AAI AMERICAN ANTITRUST INSTITUTE

July 11, 2025

VIA EMAIL
The Honorable D. John Sauer
Solicitor General of the United States
950 Pennsylvania Ave., NW
Washington, DC 20530

Re: ***Duke Energy Carolinas, LLC, et al. v. NTE Carolinas II, LLC, et al.,*** **No. 24-917**

Dear Solicitor General Sauer,

We write on behalf of the American Antitrust Institute ("AAI")[1] to urge you to advise the Supreme Court not to grant the petition for a writ of certiorari in the above-referenced matter. This case does not present the question on which the Petitioners seek review. Petitioners seek review of whether a monopolization claim can be won "by aggregating multiple distinct, independently lawful acts into an unlawful whole," or, in other words, whether "0 + 0 = 1."[2] But the Court of Appeals made no such holding. The Court found that two separate components of Duke's alleged monopolization scheme each independently raised material factual disputes precluding summary judgment. On the current record, Petitioners' certiorari bid thus presents the question of whether 1 + 1 = 0. That question is not cert-worthy.

Petitioners wrongly conflate a ubiquitous mode of factual analysis with a debated theory of antitrust liability. The mode of factual analysis—known as "course of conduct" analysis—involves the holistic evaluation of several disparate acts when such acts have a continuity of purpose. The theory of liability—known as the "monopoly broth" theory—is the idea that a series of claims that would each fail on their own can nonetheless add up to create liability.

Petitioners base their argument for cert-worthiness only on the monopoly broth theory. However, this case is not a vehicle for reaching that theory. The court below, on a summary judgment record, found triable issues on two independent claims, holding that

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[1] AAI is an independent, nonprofit organization devoted to promoting competition that protects consumers, businesses, and society. It serves the public through education, research, and advocacy on the benefits of competition and the use of antitrust enforcement as a vital component of national and international competition policy. AAI is managed by its Board of Directors, with the guidance of an Advisory Board that consists of over 130 prominent antitrust lawyers, law professors, economists, and business leaders. *See* http://www.antitrustinstitute.org.

[2] Pet'n for Cert. at I, 1, *Duke Energy Carolinas v. NTE Carolinas II*, No. 24-917 (U.S. Sup. Ct. filed Feb. 21, 2025).

neither claim failed on its own. A grant of certiorari to resolve monopoly-broth questions on this record therefore would be improvident. It would also be against the government's interests because it would condone Petitioner's mistaken conflation, sow confusion in the lower courts, and imperil several major, pending DOJ and FTC antitrust actions that rely on a course-of-conduct analysis.

I. The Court's Course-of-Conduct Analysis Was Proper and Does Not Render This Case a Monopoly Broth Case

NTE alleged that Duke monopolized the Carolinas wholesale power market by employing a wide-ranging scheme involving multiple separate components. The Fourth Circuit held that material factual disputes precluded summary judgment on each of two of those components. The court did not hold that either component was independently lawful on its own.

First, the court held that a reasonable jury could find that Duke's "blend-and-extend" pricing strategy, in which it conditioned discounts to the City of Fayetteville on a long-term renewal agreement, "independently produced anticompetitive effects." *Duke Energy Carolinas, LLC v. NTE Carolinas II LLC*, 111 F.4th 337, 362 (4th Cir. 2024). The court was careful to explain that a reasonable jury could find the pricing strategy illegal under a standalone predatory-pricing analysis. *Id.* at 360 ("[E]ven if we were to focus on a strict predatory pricing theory [under *Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209 (1993)], a factual dispute would remain as to whether Duke's pricing was indeed predatory."). But it also allowed that a reasonable jury could find the strategy illegal under an exclusionary bundling theory if the long-term renewal agreement were evaluated holistically alongside a separate agreement with the City of Fayetteville to pay above-market prices for excess power. *Id.* at 357–58 (citing and discussing *LePage's Inc. v. 3M*, 324 F.3d 141, 155 (3d Cir. 2003)); *see* Brief for the United States as Amicus Curiae at 11–12*, 3M v. LePage's Inc.*, No. 02-1865 (U.S. Sup. Ct. filed May 2004) [hereinafter "SG Olson's *LePage's* Br."] (refusing to endorse the extension of *Brooke Group* to multi-product, exclusionary bundling).

Second, the court analyzed Duke's unilateral termination of its interconnection agreement with NTE's Reidsville plant under traditional refusal-to-deal law. *Duke Energy*, 111 F.4th at 362–66. The court found that a reasonable jury "could reach the conclusion that Duke, like the defendant in *Aspen Skiing*, 'forsook short-term profits to achieve an anticompetitive end' by unilaterally terminating the Reidsville Interconnection Agreement." *Id.* at 364 (citing *Verizon Commc'ns Inc. v. L. Offs. of Curtis V. Trinko, LLP*, 540 U.S. 398, 409 (2004)). It held that "the record includes evidence from which a jury could find that Duke sought … to avoid having to compete with NTE on the merits because Duke believed it was at a 'competitive disadvantage' efficiency-wise." *Id*. at 365.

Because the court held that plaintiffs made trial-worthy allegations of both predatory pricing under *Brooke Group* (or exclusionary bundling under *LePage's*) and an anticompetitive refusal to deal under *Trinko* and *Aspen Skiing*, this case does not present the issue addressed by the Supreme Court in *linkLine*, on which petitioners extensively rely. In *linkLine,* the Court found that "plaintiffs [had] not stated a duty-to-deal claim under *Trinko* and [had] not stated a predatory pricing claim under *Brooke Group*," but

"nonetheless tried to . . . alchemize them into a new form of antitrust liability never before recognized by this Court." *Pac. Bell Tel. Co. v. linkLine Communs., Inc.*, 555 U.S. 438, 457 (2009). The Court declined to recognize the theory of liability, reasoning that "[t]wo wrong claims do not make one that is right." *Id.*

In this case, the Fourth Circuit found precisely the opposite. It held that plaintiffs have presented two "right" claims—a well pleaded refusal-to-deal claim ***and*** a well pleaded predatory pricing (or exclusionary bundling) claim, each of which independently raised a genuine dispute of material fact on summary judgment. In short, the Court of Appeals did not hold that Duke should face trial for a "new form" of antitrust liability but rather for two old, well-established forms. *Id.* That holding is plainly not cert-worthy.

Petitioners seek to paint NTE's case as presenting a monopoly broth theory of liability, which they describe as "a series of independently lawful acts" that "add up to some nebulous antitrust violation." Pet'r's Br. 1–2.[3] But as explained above, the Fourth Circuit did not "add up" Duke's blend-and-extend pricing strategy and its unilateral termination of interconnection, nor did it find that either component of the alleged scheme was "independently lawful." It reviewed each component of the scheme under a distinct body of conduct-specific law, applied that law, and held on summary judgment that each component independently presented genuine disputes for trial.

In their attempt to manufacture a cert-worthy issue, Petitioners mischaracterize the court's analysis. To be sure, the court did recognize that NTE alleged the two components were part of "a singular, coordinated anticompetitive effort" and "conclude that they must be taken as alleged, considered as part of a single campaign to foreclose competition in the Carolinas wholesale power market." *Duke Energy*, 111 F.4th at 356. The court also recognized that the question of whether NTE presented sufficient evidence to show that Duke engaged in anticompetitive conduct should be "based on the *combined effect* of the two main components." *Id*. But in evaluating the two components' combined effect, the court did not consider whether they could be "alchemized" to create a *new* effect. Pet'n for Cert., *supra* n.2, at 3. Rather, in the court's own words, it considered whether each component was "executed simultaneously and *to the same effect*." *Duke*

[3] While we use the term "monopoly broth" as the Petitioners do—to describe a series of claims which would each fail on their own but nonetheless add up to create liability—we note that the term was not coined to describe an aggregation of lawful acts that are cumulatively rendered unlawful, but rather an aggregation of acts that are lawful when performed by a competitor yet *unlawful* when performed by a monopolist. See *Mishawaka v. Am. Elec. Power Co.*, 616 F.2d 976, 986 (7th Cir. 1980) (noting that "[i]t is the mix of the various ingredients … in a monopoly broth that produces the unsavory flavor," but stating in the next sentence that "there are kinds of acts which would be lawful in the absence of monopoly but, because of their tendency to foreclose competitors from access to markets or customers or some other inherently anticompetitive tendency, are unlawful under § 2 if done by a monopolist."); *see also Eastman Kodak Co. v. Image Tech. Servs., Inc.*, 504 U.S. 451,488 (1992) (Scalia, J., dissenting) (agreeing that monopolists' behavior must be viewed through this "special lens").

Energy, 111 F.4th at 366 (emphasis in original). The court thus evaluated whether each of the two components independently served the same anticompetitive ends.

There is nothing novel about evaluating multiple acts as part of a singular course of conduct when they are each allegedly designed to produce the same effect. The Fourth Circuit was correct to describe that approach as "foundational." *Id*. at 354. Analyzing a defendant's conduct holistically is common throughout the law because it helps a factfinder understand whether there is a "continuity of purpose" behind some seemingly disparate or otherwise lawful acts.[4] Viewed in isolation, it is clearly not illegal (or even suspicious) to buy a lighter from a tobacco shop, or to fill up a tank of gas at a gas station. But viewed holistically in the context of an arson case, this otherwise legal conduct may be critical to determining the defendant's guilt.

Similarly, in antitrust law, "plaintiffs should be given the full benefit of their proof." *Cont'l Ore Co. v. Union Carbide & Carbon Corp.*, 370 U.S. 690, 699 (1962). Taking a broader course of conduct into consideration can help a court or enforcer draw an appropriate inference at summary judgment as to whether individual business practices are exclusionary or instead constitute competition on the merits. Like the arsonist buying a cigarette lighter, much anticompetitive behavior appears benign in isolation; its exclusionary consequences can only be understood in context. Courts in antitrust cases thus regularly review a defendant's entire course of conduct holistically to determine whether a defendant's apparently benign acts are probative of alleged anticompetitive effects or monopolistic intent.[5] As opinions in these cases make clear, this course-of-conduct analysis is just that—an *analysis* of factual allegations—and not a standalone theory of liability.[6]

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[4] *See, e.g.*, 18 U.S.C. § 1514(d)(1)(A) (defining "course of conduct" for the purpose of civil actions prohibiting harassment of witnesses as "a series of acts over a period of time . . . indicating a continuity of purpose"); *id.* at § 2266(2) (defining "course of conduct" for purpose of crime of interstate domestic violence as "a pattern of conduct composed of 2 or more acts, evidencing a continuity of purpose").

[5] *See, e.g.*, *Reiss v. Audible, Inc.*, No. 1:24-cv-05923 (JLR), 2025 U.S. Dist. LEXIS 110615, at *21 (S.D.N.Y. Jun. 11, 2025) (examining whether the evidence, "viewed holistically, demonstrates an anticompetitive effect such as market foreclosure"); *Nexstar Broad., Inc. v. Granite Broad. Corp.*, No. 1:11-CV-249 RM, 2012 U.S. Dist. LEXIS 95024, at *23–24 (N.D. Ind. Jul. 9, 2012) (Conduct that "standing alone might not suffice to state an antitrust claim," but that is "part of a course of conduct (or 'chain reaction')," can help show both defendant's "intent to monopolize" and its "market power").

[6] *See, e.g.*, *Reiss*, 2025 U.S. Dist. LEXIS 110615, at *21 (accepting "the uncontroversial position that two independently lawful acts will not, when combined, constitute an antitrust violation" but holding that "the court must still consider [plaintiff's] claims and allegations as a whole to determine whether [plaintiff] has, in fact, adequately pleaded a section 2 claim"). Although some opinions have used the unfortunate term "course of conduct liability" to refer to what Petitioners term the "monopoly broth" theory of liability, these opinions nonetheless make clear the distinction between an analytical tool and a theory of liability. *See, e.g.*, *United States v. Microsoft Corp.*, 253 F.3d 34, 60, 75,

For this reason, antitrust plaintiffs must often plead the entire range of a course of conduct—even the parts that, considered in isolation, would not appear to be exclusionary—to demonstrate their exclusionary effects. Here, for example, NTE alleged that Duke directed it not to make contract payments unless it received an invoice, and that Duke then failed to send any invoices, which caused NTE not to make payments. *Duke Energy*, 111 F.4th at 366. Viewed in isolation, this would not appear to indicate exclusionary conduct. But viewed in the context of the rest of Duke's conduct, the court could see that it had the intended effect of allowing Duke to terminate the contract, thereby disrupting NTE's placement on the FERC-mandated transmission queue, which in turn prohibited Fayetteville from contracting with NTE, effectively prohibiting NTE from bringing its Reidville plant online. *Id.* at 365–66. The district court had missed the competitive significance of the contract termination by refusing to assess it holistically with NTE's other allegations about Duke's renewal offer to Fayetteville. *Duke Energy Carolinas, LLC v. NTE Carolinas II, LLC*, 608 F. Supp. 3d 298, 323, 327 (W.D.N.C. 2022) [hereinafter "Dist. Ct. Op."].

Viewing independent actions as part of a course of conduct also allows courts and enforcers to properly assess whether and which conduct-specific antitrust tests apply and which specific acts should be included in its analysis.[7] Here, the Court explained how Duke's agreement to pay Fayetteville above-market prices for excess power was part of a broader effort to convince Fayetteville to renew its contract with Duke rather than switch to NTE's lower-priced services. *Duke Energy*, 111 F.4th at 356–58. This allowed the Court to see that a reasonable jury may find Duke's behavior illegal not only as a form of predatory pricing, but also as the kind of exclusionary bundling that is properly analogized to a tying violation. *Id*. at 364–66.[8] The district court had missed the competitive significance of the above-market purchase contract because it refused to assess it holistically alongside the rest of NTE's allegations of Duke's blend-and-extend pricing strategy. Dist. Ct. Op. at 323.

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78 (2001) (declining to rule on viability of "course of conduct *liability*" theory after finding disparate acts independently unlawful based on holistic analysis of conduct in browser and operating system markets) (emphasis added); *Am. President Lines, LLC v. Matson, Inc.*, 633 F. Supp. 3d 209, 228 n.8 (D.D.C. 2022) (describing "course of conduct *analysis*" as one in which "courts . . . consider a series of separate acts that independently have anticompetitive effect") (emphasis added).

[7] *See, e.g.*, *Sidibe v. Sutter Health*, No. 12-cv-04854-LB, 2021 U.S. Dist. LEXIS 45221, at *14–17 (N.D. Cal. Mar. 9, 2021) (finding material factual dispute over whether allegations of systemwide contracts are properly evaluated using the conduct-specific test for tying).

[8] It is widely accepted that multi-product bundling can be anticompetitive under different conditions than predatory pricing. *See, e.g.*, SG Olson's *LePage's* Br. 11–13; *see also* Einer Elhauge, *Tying, Bundled Discounts and the Death of the Single Monopoly Profit Theory*, 123 HARV. L. REV. 397, 403 (2009); Herbert Hovenkamp, *Discounts and Exclusions*, 3 UTAH L. REV. 841, 860 (2006).

In sum, the Fourth Circuit's course-of-conduct analysis is not a bootstrap into a new theory of liability. Far from aggregating multiple failed theories of liability, the court independently found that each of two accepted theories of liability, allegedly pursued to the same anticompetitive ends, raised genuine trial issues. The court's analysis reflects the accepted approach of carefully examining the facts as a whole to give parties the full benefit of their proof and determine whether and how the facts fit into conduct-specific tests. This type of analysis is both ubiquitous in the courts and integral to the government's efforts to enforce the antitrust laws.

II. Course-of-Conduct Analysis is a Critical Part of Many of the Government's Current Antitrust Cases

Course-of-conduct analysis is particularly important in assessing monopolistic behavior that does not fit neatly into traditional fact patterns, as is common in high-tech and other markets that are susceptible to leveraging and network effects. For this reason, course-of-conduct analysis in general—and the Fourth Circuit's opinion in this case in particular—are an important part of many of the government's ongoing antitrust cases. Conflating course-of-conduct analysis with the monopoly-broth theory of liability contravenes the government's position in these cases.

In *United States v. Google Inc.*, the government alleged that Google acquired and maintained monopoly power in the publisher ad server and ad exchange markets for open-web display advertising through a "mutually reinforcing" scheme that included (1) acquiring DoubleClick and Admeld; (2) tying its publisher ad server and ad exchange products "to lock publishers into exclusively using Google's sell-side ad tech tools"; and (3) "leveraging its tied ad tech tools to engage in a series of acts that diminished rivals' scale, thwarted their ability to compete, and harmed customers." No. 1:23-cv-108 (LMB/JFA), 2025 U.S. Dist. LEXIS 74956 (E.D. Va. Apr. 17, 2025) [hereinafter "*Google AdTech*"]. Following a three-week bench trial, the court found Google liable in an opinion that quoted extensively from the Fourth Circuit's opinion in this case. In particular, the court replicated the Fourth Circuit's course-of-conduct analysis by reviewing each of the three sub-parts of Google's scheme on its own but basing "the ultimate conclusion" of liability "on whether the company's conduct, when considered as a whole, harmed competition and therefore harmed consumers." *Id.* at *146 (citing *Duke Energy*, 111 F.4th at 354–55). A remedies trial is currently planned for September,[9] after which Google has stated it will appeal.[10]

In *United States v. Apple Inc.*, the government alleges that Apple engaged in an "anticompetitive and exclusionary course of conduct . . . exemplified by its contractual rules and restrictions targeting several products and services," each step of which "reinforced the moat around its smartphone monopoly." Amended Compl. ¶¶ 58–59, No. 2:24-cv-04055 (JXN/LDW) (D.N.J. Jun. 11, 2024) (ECF No. 51). In its opposition to

[9] Hearing Minutes at 1:7, *United States v. Google LLC*, No. 1:23-cv-108 (LMB/JFA) (E.D. Va. May 2, 2025) (ECF No. 1426).

[10] Reuters, *Google holds illegal monopolies in ad tech, US judge finds* (Apr. 17, 2025), https://www.reuters.com/technology/us-judge-finds-google-holds-illegal-online-ad-tech-monopolies-2025-04-17/.

Apple's motion to dismiss, which challenged the government's "so-called 'course of conduct' or 'monopoly playbook'" allegations, Mem. Supp. Mot. to Dismiss 33–34 (filed Aug. 1, 2024) (ECF No. 86-1), the government explained that a course of conduct analysis shows both a continuity of purpose behind seemingly disparate or independently lawful acts, Br. Opp. Mot. to Dismiss 37–38, *id.* (Sept. 12, 2024) (ECF 106) (viewing conduct holistically is probative of "predatory purpose" and "anticompetitive intent"), and whether or which conduct-specific tests properly apply. *Id*. (course of conduct analysis shows that "the fact-intensive burden-shifting test, rather than refusal-to-deal principles" better fits the allegations) (citing and quoting *Duke Energy*, 111 F.4th at 354); *see generally id.* at 18–38. On June 30, 2025, the Court sided with the government, denying the motion to dismiss and applying the burden-shifting framework. *United States v. Apple, Inc.*, 2025 U.S. Dist. LEXIS 123842, *41 (D.N.J. Jun. 30, 2025).

The government also relies on a course-of-conduct analysis in *United States v. Live Nation Entertainment, Inc.*, in which it alleges that Live Nation maintains and exercises its monopoly power in the primary ticketing services and concert promotion services markets "through a coordinated pattern of anticompetitive conduct," including retaliation and exclusionary contracts that have expanded its power in "an increasingly more complex and interconnected ecosystem." Amended Compl. ¶ 68, No. 1:24-cv-03973-AS (S.D.N.Y. Aug. 30, 2024) (ECF No. 257). As in *Apple*, the government asserts in *Live Nation* that, while each of the acts making up this pattern "is exclusionary on its own," they "also work together across the ecosystem … to magnify the anticompetitive force of the scheme." *Id.* The government's complaint survived a motion to dismiss, *United States v. Live Nation Ent., Inc.*, 2025 U.S. Dist. LEXIS 47262 (Mar. 14, 2025), and the case is currently in discovery, with summary judgment motions due in November. Management Order (Mar. 24, 2025) (ECF No. 493).

The government also relies on a course-of-conduct theory in *FTC. et al. v. Amazon.com, Inc.*, in which it alleges that Amazon illegally maintains monopolies in both the online superstore and online marketplace services markets "through an interrelated course of conduct" including both "exclusionary anti-discounting conduct that stifles price competition" and "by coercing sellers to use its fulfillment services." Amended Compl. ¶¶ 80–116, No. 2:23-cv-01495-JH (W.D. Wa. Nov. 2, 2023) (ECF No. 114). In its motion to dismiss, Amazon used the same tactic used by Petitioners here, arguing that it could not be held liable under the government's "synergistic and holistic approach to antitrust liability." *FTC v. Amazon.Com, Inc.,* No. 2:23-cv-01495-JHC, 2024 U.S. Dist. LEXIS 185792, at *14 n.5 (W.D. Wash. Sep. 30, 2024) [hereinafter "*Amazon*"]. While the court declined to dismiss the government's claims on that basis, it put off a determination on whether Amazon's "conduct should be considered cumulatively" because, like the Fourth Circuit in this case, it found that "the individual forms of conduct outlined by Plaintiffs" may have been illegally anticompetitive on their own. *Id.*

The government relies on a course-of-conduct analysis in each of these cases for good reason: the approach is critical to understanding complicated anticompetitive schemes in new and innovative markets. In an age of overlapping, technology-driven markets, anticompetitive schemes rarely map neatly onto fact patterns from more traditional markets. This is especially true when a monopolist's conduct in one market reinforces its monopoly power in another (as the government alleges in *Google AdTech*,

2025 U.S. Dist. LEXIS 74956, at *138), when exclusionary effects work together across an ecosystem (as in *Live Nation*, ECF No. 257 at ¶ 68), and when the monopolist's scheme otherwise does not fit neatly into any of the predefined categories subject to conduct-specific tests (as in *Amazon*, W.D. Wa. 2:23-cv-01495-JH, ECF No. 114, and *Apple*, D.N.J. No. 2:24-cv-04055 (JXN/LDW), ECF No. 51). In order to understand those schemes, courts and enforcers must view the firms' individual acts not in isolation but holistically, in the context of their other conduct.

By urging the Court to conflate course-of-conduct analysis with the monopoly broth theory of liability, Petitioners promote an analytical error that would imperil sound analysis, undermine antitrust enforcement, and weaken the government's position in numerous pending antitrust cases. To avoid such an outcome, we urge you to advise the Supreme Court not to grant the petition for a writ of certiorari in this matter.

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Thank you for considering the views of the American Antitrust Institute. Should additional information be useful, we are available to discuss our views at your convenience.

Sincerely,

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