No. 22-2168

IN THE

United States Court of Appeals for the Fourth Circuit

NTE CAROLINAS II, ET AL.,
Counterclaimants-Appellants,

v.

DUKE ENERGY CAROLINAS, ET AL.,
Counterclaim Defendants-Appellees.

On Appeal from the United States District Court
for the Western District of North Carolina, Charlotte Division
Case No. 3:19-cv-00515-KDB-DSC (Hon. Kenneth D. Bell)

BRIEF OF *AMICI CURIAE* THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AND NORTH CAROLINA CHAMBER LEGAL INSTITUTE IN SUPPORT OF COUNTERCLAIM DEFENDANTS-APPELLEES' PETITION FOR REHEARING EN BANC

Andrew R. Varcoe
Tyler S. Badgley
U.S. CHAMBER
LITIGATION CENTER
1615 H Street, NW
Washington, D.C. 20062

Counsel for the Chamber of Commerce of the United States of America

Michael F. Murray
Vladimir J. Semendyai
PAUL HASTINGS LLP
2050 M Street, NW
Washington, D.C. 20036

Counsel for Amici Curiae

August 26, 2024

RULE 26.1 CORPORATE DISCLOSURE STATEMENT

The Chamber of Commerce of the United States of America ("Chamber") states that it is a non-profit, tax-exempt organization incorporated in the District of Columbia. The Chamber has no parent corporation, and no publicly held company has 10 percent or greater ownership in the Chamber.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes, Regulations, and Rules

Other Authorities

INTEREST OF *AMICI CURIAE*

The Chamber of Commerce of the United States of America is the world's largest business federation.[1] It represents approximately 300,000 direct members and indirectly represents the interests of more than 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 North Carolina 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.

[1] No counsel for any party authored this brief in whole or in part and no entity or person, aside from *amici curiae*, their members, or their counsel, made any monetary contribution intended to fund the preparation or submission of this brief. All parties have consented to the filing of this brief.

Amici and their members have a substantial interest in this appeal for at least two reasons. First, *amici*'s members rely on the well-established principle, rooted in Supreme Court precedent and adopted by courts throughout the federal system, that plaintiffs may not aggregate lawful acts into a viable Sherman Act claim. This principle helps provide clarity, predictability, and administrability to federal antitrust law. It is critical to the functioning of businesses, especially in the face of the possibility of treble damages. *Amici* have a deep interest in ensuring this settled principle is not undermined by the panel's flawed reasoning.

Second, settled precedent shows that refusal-to-deal liability can exist only when a firm unilaterally terminates a prior voluntary profitable course of dealing with no pro-competitive justification. Any other rule—and especially the freewheeling standard adopted by the panel—seriously threatens the ability of businesses to freely and efficiently operate by depriving businesses of the certainty required to innovate in competitive markets, while subjecting them to the risk of costly antitrust litigation that will deter pro-competitive behavior and thus undermine consumer welfare.

INTRODUCTION AND SUMMARY OF ARGUMENT

The district court in this case carefully applied settled law and properly rejected appellants' novel antitrust claims that try to turn a series of competitively-neutral or even pro-competitive actions—a termination of a *contractual* relationship and a decision to *lower* prices, among others—into a chimera antitrust claim that would cast a district court as an energy central planner. The panel reversed and adopted a gestalt approach that contradicts settled antitrust jurisprudence and threatens to flood this Circuit with antitrust theories long rejected.

Twenty years ago, the Supreme Court emphasized that antitrust scrutiny requires an element of "anticompetitive *conduct*." *Verizon Commc'ns Inc. v. L. Offs. of Curtis V. Trinko, LLP*, 540 U.S. 398, 407 (2004) (emphasis in original). Five years later, the Court confirmed that an "amalgamation of [multiple] meritless claim[s]" cannot create antitrust liability. *Pacific Bell Tel. Co. v. linkLine Commc'ns*, 555 U.S. 438, 452 (2009). In both cases, the Court warned that antitrust courts "are ill suited 'to act as central planners, identifying the proper price, quantity, and other terms of dealing'" or "simultaneously to police" multiple disparate practices, while "aiming at a moving target, since it is the *interaction*" between the practices that purportedly creates the illegality. *linkLine*, 555 U.S. at 452-53 (quoting *Trinko*, 540 U.S. at 408). For this reason, the Court has developed specific tests keyed to particular types of allegedly anticompetitive conduct.

The Court also emphasized the importance of respecting "the long recognized right of [a] trader or manufacturer engaged in an entirely private business, freely to exercise his own independent discretion as to parties with whom he will deal." *Trinko*, 540 U.S. at 408 (quoting *United States v. Colgate & Co.*, 250 U.S. 300, 307 (1919)). Only a very narrow exception to this general rule exists when a plaintiff demonstrates *both* (1) that the defendant has terminated a prior voluntary course of profitable dealing between the parties, *and* (2) that no pro-competitive justification exists for the refusal to deal. *See Trinko*, 540 U.S. at 407-09. But the Court was "cautious in recognizing such exceptions," *id.* at 408, and warned that courts should tread lightly when assessing whether conduct is "anticompetitive," because "the means of legitimate competition" are "myriad," *id.* at 414.

The panel's decision does not tread lightly. Instead, it transforms the narrow exception into one that swallows the general rule that *Trinko* recognized and permits the very theory of liability that *linkLine* rejected—aggregation of conduct, all of which is independently lawful, into a viable Sherman Act claim. The result of this misguided approach is manifest. Instead of being able to plan their activities without fear of unpredictable liability or costly litigation, businesses will now struggle to reliably assess the risk of their conduct—and will be required to constantly re-evaluate ever-changing market conditions, competitor interactions, and new business practices. And courts in this Circuit will now be burdened with policing

nebulous interactions between instances of otherwise-lawful conduct, creating an unpredictable hodge-podge of precedent that defies coherent interpretation. The Supreme Court's repeated "emphasi[s on] the importance of clear rules in antitrust law," *linkLine*, 555 U.S. at 452, is left by the wayside.

En banc review is necessary because the panel's holistic approach enfeebles decades of Supreme Court antitrust precedent, creates costly uncertainty in the business community, and will overburden this Circuit's district courts. If left to stand, it will also make this Circuit the lone outlier permitting long-defunct antitrust theories, generating a needless circuit split on important questions of antitrust law.[2]

ARGUMENT

I. The Panel's Approach Contradicts the Supreme Court's Requirement That a Monopolization Claim Requires at Least One Unlawful Act.

As the district court properly concluded, disparate lawful acts cannot be aggregated to support a Sherman Act violation because "[i]n simple mathematical terms, 0 + 0 = 0." JA4176 (citation omitted). That principle is well-grounded in law and logic; it is compelled by *Trinko* and *linkLine* and aligns with decisions by numerous other courts. This Court now stands alone in rejecting this important principle, which provides clarity, predictability, and administrability to antitrust law and moderates antitrust law's potential to chill activities that benefit customers.

[2] Although this brief does not discuss the defects in the appellants' predatory-pricing claims, *amici* are in agreement with the appellees' presentation of these issues.

In *linkLine*, the Supreme Court built upon *Trinko* and rejected a novel price-squeeze theory combining a wholesale-market refusal-to-deal claim and a retail-market predatory-pricing claim. *linkLine*, 555 U.S. at 442, 449. The Court analyzed these two claims separately, assessing the first under *Trinko* and the second under *Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209 (1993). *See id.* at 449-52. The Court concluded that because "both the wholesale price and the retail price are independently lawful," plaintiffs' "price-squeeze" theory was no more than an "amalgamation of [two] meritless claim[s]." *Id.* at 452, 455. As the Court pithily put it, "[t]wo wrong claims do not make one that is right." *Id.* at 457.

Importantly, the *linkLine* plaintiffs could just as easily have alleged what appellants have here: refusing to deal combined with offering discounted pricing. There is no doubt that the Supreme Court would have rejected that framing just as decisively as it rejected those plaintiffs' price-squeeze theory. And the two rejected claims in *linkLine* were much closer related than the disparate claims here; if aggregating the *linkLine* claims was impermissible, *a fortiori*, aggregating the claims here is too.

Since *linkLine*, courts of appeals have uniformly refused to find antitrust "scheme" or "course of conduct" liability without at least one instance of unlawful conduct. *See, e.g.*, *Viamedia, Inc. v. Comcast Corp.*, 951 F.3d 429, 463 (7th Cir. 2020); *Eatoni Ergonomics, Inc. v. Rsch. in Motion Corp.*, 486 F. App'x 186, 191 (2d

Cir. 2012); *United States v. Microsoft Corp.*, 253 F.3d 34, 78 (D.C. Cir. 2001); *Intergraph Corp. v. Intel Corp.*, 195 F.3d 1346, 1367 (Fed. Cir. 1999); *Northeastern Tel. Co. v. AT&T*, 651 F.2d 76, 96 (2d Cir. 1981).

To be sure, the Supreme Court has permitted aggregation where the instances of conduct being aggregated are intrinsically similar with commensurable effects. *See, e.g.*, *Cont'l Ore Co. v. Union Carbide & Carbon Co.*, 370 U.S. 690, 693-95, 698-99 (1962) (considering a single "fundamental claim" of anticompetitive conduct across five similar business ventures). Under that principle, a plaintiff who alleges that a defendant has managed to construct exclusive deals with four customers or exclusive deals with two customers and tying arrangements with two others, with each foreclosing twenty percent of the market, may perhaps be able to plausibly allege that eighty percent of the market is foreclosed because that is the relevant test for exclusive dealing. *See generally Jefferson Par. Hosp. Dist. No. 2 v. Hyde*, 466 U.S. 2, 19 (1984); *Tampa Elec. Co. v. Nashville Coal Co.*, 365 U.S. 320 (1961). In such circumstances, the analysis is straightforward.

But the same cannot be said of theories alleging disparate anticompetitive conduct. For example, it is unclear how a typical refusal-to-deal claim—where the test concerns not whether a rival is foreclosed but whether that foreclosure is justified, *see, e.g.*, *Trinko*, 540 U.S. at 408—can be added quantitatively with a typical exclusive-dealing or tying claim based on foreclosure, let alone a predatory-

pricing claim based on price-cost tests. Moreover, such claims may have opposite anticompetitive effects—some may allege that the defendant is driving up costs or keeping a competitor from the market, whereas others may allege that the defendant is driving down costs or driving a competitor from the market. *See, e.g.*, *FTC v. Qualcomm*, 969 F.3d 974, 1000-01 (9th Cir. 2020) (citing *linkLine* and rejecting, as irreconcilable with each other, both the FTC's refusal-to-deal allegations based on charging "monopoly prices" and its predatory pricing allegations based on charging "ultralow prices"). Requiring courts to harmonize such opposite considerations is unworkable, which is why the Supreme Court has rejected such amalgamated claims in favor of "clear rules in antitrust law." *linkLine*, 555 U.S. at 452.

The panel's decision runs roughshod over Supreme Court precedent at every turn. The panel faulted the district court for "compartmentaliz[ing]" the anticompetitive conduct alleged here "and ask[ing] whether each one, *independently*, was unlawful." Op. 26. But that mirrors precisely the Supreme Court's approach in *linkLine*, where the Court considered whether each component of a price-squeeze theory (refusal-to-deal and predatory-pricing claims) 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," Op. 29 (cleaned up). This, too, contradicts *linkLine*, which prohibits "amalgamation of [multiple] meritless claim[s]," 555 U.S. at 452,

and *Trinko*, which prohibits antitrust liability without "an element of anticompetitive *conduct*," 540 U.S. at 407.

To get around *linkLine*, the panel purported to limit it to "cases where the alleged conduct falls within such well-defined categories" as "typical predatory pricing, refusing to deal, price fixing, or dividing markets." Op. 26-27. But the Supreme Court was clear that its reasoning is not as cabined to the facts of *Trinko* and *linkLine* as the panel claimed. *See linkLine*, 555 U.S. at 450 (explaining that "the reasoning of *Trinko* applies with equal force to [other] claims"). In any event, the panel's reasoning fails on its own terms because the anticompetitive conduct here plainly *can* be categorized, as the panel recognized. *See* Op. 22-23; Pet. 11-12.

The panel apparently believed "the question [of] '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, Op. 29, permitting the panel to adopt its flawed approach. But *linkLine* already answered that question in the negative, and this Court "must adhere to [Supreme Court] precedents." *Hubbard v. United States*, 514 U.S. 695, 713 n.13 (1995).

II. The Panel's Refusal-to-Deal Holding Creates an Unworkable Standard Not Found in Any Other Circuit.

The Supreme Court's decision in *Trinko* requires a plaintiff in a refusal-to-deal case to demonstrate both that (1) the defendant has terminated a prior voluntary course of profitable dealing between the parties, and (2) no pro-competitive

justification exists for the refusal to deal. *See* Chamber Amicus Br. 20-21. That test could not be satisfied here, in the absence of a voluntary course of dealing.

To get around that inconvenient fact, the panel created a new amorphous standard that permits a refusal-to-deal claim to proceed if a defendant allegedly "abandoned a profitable deal for the purpose of undermining competition." Op. 44. That purpose-based test, untethered to *Trinko*'s requirements of an actual prior voluntary course of dealing, is unworkable and has no parallel in any other circuit. *See* Pet. 17 (collecting cases).

III. The Panel's Decision Will Harm Businesses and Overburden Courts.

The clear rules of *Trinko* and *linkLine* properly strike the balance between over- and underdeterrence through the antitrust laws to achieve competitive goals without chilling positive business activity. The principles established by these cases ensure that "antitrust rules [remain] clear enough for lawyers to explain them to clients." *linkLine*, 555 U.S. at 453 (cleaned up). Businesses are then able to plan their activities, investments, resource allocation, and strategies because "counsel [can] state that some things do not create risks of liability." Frank H. Easterbrook, *The Limits of Antitrust*, 63 Tex. L. Rev. 1, 14 (1984). Clear rules also benefit courts by guiding them to administrable remedies within "the practical ability of a judicial tribunal to control." *Trinko*, 540 U.S. at 414 (quoting *Brooke Grp.*, 509 U.S. at 223).

The panel's contrary approach upends this careful balance and replaces clarity with uncertainty. Businesses subject to suit in this Circuit will now be forced to continuously assess the interactive and interlocking effect of their business practices on every competitor in every market in which they operate, which is precisely the type of "moving target" *linkLine* warns against. 555 U.S. at 453. And they will have no solid ground on which to assess refusal-to-deal claims. Plaintiffs will now be able to drag their competitors into court based on dubious amalgamated claims rejected in *linkLine* and *Trinko*, subjecting those businesses to exorbitant costs of antitrust discovery, *see Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 558 (2007), and potentially billions in trebled damages, *see* 15 U.S.C. § 15(a).

At the same time, this Circuit's district courts will be forced to determine which independently lawful conduct should be enjoined and constantly re-evaluate such injunctions based on new forms of conduct. And they will constantly be asked to evaluate the purpose of purported refusals-to-deal without *Trinko's* clear rule. In other words, this Circuit's district courts will have to not only "assume the day-to-day controls characteristic of a regulatory agency" (in this case, regulating two energy utilities)—a role in which they are "unlikely to be . . . effective"—but also "impose a duty to deal that [they] cannot explain or adequately and reasonably supervise." *Trinko*, 540 U.S. at 415 (cleaned up). This will leave businesses with

"no safe harbor for their pricing practices." *linkLine*, 555 U.S. at 453 (citation omitted).

CONCLUSION

For the reasons above, this Court should grant en banc review, vacate the panel's decision, and affirm the district court's decision in favor of the appellees.

Dated: August 26, 2024

Respectfully submitted,

/s/ Michael F. Murray
Michael F. Murray
Vladimir J. Semendyai
PAUL HASTINGS LLP
2050 M Street, NW
Washington, D.C. 20036
T: (202) 551-1988
F: (202) 551-0488
michaelmurray@paulhastings.com

Counsel for Amici Curiae

Andrew R. Varcoe
Tyler S. Badgley
U.S. CHAMBER
LITIGATION CENTER
1615 H Street, NW
Washington, D.C. 20062

Counsel for the Chamber of Commerce of the United States of America

CERTIFICATE OF COMPLIANCE

I certify that this brief complies with the length limitations of Federal Rule of Appellate Procedure 29(a)(5) because this brief, excluding the portions excepted by the rules, contains 2,597 words, according to the word-count feature of the software used to generate this brief.

I certify that this brief complies with the typeface and type style requirements of Federal Rule of Appellate Procedure 32(a)(5)–(6).

/s/ Michael F. Murray
Michael F. Murray

CERTIFICATE OF SERVICE

I hereby certify that on this 26th day of August, 2024, I electronically filed the foregoing brief with the Clerk of Court for the United States Court of Appeals for the Fourth Circuit by using the Court's CM/ECF system, and counsel for all parties will be served by the CM/ECF system.

/s/ Michael F. Murray
Michael F. Murray