the industry" and were "explicitly permitted" under the interconnection agreement. *Ibid.* But in response, petitioner sent respondent a "notice of breach" for nonpayment, "false[ly]" claiming that petitioner had sent respondent invoices that respondent had failed to pay. *Id.* at 15a-16a. In their internal communications, officials of petitioner explored whether this claim could be used to allege a "breach!" and to "punt" respondent from its position in the "OASIS queue"—the database that informs the public of a particular plant's place in line for interconnection services, which are essential for the plant to transmit the power it produces. *Id.* at 16a.

Petitioner escalated these efforts over the coming months, sending two notices of default and again falsely claiming that respondent had failed to pay its invoices. Pet. App. 17a. In September 2019, petitioner terminated its agreement with respondent. *Id.* at 18a. Shortly thereafter, petitioner listed the Reidsville project as "canceled" in the OASIS queue, effectively telling the public (*e.g.*, customers and investors) the plant would be "unable to transmit its power." *Id.* at 19a, 16a.

iii. In combination, these efforts doomed the Reidsville project. Being listed as "canceled" was disastrous, because the "ability to finance" that plant had "everything to do with ensuring" the interconnection agreement was "intact." Pet. App. 19a; see *id.* at 20a. Ultimately, after this "sham breach," *id.* at 132a, and in the shadow of Reidsville being "still listed as 'canceled' in [petitioner's] OASIS queue, [petitioner] and Fayetteville" formalized their new contract. *Id.* at 19a.

Petitioner nevertheless continued to target Reidsville. See Pet. App. 55a. Foremost, when respondent applied for a state permit that was "needed to construct the Reidsville plant," petitioner sought to intervene in the state permitting proceedings "to assert falsely that [respondent] had breached the Reidsville interconnection agreement and to suggest that [respondent] would fail to meet its construction goals." *Id.* at 133a.

In a May 2020 declaratory order, FERC explained that a transmission provider may not terminate an interconnection agreement over the interconnection customer's objection, or announce that such a termination has occurred, without first receiving Commission approval. See C.A. App. 562-564; Pet. App. 21a. By then, however, petitioner had "already secured Fayetteville's business." Pet. App. 21a. The result, according to respondent, was that petitioner "destroyed the value of the Reidsville project," leaving customers with "no choice but to pay [petitioner's] higher rates." *Id.* at 22a. Without Reidsville, what followed was "reduced consumer choice, higher prices in the long term, and market foreclosure." *Id.* at 28a.

2. a. Petitioner sued respondent in state court, alleging that respondent had breached the interconnection agreement. Pet. App. 22a. Respondent removed the case to federal court and filed counterclaims for monopolization and attempted monopolization under Section 2 of the Sherman Act, ch. 647, 26 Stat. 209 (15 U.S.C. 1 *et seq.*). Pet. App. 22a.

The district court granted summary judgment to petitioner on respondent's counterclaims. Pet. App. 127a. The court held that no reasonable jury could find that petitioner had engaged in unlawful monopolization. *Id.* at 85a, 109a. The court reviewed each part of petitioner's campaign in isolation, found that none had violated Section 2, and concluded that "[a]dding up several instances of lawful conduct cannot total unlawful conduct. In simple mathematical terms, 0 + 0 = 0." *Id.* at 88a.

b. The court of appeals reversed. Pet. App. 1a-60a. The court agreed that the district court's "approach" would have been "proper" if each aspect of petitioner's alleged anticompetitive conduct had fit within one of this Court's established doctrinal standards. *Id.* at 29a. The court concluded, however, that if the "individual components" of an "exclusionary campaign" do not "fit neatly within pre-established categories," considering those acts in isolation would prove "too rigid." *Ibid.* Rather, in those cases, "anticompetitive conduct must be considered as a whole." *Ibid.* But the court cautioned that antitrust courts "must take care not to aggregate acts that are procompetitive." *Id.* at 32a. And it emphasized that, in protecting the "competitive process," the antitrust laws insulate from liability—and indeed encourage—efforts to compete on efficiency, such as by offering a "superior product, service, or lower prices." *Id.* at 26a-27a.

Applying that framework here, the court of appeals first held that no part of petitioner's campaign fit this Court's conduct-specific standards. *E.g.*, Pet. App. 41a-42a, 46a. The court of appeals concluded that petitioner's restructured arrangement with Fayetteville was meaningfully different from traditional predatory pricing, because the revised deal did not involve a standalone price-cut, but instead involved a short-term discount, a sizable side payment, and a "cross-subsidization plan" where other customers would help cover any losses. *Id.* at 45a; see *id.* at 45a-46a. For that reason, the court of appeals explained that "predatory pricing analysis cannot fully account for the more comprehensive conditions of [petitioner's] blend-and-extend strategy and the Butler Warner offering." *Id.* at 35a; see *id.* at 42a ("conclud[ing] that disputed facts persist regarding whether *the structure* of [petitioner's] offer [to Fayetteville] was exclusionary").

The court of appeals likewise found that this Court's unilateral-refusal-to-deal framework did not adequately capture petitioner's termination of the interconnection agreement. While acknowledging that this second component of petitioner's campaign "somewhat resembles a refusal to deal," Pet. App. 46a, the court viewed it more as an effort to temporarily mislead "potential customers and investors" into believing "that the Reidsville project would not move forward." *Id.* at 53a; see *id.* at 46a (describing relevant conduct as "disrupting [respondent's] placement in [petitioner's] OASIS queue"); *id.* at 51a-52a ("[A] reasonable jury could find that [petitioner] actually instructed [respondent] not to pay [its] bills and ultimately walked [respondent] into an apparent breach of the Reidsville Interconnection Agreement.").

The court of appeals held that each part of petitioner's campaign "independently produced anticompetitive effects," Pet. App. 46a, because each impeded a rival from competing on some basis other than efficiency, see *id.* at 35a-39a (describing the Fayetteville deal); *id.* at 50a-54a (contract dispute). After analyzing these components separately, the court of appeals concluded that they functioned as part of one "larger scheme" to exclude a more efficient rival from the market. *Id.* at 54a. The court recognized that petitioner may have valid justifications for its conduct. *Id.* at 54a-

57a. It explained, however, that this factual dispute between the parties should be resolved by a jury, not by the court at summary judgment. *Id.* at 55a.

c. The court of appeals denied rehearing en banc by an 11-2 vote. Pet. App. 129a. Judge Niemeyer, the author of the panel opinion, concurred in the denial of en banc review, stating that further review would be a "wasteful use of limited judicial resources" because the lawfulness of petitioner's conduct turned on disputes of fact. *Id.* at 138a. Judge Quattlebaum dissented. *Id.* at 139a. In his view, the panel should have assessed petitioner's conduct solely under this Court's established doctrinal standards for predatory pricing and refusals to deal. *Id.* at 149a.

DISCUSSION

A. This Case Is An Unsuitable Vehicle To Announce A New And Abstract Rule Of Antitrust Law

Petitioner asks this Court to announce a broad general rule concerning the circumstances under which courts may aggregate conduct for purposes of Section 2 liability. This case would be a poor vehicle in which to announce such a sweeping principle of antitrust law.

Petitioner does not precisely articulate the anti-aggregation rule that it wants this Court to adopt. The petition asserts (Pet. 18) that when conduct "can be analyzed under an existing doctrinal test * * * the court must apply that test." But the court of appeals agreed that "where the alleged conduct falls within [one of the] well-defined categories" for which this Court has "developed [a] test[]," that test controls. Pet. App. 29a; see Opp. 20-22; Chamber Br. 12; Daniel A. Crane, *Does Monopoly Broth Make Bad Soup?* 76 Antitrust L.J. 663, 668 (2010).

Petitioner's core dispute with the decision below is not over that rule, but rather its application. On petitioner's view (Pet. 19-20; Reply 9-11), the court below should have analyzed the restructured agreement between petitioner and Fayetteville under the predatory-pricing test from *Brooke Group Ltd.* v. *Brown & Williamson Tobacco Corp.*, 509 U.S. 209 (1993); and the court should have analyzed the terminated interconnection agreement under the unilateral-refusal-to-deal standards discussed in *Verizon Communications Inc.* v. *Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398 (2004). The court of appeals disagreed, finding that each component of petitioner's alleged scheme had significant features not contemplated by those frameworks. See Pet. App. 29a, 35a-36a, 41a-42a, 45a-46a, 51a-52a. That is, the court found the predatory-pricing and refusal-to-deal standards inadequate not simply because petitioner's scheme included two distinct components (see Pet. 19), but because "the individual components of [the scheme] do not fit neatly within pre-established categories." Pet. App. 29a; see pp. 10-11, *supra*.

At least in theory, petitioner might have urged this Court to consider each discrete aspect of petitioner's alleged misconduct, and to determine the competitive significance of each component of the overall campaign, before reviewing the court of appeals' approach to aggregation. But petitioner does not challenge the court of appeals' subsidiary holdings about the inapplicability of this Court's established doctrinal categories or the anticompetitive effects of the scheme's individual components—perhaps recognizing that such fact-bound error-correction is not ordinarily the stuff of this Court's review. Petitioner instead has challenged only the court of appeals' conclusion that petitioner's Section 2 liability will ultimately depend on the totality of petitioner's conduct.

In places, petitioner offers (Pet. 19) a rule—which it charges the court of appeals with violating—that if "none of the acts challenged by the plaintiff are anticompetitive, an aggregated claim must fail." But nothing in the decision below is inconsistent with that approach. After concluding that none of this Court's conduct-specific tests applied, the court below found that each of petitioner's main exclusionary acts "independently produced anticompetitive effects." Pet. App. 46a; see *id.* at 54a. In addition, the court of appeals 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." *Id.* at 32a. So if the rule is that a "plaintiff must identify at least one anticompetitive act to prove a Section 2 violation," Pet. 14, the court below believed that it had found at least two, in rulings that petitioner does not challenge here.

Elsewhere, petitioner suggests that a course of anticompetitive conduct cannot violate Section 2 unless one of its component parts is sufficiently consequential to constitute a standalone Section 2 violation. Pet. Reply 1; see Chamber Br. 6-10. But petitioner's endorsement of that anti-aggregation principle is not unequivocal. For instance, petitioner concedes (Pet. 21) that aggregation can be appropriate "when a monopolist enters into a series of contracts that each tie up a portion of the market." That concession appears to encompass circumstances where no individual contract—tying up 5% of the market here, 15% there—would be a standalone antitrust violation; only when the contracts are taken together are their effects on the market sufficient to violate Section 2. Petitioner suggests (*ibid.*) that aggregation is appropriate only for different iterations of the same kind of anticompetitive conduct (*e.g.*, four exclusionary contracts of the same basic character). But it identifies no logical rationale for limiting aggregation analysis in that manner. If different *types* of anticompetitive conduct taken together restrain competition to a much greater degree than would any single component of a defendant's scheme, there is no sound reason to ignore that effect in assessing the scheme's legality.

Petitioner's amici likewise agree that an anticompetitive scheme can violate the antitrust laws even when no single constituent part would do so. See Crane & Hovenkamp Br. 4. They accept that there are circumstances where "disparate conduct" should be "considered collectively." *Id.* at 2. To be sure, those amici agree with petitioner that this is not such a case, and that the court below instead should have applied this Court's "conduct-based tests." *Id.* at 4. But as explained, those subsidiary rulings are not challenged here.

Although petitioner asks (Reply 2) this Court to "make[] clear what the proper Section 2 analysis should look like" in this case, petitioner offers no clearly defined alternative to the court of appeals' approach. Read literally, petitioner's question presented (Pet. I) appears to ask whether aggregation can *ever* be used to establish Section 2 liability when no single act of the defendant constitutes a standalone violation. But petitioner does not ultimately appear to endorse a categorical no-aggregation rule. Petitioner also asserts (*e.g.*, Pet. 19) that the court should have analyzed the two principal components of petitioner's scheme under the established standards for predatory pricing and refusals to deal respectively. But petitioner does not grapple with, or ask this Court to review, the court of appeals' stated reasons (see pp. 10-11, *supra*) for finding that those standards did not adequately capture the nature and scope of the scheme's individual components. Petitioner's varying formulations of the proper aggregation rule thus are unclear and are largely disconnected from the facts of this case.

This Court does not typically announce general antitrust rules divorced from the specific conduct at issue; instead, it has reviewed discrete theories of aggregation in cases where those theories were actually asserted. The Court's decision in *Pacific Bell Telephone Co.* v. *linkLine Communications, Inc.*, 555 U.S. 438 (2009), offers a good example. There, this Court reviewed a business maneuver—the simultaneous charging of high-but-lawful wholesale prices and low-but-lawful retail prices (*i.e.*, a "price squeeze")—that combined specific actions and was replicable across industries. *Id.* at 449. This Court's announcement of specific rules to govern such recurring claims helps to make Section 2 litigation more predictable. But nothing in the Court's precedents suggests that *every* Section 2 claim must be shoehorned into some pre-existing analytic category, no matter how imprecise the fit.

The *linkLine* Court concluded that recognition of "price-squeeze" claims as a potentially valid theory of Section 2 liability would discourage "aggressive price competition" and would leave certain firms with "no safe harbor for their pricing practices." 555 U.S. at 452-453; see pp. 21, *infra*. In holding that Section 2 liability could not be premised on the combined effect of independently lawful wholesale and retail prices, the Court thus relied on the likely deleterious consequences of aggregation *in that particular setting*. Here, by contrast, petitioner's efforts to prevent respondent from competing for Fayetteville's business involved an idiosyncratic combination of actions that are not likely to regularly occur, rather than any replicable behavior that lends itself to a single antitrust rule. And petitioner asks this Court to announce a broad anti-aggregation principle that is untethered to the specific forms of exclusionary conduct alleged in this case.

B. Petitioner Has Not Demonstrated That Any Other Court Of Appeals Would Have Reached A Different Outcome

1. The circuits broadly agree about whether and how a court adjudicating a Section 2 claim may aggregate the discrete constituent parts of a defendant's overall course of conduct. Across the country, courts analyze the particular challenged acts, apply conduct-specific tests where appropriate, and otherwise evaluate the alleged monopolistic conduct holistically.

In *Conwood Co.* v. *United States Tobacco Co.*, 290 F.3d 768 (2002), cert. denied, 537 U.S. 1148 (2003), for instance, the Sixth Circuit addressed a "systematic effort" by a moist-snuff monopolist to "exclude competition" from that market. *Id.* at 783. No single aspect of that campaign was held to constitute a standalone Section 2 violation. Instead, the defendant's course of conduct involved a series of interlocking efforts that included a variety of business torts (*e.g.*, trade libel) and exclusive-dealing arrangements. See *id.* at 783-784. The court nonetheless held that the defendant had violated Section 2 through this concerted effort to extinguish "effective competition" through means other than greater efficiency. *Id.* at 788.

Other courts of appeals have employed substantially the same approach. In general, the "relevant inquiry" considers "the anticompetitive effect of a defendant's exclusionary practices considered together." *In re Lipitor Antitrust Litig.*, 855 F.3d 126, 147 (3d Cir. 2017) (brackets and citation omitted), cert. denied, 586 U.S. 917 (2018); see, *e.g.*, *Viamedia, Inc.* v. *Comcast Corp.*, 951 F.3d 429, 452-453 (7th Cir. 2020), cert. denied, 141 S. Ct. 2877 (2021). To be sure, where courts have found that particular conduct qualifies for a safe harbor under one of this Court's settled tests, they have "exclude[d]" it from the analysis. *New York* v. *Facebook, Inc.*, 549 F. Supp. 3d 6, 47 (D.D.C. 2021) (cited at Pet. 21). Where no such settled rule applies, however, courts have recognized that "the evidence" in Section 2 cases generally must be "evaluate[d]" in its "totality" so that a court can take account of any "synergistic effect" on competition. *In re EpiPen Marketing, Sales Practices & Antitrust Litigation*, 44 F.4th 959, 982 (10th Cir. 2022) (citations omitted) (cited at Pet. 24-25), cert. denied, 143 S. Ct. 1748 (2023).

2. None of the decisions invoked by petitioner holds otherwise. Courts have sometimes declined for case-specific reasons to consider the collective effect of a defendant's actions. In *Dreamstime.com, LLC* v. *Google, LLC*, 54 F.4th 1130 (2022) (cited at Pet. 24), for example, the Ninth Circuit declined to aggregate the defendant's actions where the plaintiff had failed to show that any act had affected the market to which the plaintiff had "expressly tied" its complaint. *Id.* at 1143; see, *e.g.*, *United States* v. *Microsoft Corp.*, 253 F.3d 34, 78 (D.C. Cir.) (per curiam) (en banc) (cited at Pet. 25), cert. denied, 534 U.S. 952 (2001). But in general, like other circuits, the Ninth Circuit holds that it is not "proper to

focus on specific individual acts of an accused monopolist while refusing to consider their overall combined effect." *City of Anaheim* v. *Southern California Edison Co.*, 955 F.2d 1373, 1376 (1992).

More fundamentally, petitioner misunderstands why courts have rejected aggregation-based arguments in particular cases. Courts have regularly held that disconnected acts should not be added up like fractions in an effort to cross some nebulous antitrust threshold. Pet. 18; see *Intergraph Corp.* v. *Intel Corp.*, 195 F.3d 1346, 1366-1367 (Fed. Cir. 1999) (cited at Pet. 26). But petitioner is wrong to extend that limit on aggregation to situations where the defendant has devised a scheme through which separate acts are intended to work together. In *that* circumstance, courts consider those actions' "synergistic effect." *City of Groton* v. *Connecticut Light & Power Co.*, 662 F.2d 921, 929 (2d Cir. 1981) (citation omitted); see *New York* v. *Actavis PLC*, 787 F.3d 638, 654-655 (2d Cir.), cert. dismissed, 577 U.S. 1002 (2015).

3. Petitioner faults (Pet. 20) the court of appeals for aggregating actions that purportedly are "unrelated, except for the fact that they involve [petitioner] and [respondent]." But in fact, the court emphasized that the disparate acts were parts of a common scheme. Viewing the evidence in the light most favorable to respondent, the court concluded that petitioner's acts were designed to work in tandem and "were executed simultaneously and *to the same effect*"—*i.e.*, to prevent respondent from "compet[ing] to secure an anchor customer for its Reidsville plant, thus depriving [respondent] of any practical ability to bring the more efficient plant to market." Pet. App. 54a. Petitioner identifies no court of appeals decision holding that an antitrust court faced

with such a scheme should decline to consider the combined effect of acts that were intended to work in combination.

C. The Decision Below Is Consistent With This Court's Precedents

1. Anticompetitive conduct implicating the Sherman Act can take "myriad" forms. *Trinko*, 540 U.S. at 414 (citation omitted). Anticompetitive acts can include "exclusive agreement[s]" that "hamper or destroy competition," *Associated Press* v. *United States*, 326 U.S. 1, 14 (1945), as well as "restrictive agreements," "[p]ricing practices," and "acquisitions." *United States* v. *Grinnell Corp.*, 384 U.S. 563, 576 (1966). They can also involve price fixing, profit-pooling agreements, licensing practices, and other restrictive or discriminatory conduct. *United States* v. *Paramount Pictures*, 334 U.S. 131, 141, 144-145, 149, 152-154, 156, 160-161 (1948).

An overall course of anticompetitive conduct can incorporate multifarious combinations of these diverse exclusionary acts. When the goal is to eliminate rivals without competing on efficiency, monopolists often seek to pull any lever available. Antitrust plaintiffs therefore "should be given the full benefit of their proof without tightly compartmentalizing the various factual components and wiping the slate clean after scrutiny of each." *Continental Ore Co.* v. *Union Carbide & Carbon Corp.*, 370 U.S. 690, 699 (1962).[3]

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[3] See, *e.g.*, *United States* v. *American Tobacco Co.*, 221 U.S. 106, 183 (1911) (finding Section 2 violation from combination of acquisitions, non-compete agreements, and other exclusionary acts); *Standard Oil Co.* v. *United States*, 221 U.S. 1, 32-34, 41, 70-77 (1911) (similar from scheme of acquisitions, exclusionary marketing, and related practices); *Swift & Co.* v. *United States*, 196 U.S. 375, 396-

Contrary to petitioner's contention (Pet. 20-21), the Court in *linkLine* did not upend that longstanding approach. The Court there rejected a specific price-squeeze theory of antitrust liability, concluding that the costs of imposing liability on that basis would exceed any benefit to competition. The Court explained that recognition of price-squeeze claims might induce firms to "raise their retail prices or refrain from aggressive price competition," *linkLine*, 555 U.S. at 452, thereby "chill[ing] the very conduct the antitrust laws are designed to protect," *id.* at 451 (citation omitted). Recognition of such claims would also force antitrust courts to "police" the interaction of prices in two different (wholesale and retail) markets, without any judicially manageable standard for doing so, and would subvert the "safe harbor" that prior decisions had created for firms' "pricing practices." *Id.* at 453. Given those hazards, the *linkLine* Court declined to accept "a new form of antitrust liability never before recognized by this Court." *Id.* at 457.

While the *linkLine* Court observed that "[t]wo wrong claims do not make one that is right," 555 U.S. at 457, its analysis focused on the *specific* "wrong claims" at issue; the Court did not broadly condemn holistic analysis in principle. Rather, in addition to identifying the drawbacks described above, the Court noted the apparent absence of "any independent competitive harm caused by price squeezes above and beyond the harm that would result from a duty-to-deal violation at the wholesale level or predatory pricing at the retail level." *Id.* at 455. By contrast, where a scheme consists of multiple anticompetitive parts that *do* have such synergistic

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398 (1905) (finding unlawful attempt to monopolize from total effect of a "single plan").

effects—and do not otherwise qualify for an antitrust safe harbor—nothing in *linkLine* bars an antitrust court from looking at that conduct holistically. See Pet. App. 29a, 137a-138a.

2. Viewing the summary-judgment record in the light most favorable to respondent, the court of appeals correctly concluded that neither of the main parts of petitioner's exclusionary campaign fit one of this Court's conduct-specific tests, and that both produced anticompetitive effects, since each impaired competition on some basis other than efficiency. See Pet App. 27a. Indeed, the summary-judgment record revealed that petitioner could not compete with respondent "on the merits," because its plants were outmoded and its product more expensive. *Id.* at 52a. And a jury could reasonably find that, in staving off a more efficient rival, petitioner's "single campaign" against Reidsville produced quintessential antitrust harms—"reduced consumer choice, higher prices in the long term, and market foreclosure." *Id.* at 28a, 32a.

"Antitrust analysis must always be attuned to the particular structure and circumstances of the industry at issue." *Trinko*, 540 U.S. at 411. And the actions of existing monopolists should be viewed with a "special lens." *Eastman Kodak Co.* v. *Image Technical Services, Inc.*, 504 U.S. 451, 488 (1992) (Scalia, J., dissenting). Faithful to those principles, the court below recognized that a holistic analysis was especially warranted here. Petitioner is a government-created monopolist; it controls a market where economies of scale impede entry by newcomers unless an "anchor" client can cover startup costs; and petitioner benefits from industry-standard contracts that lock up those clients for long periods. Pet. App. 54a. Given that dynamic, a monopolist may seek to preserve its position by picking off a nascent competitor's potential anchor clients as they emerge, without creating a better product or lowering overall prices. The summary-judgment record here reflects that sort of exclusionary conduct.

3. Petitioner asserts (Pet. 2) that the decision below jeopardizes the "clear rules" that otherwise govern Section 2 claims. That criticism is misconceived. Although this Court has "emphasized the importance of clear rules in antitrust law," *linkLine*, 555 U.S. at 452, it has never insisted that all allegedly anticompetitive conduct must be analyzed under one of the Court's existing tests. See, *e.g.*, *Kodak*, 504 U.S. at 463 n.8 (declining to assess challenged sales practice under "unilateral refusal to deal" framework). And as explained above, petitioner does not ask this Court to review any of the court of appeals' subsidiary holdings that particular aspects of petitioner's scheme were anticompetitive and did not fall within any established doctrinal category.

The decision below is appropriately confined. The court of appeals did not endorse a novel theory of liability that would require courts to systematically "police" prices. *linkLine*, 555 U.S. at 453. Nor did it create a "duty to deal" that would substantially impair businesses' freedom to choose their contracting partners. *Trinko*, 540 U.S. at 415. Instead, it applied the bedrock definition of anticompetitive conduct—*i.e.*, action that excludes competition on some basis other than efficiency—to an "atypical exclusionary campaign" waged by a conceded monopolist. Pet. App. 29a. If that campaign simply involved "lower prices" and "hard-nosed competition," petitioner should ultimately prevail at trial. Pet. 4, 7. But in applying settled law to the summary-judgment record here, the court of appeals correctly held that a jury should make that determination. See Pet. App. 55a-57a.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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