No. _____

IN THE

Supreme Court of the United States

GENERAL DYNAMICS CORP., et al.,
Petitioners.

v.

SUSAN SCHARPF, on behalf of herself and all others similarly situated.

On Petition for a Writ of Certiorari to the U.S. Court of Appeals for the Fourth Circuit

PETITION FOR A WRIT OF CERTIORARI

MATTHEW S. HELLMAN
DOUGLAS E. LITVACK
ELIZABETH B. DEUTSCH
JENNER & BLOCK LLP
1099 New York Ave. NW
Suite 900
Washington, DC 20016
(202) 639-6000

DONALD B. VERRILLI, JR.
Counsel of Record
GINGER D. ANDERS
MUNGER, TOLLES & OLSON LLP
601 Massachusetts Ave. NW
Suite 500E
Washington, DC 20001-5369
(202) 220-1100
Donald.Verrilli@mto.com

Counsel for Petitioners

(additional counsel on inside cover)

ADAM BLOCK SCHWARTZ
TODD STENERSON
DAVID HIGBEE
DJORDJE PETKOSKI
JOSEPH PAUL SAMUELS
ALLEN OVERY SHEARMAN
STERLING US LLP
1101 New York Ave., NW
Washington, DC 20005
Tel: (202) 508-8000

SIMA NAMIRI-KALANTARI
CROWELL & MORING LLP
515 South Flower Street
40th Floor
Los Angeles, CA 90071
Tel: (213) 622-4750

CHAHIRA SOLH
CROWELL & MORING LLP
3 Park Plaza
20th Floor
Irvine, CA 92614
Tel: (949) 263-8400

BRIAN ANDREW HILL
BRIAN J. WHITTAKER
NIXON PEABODY LLP
799 9th Street NW
Suite 500
Washington, DC 20000
Tel: (202) 585-8000

ALLISON W. REIMANN
GODFREY & KAHN, S.C.
One East Main Street
Suite 500
Madison, WI 53703
Tel: (608) 257-3911

MICHAEL A. DOORNWEERD
GABRIEL K. GILLETT
JENNER & BLOCK LLP
353 North Clark Street
Chicago, IL 60654
Tel: (312) 923-2631

DAVID G. BARGER
GREENBERG TRAURIG, LLP
1750 Tysons Boulevard
Suite 1000
McLean, VA 22102
Tel: (703) 749-1307

ATTISON L. BARNES, III
KRYSTAL B. SWENDSBOE
SCOTT M. MCCALEB
JON W. BURD
WILEY REIN LLP
2050 M Street, NW
Washington, DC 20036
Tel: (202) 719-7000

BENJAMIN L. HATCH
CASEY ERIN LUCIER
MCGUIREWOODS LLP
888 16th Street, NW
Washington, DC 20006
Tel: (202) 857-1700

J. BRENT JUSTUS
NICHOLAS J. GILES
JOSHUA D. WADE
W. COLE GEDDY
MCGUIREWOODS LLP
Gateway Plaza
800 East Canal Street
Richmond, VA 23219
Tel: (804) 775-1018

(additional counsel appear on the signature page)

QUESTION PRESENTED

Congress has provided a four-year statute of limitations for antitrust claims alleging a violation of Section 1 of the Sherman Act. See 15 U.S.C. 1 (Sherman Act), 15b (Clayton Act statute of limitations). Like other federal limitations periods, the Section 15b statute of limitations may be tolled under the doctrine of fraudulent concealment. In the decision below, the Fourth Circuit parted ways with the Fifth, Sixth, and Ninth Circuits in holding that plaintiffs who allege an *unwritten* conspiratorial agreement sufficiently plead an affirmative act of fraudulent concealment—even though nearly all plaintiffs claiming an unlawful conspiracy will be able to make such an allegation, and even though the bare assertion of an unwritten agreement does not reflect any active attempt to mislead third parties in order to conceal the conspiracy. The question presented is:

Whether plaintiffs adequately plead that defendants engaged in fraudulent concealment, for purposes of tolling the Section 15b statute of limitations, by alleging that defendants maintained an unwritten agreement.

PARTIES TO THE PROCEEDINGS

Defendants-appellees in the court of appeals were: General Dynamics Corporation; Bath Iron Works Corporation; Electric Boat Corporation; General Dynamics Information Technology, Inc.; Huntington Ingalls Industries, Inc.; Newport News Shipbuilding and Dry Dock Company; Ingalls Shipbuilding, Inc.; HII Mission Technologies Corp.; HII Fleet Support Group LLC; Marinette Marine Corporation; Bollinger Shipyards, LLC; Gibbs & Cox, Inc.; Serco, Incorporated; CACI International, Incorporated; Columbia Group, Inc.; Thor Solutions, LLC; and Tridentis, LLC. Faststream Recruitment Ltd. was a defendant in the courts below but did not participate in merits proceedings in the court of appeals and is not a petitioner in this Court.

Plaintiffs-appellants in the court of appeals were: Susan Scharpf, on behalf of herself and all others similarly situated; and Anthony D'Armiento, on behalf of himself and all others similarly situated. On September 9, 2025, D'Armiento withdrew from the case as a named plaintiff.

RULE 29.6 STATEMENT

Petitioner General Dynamics Corporation ("General Dynamics") has no parent corporation, and no publicly held corporation owns 10% or more of General Dynamics' stock.

Petitioner Bath Iron Works Corp.'s ("Bath Iron Works") parent corporation is General Dynamics, and General Dynamics owns 10% or more of Bath Iron Works' stock.

Petitioner Electric Boat Corp.'s ("Electric Boat") parent corporation is General Dynamics, and General Dynamics owns 10% or more of Electric Boat's stock.

Petitioner General Dynamics Information Technology, Inc.'s ("General Dynamics Information Technology") parent corporation is General Dynamics, and General Dynamics owns 10% or more of General Dynamics Information Technology's stock.

Petitioner Huntington Ingalls Industries, Inc. ("Huntington Ingalls") has no parent corporation, and no publicly held corporation owns 10% or more of Huntington Ingalls' stock.

Petitioner Newport News Shipbuilding and Dry Dock Company ("Newport News") is a wholly owned subsidiary of Huntington Ingalls Incorporated, which is a wholly owned subsidiary of Huntington Ingalls. No publicly held corporation owns 10% or more of Newport News' stock.

Petitioner Ingalls Shipbuilding, Inc. ("Ingalls Shipbuilding") is a wholly owned subsidiary of Huntington Ingalls Incorporated, which is a wholly

owned subsidiary of Huntington Ingalls. No publicly held corporation owns 10% or more of Ingalls Shipbuilding's stock.

Petitioner HII Mission Technologies Corp. ("HII Mission Technologies") is a wholly owned subsidiary of HII TSD Holding Company, which is a wholly owned subsidiary of HII Technical Solutions Corporation, which is a wholly owned subsidiary of Huntington Ingalls. No publicly held corporation owns 10% or more of HII Mission Technologies' stock.

Petitioner HII Fleet Support Group LLC ("HII Fleet Support Group") is a wholly owned subsidiary of Fleet Services Holding Corp., which is a wholly owned subsidiary of Huntington Ingalls Incorporated, which is a wholly owned subsidiary of Huntington Ingalls. No publicly held corporation owns 10% or more of HII Fleet Support Group's stock.

Petitioner Marinette Marine Corporation's ("Marinette Marine") parent corporation is Fincantieri Marine Group, LLC ("FMG"). FMG's sole member is Fincantieri Marine Group Holdings Inc. ("FMGH). Lockheed Martin Corporation, which is publicly traded on the NYSE, holds an ownership interest in FMGH. FMGH is also an indirect subsidiary of Fincantieri S.p.A., which has issued shares to the public through the Milan Stock Exchange. Marinette Marine is not aware of any other entities that own 10% or more of Marinette Marine's stock.

Petitioner Bollinger Shipyards, LLC ("Bollinger Shipyards") has no parent corporation, and no publicly held corporation owns 10% or more of Bollinger Shipyards' stock.

Petitioner Gibbs & Cox, Inc. ("Gibbs & Cox") is a wholly owned subsidiary of Leidos, Inc., which is wholly owned by Leidos Holdings, Inc. which is publicly traded. Besides Leidos Holdings, Inc., no other publicly held corporation owns 10% or more of Gibbs & Cox's stock.

Petitioner Serco Inc. ("Serco") is a wholly owned subsidiary of Serco North America (Holdings) Inc., which is wholly owned by Serco Holdings Limited. The ultimate parent of Serco Holdings Limited is Serco Group Plc. Besides Serco Group Plc, which is publicly traded on the London stock exchange, no other publicly held corporation owns 10% or more of Serco's stock.

Petitioner CACI International Inc. ("CACI International") has no parent corporation, and no publicly held corporation owns 10% or more of CACI International's stock.

Petitioner The Columbia Group, Inc.'s ("Columbia Group") parent corporation is The Columbia Group of Virginia, Inc., and no publicly held corporation owns 10% or more of Columbia Group's stock.

Petitioner Thor Solutions, LLC ("Thor Solutions") has no parent corporation, and no publicly held corporation owns 10% or more of Thor Solutions' stock.

Petitioner Tridentis LLC ("Tridentis") has no parent corporation, and no publicly held corporation owns 10% or more of Tridentis' stock.

RELATED PROCEEDINGS

Scharpf, on behalf of herself and all others similarly situated, et al. v. *General Dynamics Corp., et al.*, No. 24-1465 (4th Cir. May 9, 2025)

Scharpf, on behalf of herself and all others similarly situated, et al. v. *General Dynamics Corp., et al.*, No. 1:23-cv-01372 (AJT/WEF) (E.D. Va. Apr. 19, 2024)

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Petitioners respectfully petition for a writ of certiorari to review the judgment of the U.S. Court of Appeals for the Fourth Circuit.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a) is reported at 137 F.4th 188. The decision of the district court (App., *infra*, 36a) is available at 2024 WL 1704665.

JURISDICTION

The court of appeals entered its judgment on May 9, 2025, and denied a petition for rehearing en banc on June 13, 2025. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTES INVOLVED

15 U.S.C. 1 provides:

Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal. ****

15 U.S.C. 15b provides:

Any action to enforce any cause of action under section 15, 15a, or 15c of this title shall be forever barred unless commenced within four years after the cause of action accrued. ****

INTRODUCTION

In this putative antitrust class action, plaintiffs allege that the defendants—principally companies that design and manufacture the United States' public naval fleet—maintained an unwritten agreement not to recruit and hire each other's naval engineer employees. Congress has provided that the limitations period for such a suit is four years from the claim's accrual,

and that damages are generally available only for conduct within the four-year period. 15 U.S.C. 15b. Yet plaintiffs filed this suit a *decade* after they last allegedly suffered injury, and they seek treble damages going back *25 years*, to 2000—for an asserted class of plaintiffs that numbers in the thousands.

In a divided decision, the court of appeals allowed plaintiffs' long-since-stale claims to proceed, holding that plaintiffs' mere allegation that the defendants' purported agreement is *unwritten* is sufficient to invoke the doctrine of fraudulent concealment and toll the limitations period. But unlawful conspiracies are by their nature clandestine—not memorialized or publicized. The Fourth Circuit has thus permitted plaintiffs to allege fraudulent concealment merely by pointing to a characteristic *that is a quintessential feature of conspiracies*. As Chief Judge Diaz explained in dissent, the court's decision effectively gives "plaintiffs alleging a conspiracy * * * a free pass on time-barred claims." App.34a.

The court of appeals' decision creates a square circuit conflict with the decisions of the Fifth, Sixth, and Ninth Circuits—that is, every other circuit court that has had occasion to consider whether the mere act of keeping an agreement secret can constitute fraudulent concealment. In those circuits, it is not enough for plaintiffs to allege that the defendants had a secret agreement, met in secret, or kept others "in the dark" about the agreement. *Thorman* v. *Am. Seafoods Co.*, 421 F.3d 1090, 1095 (9th Cir. 2005); *Carrier Corp.* v. *Outokumpu Oyj*, 673 F.3d 430, 447 (6th Cir. 2012); *Rx.com* v. *Medco Health Sols., Inc.*, 322 F. App'x 394, 397 (5th Cir. 2009). Those courts have explained that "[m]ere silence or unwillingness to divulge wrongful

activities is not sufficient" to establish fraudulent concealment; instead, "there must be some 'trick or contrivance intended to exclude suspicion and prevent inquiry.'" *Carrier Corp.*, 673 F.3d at 446-447 (citations omitted). In those circuits, then, plaintiffs' allegations of an unwritten agreement would have fallen far short of what is required for fraudulent concealment, and the suit would have been dismissed as untimely.

The decision below is also incorrect and highly destabilizing. The court of appeals' expansion of fraudulent concealment is irreconcilable with Congress's decision to establish a four-year statute of limitations period that runs from the plaintiffs' injury (not from discovery of the injury). Because conspiracies are seldom memorialized, virtually any antitrust plaintiff in the Fourth Circuit can now toll the limitations period simply by pleading fraudulent concealment, thereby expanding the limitations period far beyond what Congress contemplated. The decision also deviates from longstanding general principles of fraudulent concealment. The doctrine has long been understood to require *fraud*—that is, misleading or deceptive acts. As this Court put it almost 150 years ago, "mere silence is not enough" to establish fraudulent concealment. *Wood* v. *Carpenter*, 101 U.S. 135, 143 (1879).

The question whether an unwritten agreement to restrain trade rises to the level of fraudulent concealment is important and recurring. The decision below gives plaintiffs a powerful new tool to resurrect ancient conspiracy allegations and to bring class actions challenging years or decades of alleged conduct. And it vastly increases the damages exposure in *all* antitrust conspiracy cases, as alleging fraudulent concealment enables plaintiffs to seek treble damages for the *entire* period of fraudulent concealment rather than

(as is normally the case) for the past four years. Faced with the potentially enormous expense of discovery into decades of conduct, the challenges of mounting an effective defense for actions that occurred so long in the past, and potentially ruinous damages exposure, defendants will often be compelled to settle, without regard to whether the plaintiffs might ultimately be able to prove fraudulent concealment and their substantive allegations. In similar circumstances, this Court has previously intervened to ensure that pleading requirements are sufficiently rigorous to prevent unfair and disproportionate settlement pressure. See, *e.g.*, *Bell Atl. Corp.* v. *Twombly*, 550 U.S. 544 (2007). The Court should do the same here.

STATEMENT OF CASE

I. Legal Background

Section 1 of the Sherman Act prohibits "[e]very contract, combination in the form of trust or otherwise, or conspiracy" that unreasonably restrains "trade or commerce among the several States." 15 U.S.C. 1; see *Texaco Inc.* v. *Dagher*, 547 U.S. 1, 5 (2006). In the Clayton Act, 15 U.S.C. 15b, Congress established a four-year statute of limitations for suits alleging Sherman Act violations. That limitations period begins to run when the "cause of action accrue[s]," *ibid.*, that is, "when a defendant commits an act that injures a plaintiff's business." *Zenith Radio Corp.* v. *Hazeltine Rsch., Inc.*, 401 U.S. 321, 338 (1971).

Under the equitable doctrines that courts apply to statutes of limitations, Section 15b's limitations period may be "pause[d]" in a particular case to account for "extraordinary circumstance[s]." *Lozano* v. *Montoya Alvarez*, 572 U.S. 1, 10 (2014). One such extraordinary circumstance is when there has been "fraudulent concealment" of the allegedly wrongful conduct.

Credit Suisse Secs. (USA) LLC v. *Simmonds*, 566 U.S. 221, 227 (2012).[1] Where the plaintiff establishes that defendants fraudulently concealed the violation, the limitations period is tolled until the date on which the violation was discovered, or should have been discovered, by the plaintiff. *Ibid*.

To plead fraudulent concealment, plaintiffs must allege that (1) defendants "fraudulently concealed facts which are the basis of [the] claim"; (2) plaintiffs "failed to discover those facts within the statutory period"; and (3) plaintiffs exercised "due diligence." *Pocahontas Supreme Coal Co.* v. *Bethlehem Steel Corp.*, 828 F.2d 211, 218 (4th Cir. 1987); accord *Klehr* v. *A.O. Smith Corp*., 521 U.S. 179 (1997). With respect to the first element, the courts of appeals generally hold that plaintiffs must plead "affirmative acts of concealment" taken with intent to prevent discovery. *Robertson* v. *Sea Pines Real Estate Cos.*, 679 F.3d 278, 291 n.2 (4th Cir. 2012); App.9a (citing cases).

II. Factual Background

In this putative class action, plaintiff Susan Scharpf sued defendants, who are petitioners in this Court and are principally companies that design and manufacture the U.S. "public fleet." App.39a. Petitioners include shipbuilders, naval engineering consulting companies, and a recruiting firm working in the industry. App.2a. Both the shipbuilders and the consulting companies perform contract work for the federal government. App.2a.

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[1] Fraudulent concealment is a tolling doctrine related to equitable tolling, though it focuses on the defendant's conduct rather than on circumstances outside the parties' control. *Sebelius* v. *Auburn Reg'l Med. Ctr*., 568 U.S. 145, 164 (2013) (Sotomayor, J., concurring).

Plaintiffs allege that defendants violated Section 1 of the Sherman Act by maintaining an "unwritten 'gentlemen's agreement'" to refrain from actively recruiting and hiring each other's naval engineers. Compl. ¶ 1, No. 1:23-cv-01372, ECF No. 1 (E.D. Va. Oct. 6, 2023). Scharpf, who worked as a naval engineer from 2007 to 2013, represents a proposed class consisting of naval engineers who are employed by defendants and allegedly were injured by the unwritten agreement. App.37a.

Plaintiffs allege that in the early 1980s defendants entered into the alleged agreement not to recruit and hire each other's engineers, and that the agreement "expanded to industry-wide proportions by at least 2000" and continues to this day. Compl. ¶ 144. Plaintiffs allege that the no-poach agreement suppresses wages, and has cost the proposed class "hundreds of millions of dollars in earnings." Compl. ¶ 200.

Plaintiffs' allegations regarding the purported no-poach agreement fall into two general categories. First, plaintiffs' complaint contains allegations from interviews with many "industry insiders," who described a "standing 'gentlemen's agreement' not to poach naval engineers from other conspirators." Compl. ¶¶ 4, 176. Those insiders reported that although defendants "were prohibited from affirmatively recruiting from one another—with some going so far as maintaining 'do not hire' lists—[they] were permitted to hire naval engineers who initiated contact." Compl. ¶ 9. For example, one naval engineer "report[ed] that when he attempted to interview with other naval engineering firms, he was required to specify that he had independently pursued the opportunity and [had] not been solicited." Compl. ¶ 146.

Second, plaintiffs allege various public facts about the naval engineering industry from which, they claim, the existence of a no-poach agreement can be inferred. Plaintiffs allege that there is an "industry-wide shortage of naval engineers," and that one would therefore expect defendants to "compete[] aggressively to lure away each other's employees by offering better salaries and benefits." Compl. ¶ 176. Instead, plaintiffs assert, defendants "maintained relatively uniform compensation structures, rarely gave bonuses or promotions, and did not actively recruit each other's employees." Compl. ¶ 176. Plaintiffs further allege that the naval engineering industry is "particularly susceptible to collusion," Compl. ¶ 166, and that its "close-knit" nature enabled defendants to "form, monitor, and enforce their conspiracy," Compl. ¶ 171.

Plaintiffs allege that they discovered the alleged no-poach agreement in April 2023, and that they could not have discovered it any earlier "with the exercise of reasonable diligence." Compl. ¶ 222. Plaintiffs make this assertion despite their allegations that "[m]any" executives and managers knew about the agreement, that the agreement spans more than 40 years, that the naval engineering industry is especially "close-knit," and that the existence of the agreement can be inferred from public facts about the industry. Compl. ¶¶ 4, 11, 162-176.

Because Scharpf had not worked as a naval engineer for a decade, the complaint includes allegations intended to establish that plaintiffs are entitled to tolling of Section 15b's four-year statute of limitations under the doctrine of fraudulent concealment. In particular, plaintiffs allege that defendants "concealed their conspiracy" by not writing down the alleged no-poach

agreement and instead maintaining it as an "unwritten, broad secret agreement." Compl. ¶¶ 205-206. In the same vein, plaintiffs allege the agreement is "non-ink-to-paper," is "passed on only as verbal instructions from executives to managers," and is enforced "through private phone calls between high-level executives." Compl. ¶¶ 12, 149, 220.

The complaint seeks damages going back to 2000 on behalf of the proposed class. Compl. ¶ 227, Prayer for Relief. The complaint also requests treble damages under 15 U.S.C. 15(a).

III. Proceedings Below

1. Defendants moved to dismiss, arguing, among other things, that plaintiffs' action was time-barred and that plaintiffs had failed to plausibly allege conspiracy. See generally *Bell Atl. Corp.* v. *Twombly*, 550 U.S. 544 (2007).

The district court dismissed the suit as untimely. The court explained that in order to adequately plead fraudulent concealment, plaintiffs were required to allege "affirmative acts of the defendants' concealment." App.47a-48a; see *Robertson*, 679 F.3d at 291 n.2. And because fraudulent concealment involves fraud, plaintiffs' allegations had to be stated with particularity. See Fed. R. Civ. P. 9(b) ("In alleging fraud or mistake, a party must state with particularity the circumstances constituting fraud or mistake."). The court held that plaintiffs had not adequately pleaded affirmative acts of concealment because their allegation—that defendants kept the alleged no-poach agreement secret by not putting it in writing—was the type of al-

legation that the Fourth Circuit had previously "rejected as insufficient to toll the statute of limitations." App.50a-51a (citing *Robertson*, 679 F.3d at 291 n.2).[2]

2. The Fourth Circuit reversed in a divided opinion. App.1a-35a.

a. The court first held that maintaining a "secret, non-ink-to-paper agreement[]" can constitute an affirmative act of fraudulent concealment. App.11a. In the court's view, "conspirators who 'are *careful not to write down* evidence of their antitrust violations in the first place'" should be "held accountable." App.10a (quoting *Supermarket of Marlinton, Inc.* v. *Meadow Gold Dairies*, 71 F.3d 119, 125 (4th Cir. 1995) (emphasis added)). The court explained that "the doctrine of fraudulent concealment is designed to prevent conspirators who take steps to avoid detection from hiding behind the statute of limitations," and that defendants who "avoid creating evidence of their conspiracy" should not "escape this general rule." App.15a-16a.

The court accordingly held that plaintiffs "adequately allege[d] that Defendants engaged in affirmative acts [of fraudulent concealment] by creating an illicit no-poach agreement that they deliberately kept non-ink-to-paper." App.16a. The court elaborated that "Defendants allegedly avoided detection by transmitting the agreement orally from executives to managers and by referring to it obliquely." App.17a. The court believed those allegations to be sufficiently particular to satisfy Rule 9(b) because "Defendants have been 'made aware' that they will have to defend against allegations of an unwritten agreement not to

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[2] The district court did not address defendants' contention that plaintiffs had failed to adequately plead conspiracy under *Twombly*.

poach each other's employees unless those employees affirmatively seek employment." App.17a.

The court next held that plaintiffs had adequately alleged the other elements necessary to plead fraudulent concealment. Plaintiffs had sufficiently alleged that defendants intended to deceive others because it was "hard to imagine" that such an agreement "would remain unwritten merely for the sake of convenience." App.19a-20a. In addition, "[t]he allegedly obvious illegality of Defendants' no-poach agreement" also "weigh[ed] in favor of finding" intent to deceive. App.21a. Finally, the court held that plaintiffs' "due diligence in uncovering the alleged conspiracy" was a "question of fact" that was "not amenable to resolution on the pleadings"—even though plaintiffs themselves alleged that numerous employees and executives were aware of the agreement. App.22a, 24a.

b. Chief Judge Diaz dissented. App.26a-35a. He explained that under the court's decision, "plaintiffs * * * get a free pass on time-barred claims" simply by "alleging a conspiracy." App.34a. Because unlawful conspiracies are seldom memorialized in writing, the court effectively "allow[ed] the plaintiffs" to allege fraudulent concealment by "repackag[ing] overlapping and general descriptions of a single conspiracy, rather than requiring them to allege discrete and particularized acts by the defendants to conceal the conspiracy." App.34a. Under that approach, Chief Judge Diaz stated, "we needn't bother having a statute of limitations defense at all." App.35a.

Chief Judge Diaz also explained that the court had "excuse[d] the plaintiffs from having to show any diligence whatsoever in pursuing claims in an alleged decades-long conspiracy." App.34a. He highlighted

"plaintiffs' own allegations" casting doubt on their diligence, such as alleged public facts about "a 'shortage of naval engineers,' a lack of 'labor mobility,' and 'relatively uniform compensation structures' that were 'far below what would be available in a competitive market.'" App.34a.

REASONS FOR GRANTING THE PETITION

The court of appeals' decision presents a square circuit conflict on the requirements for pleading fraudulent concealment sufficient to toll the Clayton Act's four-year limitations period. That question is of overriding and recurring importance. The decision below holds that "[p]laintiffs adequately allege * * * affirmative acts" of fraudulent concealment by alleging that the defendants entered into an anticompetitive agreement that was "kept non-ink-to-paper." App.16a. In other words: the mere fact of an unwritten agreement suffices to establish fraudulent concealment. But unlawful conspiracies are clandestine by nature. For just that reason, the three other courts of appeals that have considered the question—the Fifth, Sixth, and Ninth Circuits—have all held that allegations of an unwritten agreement or general secrecy are insufficient to adequately plead the affirmative acts necessary for fraudulent concealment. And this Court has long held that fraudulent concealment requires more than "mere silence"—it requires a deceptive "trick or contrivance." *Wood* v. *Carpenter*, 101 U.S. 135, 143 (1879).

The inevitable consequence of the decision below is to enable Sherman Act plaintiffs to allege an unwritten agreement and toll the limitations period in virtually every conspiracy case. It amounts to an open invitation to plaintiffs (and plaintiffs' lawyers) to attempt to revive stale claims concerning decades-old

conduct—posing all the risks of faded memories, unavailable witnesses, and myriad other problems of proof that statutes of limitations exist to avoid. And because alleging fraudulent concealment enables plaintiffs to seek treble damages for the entire period of concealment, the decision below vastly increases the damages exposure in *every* case. Faced with ruinous damages demands arising out of allegations of long-past conduct, many defendants will have no choice but to settle, regardless of plaintiffs' ultimate ability to prove fraudulent concealment or their underlying claims. This Court's review is manifestly warranted.

I. The Fourth Circuit's Decision Conflicts With The Decisions Of Three Other Courts Of Appeals.

The Fourth Circuit's holding that the mere choice to avoid writing down an unlawful agreement can constitute an affirmative act of fraudulent concealment squarely conflicts with decisions of the Fifth, Sixth, and Ninth Circuits. Those courts have held that fraudulent concealment requires more than mere silence—it requires active efforts to mislead third parties.

1. The Sixth Circuit held in *Carrier Corporation* v. *Outokumpu Oyj* that "simply meeting in secret" is not sufficient to constitute fraudulent concealment. 673 F.3d 430, 447 (6th Cir. 2012). The court explained that "[m]ere silence or unwillingness to divulge wrongful activities is not sufficient" to establish fraudulent concealment; instead, "there must be some 'trick or contrivance intended to exclude suspicion and prevent inquiry.'" *Id.* at 446-447 (citation omitted). Plaintiffs' allegations that defendants "utiliz[ed] covert meetings" in furtherance of their price-fixing conspiracy

therefore did not suffice to adequately plead fraudulent concealment. *Id.* at 447.

The Sixth Circuit explained, however, that certain other allegations *were* sufficient to adequately plead fraudulent concealment. In particular, the complaint in that case alleged that defendants "established security rules to prevent a paper trail * * * and used a coding-system to hide the identity of the producers in their documents and spreadsheets." *Ibid*. That conduct, the court explained, was "sufficiently affirmative for purposes of satisfying the 'wrongful concealment' element because the alleged actions involved taking active steps to hide evidence, as opposed to simply meeting in secret." *Ibid.* (citation omitted). Notably, those allegations involved affirmatively misleading other parties, rather than simply declining to create evidence that would make detection easier.

2. Similarly, the Ninth Circuit held in *Davidson* v. *Pinnacle West Capital Corp.* that the mere existence of a "secret agreement" does not establish the affirmative concealment necessary for fraudulent concealment. 1997 WL 377975, at *1 (9th Cir. July 8, 1997); see also *Rutledge* v. *Bos. Woven Hose & Rubber Co.*, 576 F.2d 248, 250 (9th Cir. 1978) ("[s]ilence or passive conduct of the defendant is not deemed fraudulent"). The court explained that there must "be *some act of fraud over and above making the secret agreement*." *Davidson*, 1997 WL 377975, at *1 (emphasis added). In other words, "[m]ere silence by the person allegedly committing the fraud will not avoid the running of the statute. There must be some trick or contrivance intended to exclude suspicion and prevent [inquiry]." *Ibid.* (citation omitted). The secretive nature of the agreement amounted to mere silence, and was not a trick or contrivance.

The Ninth Circuit has repeatedly explained that fraudulent concealment requires that "the plaintiff both plead[] and prove[] that the defendant *actively* misled her." *Thorman* v. *Am. Seafoods Co.*, 421 F.3d 1090, 1095 (9th Cir. 2005) (emphasis in original) (quoting *Grimmett* v. *Brown*, 75 F.3d 506, 514 (9th Cir. 1996)). "Merely keeping someone in the dark is *not* the same as affirmatively misleading him." *Ibid.* (emphasis added). For example, it was not sufficient to allege that a company had "kept secret" pertinent information. *Id.* at 1095-1096; see also *Hexcel Corp.* v. *Ineos Polymers, Inc.*, 681 F.3d 1055, 1060 (9th Cir. 2012) (plaintiff "must plead facts showing that [the defendant] affirmatively misled it" for fraudulent concealment (citation omitted)).

3. Finally, the Fifth Circuit held in *Rx.com* v. *Medco Health Solutions, Inc.*, that "secret communications between the Defendants" did not suffice as an affirmative act of concealment. 322 F. App'x 394, 397 (5th Cir. 2009). The Fifth Circuit explained that plaintiff had failed to show that "the defendants * * * engaged in 'affirmative acts of concealment.'" *Id.* at 397 (citation omitted). Under that standard, the court explained, "[c]oncealment by defendant only by silence is not enough"; the defendant "must be guilty of some trick or contrivance tending to exclude suspicion and prevent inquiry." *Id.* at 398 (citation omitted). The plaintiff's allegations did not meet that standard.[3]

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[3] The Third Circuit also has stated the standard for fraudulent concealment in a way that strongly suggests that merely maintaining an unwritten agreement would be insufficient to demonstrate affirmative concealment. See, *e.g.*, *In re Cmty. Bank of N. Va. Mortg. Lending Pracs. Litig.*, 795 F.3d 380, 401 (3d Cir. 2015) (requiring "*affirmative steps to mislead* the plaintiff with

(footnote continued)

4. Had this case originated in the Fifth, Sixth, or Ninth Circuits instead of in the Fourth Circuit, a court applying those circuits' precedents would have been required to dismiss plaintiffs' complaint as time-barred. Like the plaintiffs in *Carrier Corporation*, *Davidson*, and *Rx.com*, plaintiffs here merely allege that defendants kept their agreement secret—namely, that defendants did not commit the purported no-poach agreement to writing. Plaintiffs' complaint is completely devoid of any allegations that defendants affirmatively misled plaintiffs—indeed, plaintiffs expressly allege that although the alleged no-poach agreement was not written down, many people knew about it, because they were verbally instructed about it and given "do not hire" lists. The Fourth Circuit's approach is therefore a stark departure from the showing of active steps to mislead that is required in the Fifth, Sixth, and Ninth Circuits.

II. The Court Of Appeals' Decision Is Incorrect.

The Fourth Circuit erred in holding that a "conspirator commits an affirmative act of fraudulent concealment" simply by maintaining an unwritten agreement. App.16a. Because plaintiffs will virtually always be able to plead an unwritten agreement—unlawful conspiracies are by their nature not committed to writing—the court of appeals' decision conflicts with

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respect to the claim" (emphasis added)); *Harris* v. *Twp. of O'Hara*, 282 F. App'x 172, 175 (3d Cir. 2008) ("To benefit from the doctrine of fraudulent concealment, a plaintiff must demonstrate that the defendant engaged in affirmative acts which *actively misled the plaintiff* and were designed to conceal facts supporting the cause of action." (emphasis added)). The Third Circuit has not, however, had occasion to apply this standard to allegations of an unwritten agreement, secret meetings, or secret communications.

Congress's decision to provide for a four-year limitations period that runs from the date of the plaintiff's injury. In addition, the decision below wrenches fraudulent concealment from its doctrinal moorings: fraudulent concealment has always involved *fraud*, i.e., misrepresentations or deception. Simply declining to memorialize an unlawful agreement does not constitute fraud or fraudulent concealment.

A. The Fourth Circuit's decision cannot be reconciled with the four-year statute of limitations applicable to the Sherman Act.

Congress established a four-year statute of limitations for Sherman Act claims that begins to run at the time of a plaintiff's injury. 15 U.S.C. 15b. But the decision below ensures that statute of limitations will be all but meaningless.

1. It is bedrock law that when Congress establishes a statutory limitations period for a federal cause of action, courts must take care to employ judicially created equitable doctrines—such as equitable tolling and fraudulent concealment—only in a manner that is consistent with Congress's intent in establishing the limitations period. See*, e.g.*, *Klehr* v. *A.O. Smith Corp.*, 521 U.S. 179, 187 (1997) (rejecting judicial gloss on accrual rule because it would "create[] a limitations period that is longer than Congress could have contemplated"); cf. *Sebelius*, 568 U.S. at 159 (whether equitable tolling applies depends on congressional intent).

For that reason, this Court has held that equitable tolling is "a rare remedy to be applied in unusual circumstances, not a cure-all for an entirely common state of affairs." *Wallace* v. *Kato*, 549 U.S. 384, 396 (2007); see also *Arellano* v. *McDonough*, 598 U.S. 1, 6-

7 (2023) (equitable tolling applies only in "extraordinary circumstance[s]" (citation omitted)). Otherwise—if the circumstances that triggered tolling were "common," *Wallace*, 549 U.S. at 396 —the judicial exceptions to strict application of the limitations period would swallow Congress's provision of a defined period of time after which defendants enjoy repose. That common-sense principle applies with as much force to fraudulent concealment as other tolling doctrines. See *Klehr*, 521 U.S. at 195 (determining the scope of fraudulent concealment so as to conform to the purposes underlying the civil RICO statute).

In the context of Sherman Act claims, Congress directed that the limitations period begins running when the plaintiff's claim "accrues"—that is, "when a defendant commits an act that *injures a plaintiff's business*." *Zenith Radio Corp.* v. *Hazeltine Rsch., Inc.*, 401 U.S. 321, 338 (1971) (emphasis added); 15 U.S.C. 15b. Notably, Congress tied the start of the limitations period to the *accrual* of the claim—rather than to the plaintiff's *discovery* of the claim. See *Rotkiske* v. *Klemm*, 589 U.S. 8, 14 (2019) (describing statutes of limitations running from discovery). That is so even though "the facts which underlie" a claim of an unlawful conspiracy under Section 1 of the Sherman Act "may only gradually come to light." *Brumbaugh* v. *Princeton Partners*, 985 F.2d 157, 162 (4th Cir. 1993). Congress undoubtedly understood that illegal conspiracies will invariably be shrouded in secrecy. See *United States* v. *Snow*, 462 F.3d 55, 68 (2d Cir. 2006) ("conspiracy by its very nature is a secretive operation"); see also *In re Platinum & Palladium Antitrust Litig.*, 61 F.4th 242, 277 (2d Cir. 2023). Yet Congress nonetheless required plaintiffs to sue within four years of the injury, even though that injury might be difficult to uncover.

Section 15b therefore reflects Congress's considered judgment that defendants should generally enjoy repose from Sherman Act claims four years after the acts in question have occurred—even if the violation was not immediately evident upon its commission. In other words, Congress decided that after four years, the important policies of certainty, repose, and avoiding the difficulties associated with litigating stale claims outweigh concerns about belated discovery of hidden conspiracies. See *Rotella* v. *Wood*, 528 U.S. 549, 555 (2000) (describing "basic policies of all limitations provisions"). Indeed, although Congress's choice of an injury accrual rule leaves no doubt on this point, the legislative history of the four-year statute of limitations confirms that Congress was particularly concerned about "prolong[ing] stale claims." S. Rep. No. 84-619, at 6 (1955). Moreover, although judicial tolling is a "background principle against which Congress drafts limitations periods," *Arellano*, 598 U.S. at 6 (citation omitted), Congress presumably also assumed that, consistent with governing precedent, tolling of the limitations period in Section 15b would be available only in rare circumstances. And Rule 9(b) reinforces that intent, as Congress expected that plaintiffs seeking to toll limitations by alleging fraudulent concealment would have to do so with particularity.

2. The Fourth Circuit's vast expansion of what counts as fraudulent concealment is irreconcilable with Section 15b because it "creates a limitations period that is longer than Congress could have contemplated." *Klehr*, 521 U.S. at 187.

The Fourth Circuit held that a "non-ink-to-paper agreement" qualifies as "an affirmative act of fraudulent concealment." App.16a. But maintaining one's

allegedly unlawful agreement in unwritten form is virtually *intrinsic* to illegal conspiracies. See *supra*, p. *. It should go without saying that companies do not advertise their participation in illegal conspiracies, or create records memorializing those agreements. As courts have acknowledged, "[c]onspiracies are often tacit or unwritten in an effort to escape detection." *Robertson*, 679 F.3d at 289-290; see *Anderson News, LLC* v. *Am. Media, Inc.*, 680 F.3d 162, 183 (2d Cir. 2012) ("[C]onspiracies are rarely evidenced by explicit agreements."); *Texas* v. *Allan Const. Co.*, 851 F.2d 1526, 1532 (5th Cir. 1988) ("[A]lmost every price-fixing conspiracy involves some efforts aimed at secrecy.").

Indeed, this Court's explication of the proof necessary to establish an antitrust conspiracy is premised on the assumption that direct evidence such as a written memorialization of a conspiracy will often be absent, even *after* discovery. The Court has explained that the evidence in an antitrust case may often be "ambiguous," and that the plaintiff "must show that the *inference* of conspiracy is reasonable in light of the competing inference[] of independent action." *Matsushita Elec. Indus. Co.* v. *Zenith Radio Corp.*, 475 U.S. 574, 588 (1986) (emphasis added). Those statements assume that a plaintiff might not uncover *direct* evidence of an illegal agreement—let alone written evidence—and that a plaintiff may need to prove conspiracy by relying solely on inferences from the alleged conspirators' public actions. Accord *Monsanto Co.* v. *Spray-Rite Serv. Corp.*, 465 U.S. 752, 764 (1984); *Twombly*, 550 U.S. at 557 (complaint must at least allege a plausible "basis for inferring a *tacit* agreement" (citation modified)).

Against that backdrop, the upshot of the Fourth Circuit's decision is crystal clear: plaintiffs claiming

an unlawful antitrust conspiracy will virtually *always* be able to toll the limitations period by pleading that the conspiracy was unwritten and therefore fraudulently concealed. It is no answer to point to the other elements of fraudulent conspiracy, as the decision below makes clear that they pose no meaningful hurdle at the pleading stage. The court held that intent to conceal can be inferred from the fact that an unwritten agreement is long-running and includes many participants, and from the "obvious" nature of the violation. App.20a-21a. Those observations will nearly always be true of alleged secret agreements, particularly those that are per se illegal under the Sherman Act. App.26a; *Watson Carpet & Floor Covering, Inc.* v. *Mohawk Indus., Inc.*, 648 F.3d 452, 459 (6th Cir. 2011) ("[I]t is not uncommon * * * for antitrust conspiracies to last many years."); *United States* v. *Rose*, 449 F.3d 627, 630 (5th Cir. 2006). And the court held that due diligence is a factual question generally "not amenable to resolution on the pleadings." App.23a. As Chief Judge Diaz put it, the Fourth Circuit's decision effectively gives plaintiffs "a free pass on time-barred claims." App.34a; see also *Berkson* v. *Del Monte Corp.*, 743 F.2d 53, 56 (1st Cir. 1984) (recognizing precedent that, because a conspiracy is "secret by nature," that should not be "per se sufficient to toll statute of limitation").

This case aptly illustrates just how easy it will be to plead fraudulent concealment under the court of appeals' decision. According to plaintiffs' own allegations, the no-poach agreement was an open secret: it has existed industry-wide since 2000; many executives and hiring managers knew about it; and it was reflected in public information concerning the lack of recruitment and below-market salaries for naval engi-

neers. Compl. ¶¶ 4, 7, 9. Yet the court held that plaintiffs adequately alleged that defendants fraudulently concealed this openly discussed agreement because the agreement was "never reduced to writing and passed on only as verbal instructions from executives to managers." App.16a. The court buttressed its view by observing that "it is hard to imagine that a decades-old multilateral agreement * * * would remain unwritten merely for the sake of convenience," especially given that the agreement's "illegality" was "allegedly obvious." App.20a-21a. The court further held that whether plaintiffs had acted with diligence, despite the extensive public evidence of the conspiracy that they themselves cited, was a "question of fact" that could not be resolved on the pleadings. App.23a-24a. As should be evident, that reasoning so lowers the pleading bar that plaintiffs will be able to clear it in cases alleging a long-running clandestine agreement—that is to say, nearly every Sherman Act conspiracy case.

That result cannot be reconciled with Congress's clearly expressed intent. The Fourth Circuit's rule that the secrecy inherent in a conspiracy is sufficient to toll the limitations period effectively transforms Section 15b's statute of limitations into one triggered by the plaintiff's *discovery* of the cause of action rather than the *accrual* of the cause of action. *Rotkiske*, 589 U.S. at 14. But in Section 15b, Congress expressly chose an accrual rule rather than a discovery rule—despite the common knowledge that alleged antitrust conspiracies are not generally memorialized and might not be discovered until years after initial injury. Congress doubtless did so in recognition that too lax a standard would unfairly open the door for antitrust plaintiffs to pursue difficult-to-defend stale claims, with potentially ruinous treble damages awards, in

derogation of the values that statutes of limitations exist to further. The Fourth Circuit's decision thus overrides not only Congress's establishment of an injury accrual rule, but also the "strong congressional policy in favor of repose in antitrust suits." *Pinney Dock & Transp. Co.* v. *Penn Cent. Corp.*, 838 F.2d 1445, 1469 (6th Cir. 1988) (citation omitted).

B. The Fourth Circuit's decision is contrary to basic principles of fraud and fraudulent concealment.

The Fourth Circuit's decision also distorts longstanding principles of fraudulent concealment beyond recognition.

Fraudulent concealment, as its name suggests, requires fraud. That is, fraudulent concealment tolls the statute of limitations when the defendant has *fraudulently* prevented the plaintiff from learning of its cause of action. See *Sebelius*, 568 U.S. at 164 (Sotomayor, J., concurring) (fraudulent concealment involves "*deception* [that] prevented a reasonably diligent plaintiff from bringing a timely claim" (emphasis added)).

It is well established that "[t]here can be no fraud without misrepresentation, i.e., a representation or statement which is false." 37 C.J.S. Fraud § 18; see also, *e.g.*, *Unicolors, Inc.* v. *H&M Hennes & Mauritz, L. P.,* 595 U.S. 178, 188 (2022) ("Fraud typically requires [a] *knowing misrepresentation* * * * of a material fact." (second emphasis added)). Fraud therefore occurs only when a plaintiff "fraudulently *produc[es] a false impression* upon the mind of the other party." *Stewart* v. *Wyoming Cattle-Ranche Co.*, 128 U.S. 383, 388 (1888) (emphasis added). Although an omission—failure to disclose the true facts—can constitute a misrepresentation in some circumstances, "mere silence is

quite different from concealment," and does not ordinarily rise to the level of fraud absent a duty to disclose.[4] *Ibid.*; *Universal Health Servs., Inc.* v. *United States*, 579 U.S. 176, 188 (2016).

As a result, this Court has held for well over a century that to establish fraudulent concealment, "mere silence is not enough." *Wood* v. *Carpenter*, 101 U.S. 135, 143 (1879). Instead, "[t]here must be some *trick* or *contrivance* intended to exclude suspicion and prevent inquiry." *Ibid.* (emphasis added); see generally *Husky Int'l Elecs., Inc.* v. *Ritz*, 578 U.S. 355, 360 (2016) ("'[F]raud' connotes deception or trickery."). And the Court has explained more recently that "[f]ederal courts have typically extended equitable relief [from limitations periods] only sparingly," such as where a "complainant has been *induced or tricked* by his adversary's misconduct into allowing the filing deadline to pass." *Irwin* v. *Dep't of Veterans Affs.*, 498 U.S. 89, 96 (1990) (emphasis added); see also *Taylor* v. *Freeland & Kronz*, 503 U.S. 638, 647 (1992) (Stevens, J., dissenting) (limitations period will not be strictly followed "where the ignorance of the fraud has been produced by *affirmative acts* of the guilty party in *concealing the facts*" (emphases added)).

The reason for that requirement is straightforward. As courts have long emphasized, some form of trickery is required because tolling should be available only in extraordinary circumstances where the plaintiff was actively prevented from learning of the cause of action. "[T]he statute of limitations is a statute of

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[4] Silence in the face of a duty to disclose is equivalent to a misrepresentation that there is nothing to disclose, and therefore can constitute a fraudulent misrepresentation. *Stewart*, 128 U.S. at 388. No such duty is alleged to be implicated here.

repose," and so "in order to * * * avoid the operation of the statute, something more than silence * * * must be shown." *State ex rel. Bell* v. *Yates*, 132 S.W. 672, 676 (Mo. 1910) (quoting *Stone* v. *Brown*, 18 N.E. 392, 394 (Ind. 1888)); *see Johnston* v. *Spokane & I.E.R. Co.*, 177 P. 810, 813 (Wash. 1919) ("[M]ere silence is not sufficient * * * to interfere with the running of the statute of limitations."). If all that exists is mere silence, the "[p]laintiff easily could have found out" about the violation "by making inquiry," so long as the defendant "did not deceive her or actively conceal from her the true situation"; in such a case, "the statute undoubtedly beg[ins] to run." *Beard* v. *Citizens' Bank of Memphis*, 37 S.W. 2d 678, 680 (Mo. Ct. App. 1931).

Thus, fraudulent concealment requires an affirmative, intentional act of deception or trickery—as the courts of appeals on the other side of the circuit conflict have held. See, *e.g.*, *Smith* v. *Am. President Lines, Ltd.*, 571 F.2d 102, 109 n.12 (2d Cir. 1978) (fraudulent concealment "ordinarily consist[s] of affirmative misrepresentations or active misconduct on the part of the defendant"); *Carrier Corp.*, 673 F.3d at 447; *Rutledge*, 576 F.2d at 250. Importantly, the courts have distinguished between fraudulent concealment and mere silence even though remaining silent about one's illegal conduct does make detecting that conduct more difficult. That reflects the recognition that attempting to avoid easy detection of illegal conduct by remaining silent does not equate to actively *deceiving* others, or misrepresenting the true facts, so as to prevent discovery of those facts. See *Stewart*, 128 U.S. at 388.

The decision below flies in the face of those principles. Failure to memorialize an agreement may be motivated by a desire to avoid detection, but it does not

amount to a deceptive misrepresentation or act of concealment. See *Stewart*, 128 U.S. at 388. Indeed, by choosing not to write down the agreement, the party simply chooses not to make any representation in the first place. For that reason, "a code of silence does not constitute fraudulent concealment." *Chandler* v. *Wackenhut Corp.*, 465 F. App'x 425, 428 (6th Cir. 2012). By contrast, acts that *do* effectuate a misrepresentation amount to a deceptive "trick or contrivance" and therefore can count as fraudulent concealment. *Wood*, 101 U.S. at 143. For example, falsifying documents that would otherwise contain content reflecting the existence of the conspiracy, or lying about the conspiracy, could constitute acts of fraudulent concealment. See *Conmar Corp.* v. *Mitsui & Co. (U.S.A.)*, 858 F.2d 499, 505 (9th Cir. 1988) (fraudulent concealment where defendant created "documents falsely reporting prices").

But the Fourth Circuit did not suggest that any such misrepresentation or contrivance is necessary—or that plaintiffs had made any such allegations. Instead, the court of appeals' analysis began and ended with plaintiffs' allegation of an "unwritten agreement." App.17a. In the court's view, the mere allegation that defendants "avoid[ed] creating evidence" of their alleged agreement was sufficient under the doctrine of fraudulent concealment (and Rule 9(b)'s particularity requirement). App.15a-16a. The court thus permitted plaintiffs to plead fraudulent concealment by alleging "mere silence." *Wood*, 101 U.S. at 143. The decision therefore directly contradicts this Court's long-established understanding of fraudulent concealment. See *ibid.*

III. This Case Presents An Important And Recurring Question.

A. The question presented is of overriding importance.

1. The decision below hands plaintiffs and plaintiffs' lawyers a powerful new means of resurrecting stale claims and forcing costly settlements by threatening defendants with decades-long damages periods. As the leading antitrust treatise has explained, "regarding every secret conspiracy as sufficient[] * * * to toll the statute would often force the courts to deal with stale, if not ancient, evidence." Areeda & Hovenkamp, Antitrust Law § 320e. This case provides a stark example: Scharpf was allegedly injured by the no-poach conspiracy between 2007 and 2013, allegedly discovered the conspiracy in 2023, brought suit in 2023 (10 years after she last allegedly suffered injury), and seeks damages for a class period dating back to 2000. And she has obtained that years-long extension of the limitations period merely by alleging that defendants did not write down their allegedly illegal agreement.

Given that low bar, complaints focused on long-past conduct will routinely survive a motion to dismiss on timeliness grounds. That is particularly so given that the other elements of fraudulent concealment are equally easy to allege under the Fourth Circuit's decision: plaintiffs may survive a motion to dismiss solely by alleging that the defendants maintained an unwritten agreement that was longstanding and involved an alleged per se Section 1 violation, and that they were not on notice. *See* p. *, *supra*. At that point, defendants will face enormous pressure to settle, as "the threat of discovery expense" occasioned by allegations spanning years or decades of conduct "will push cost-

conscious defendants to settle even anemic cases before reaching those proceedings." *Twombly*, 550 U.S. at 559.

That pressure to settle will be greatly exacerbated by the potentially staggering damages demands enabled by fraudulent-concealment allegations. The Sherman Act allows plaintiffs to seek treble damages, but ordinarily, those damages are cabined by the limitations period: a plaintiff may not "recover for the injury caused by old overt acts outside the limitations period." *Klehr*, 521 U.S. at 189. That reflects Congress's determination that even defendants found to have illegally conspired should not be liable for damages for long-past conduct. But pleading fraudulent concealment enables a plaintiff to vastly expand defendants' damages exposure by seeking damages for the *entire* period that the conspiracy was allegedly concealed. See, *e.g.*, *Greyhound Corp.* v. *Mt. Hood Stages, Inc.*, 437 U.S. 322, 329 (1978) (describing creation of "20-year damages period" for Sherman Act claims in part due to "fraudulent concealment"); *Morton's Mkt., Inc.* v. *Gustafson's Dairy, Inc.*, 198 F.3d 823, 832 (11th Cir. 1999) ("plaintiffs may recover damages for all the years during which the conspiracy was fraudulently concealed and the statute was tolled"); *In re Beef Indus. Antitrust Litig.*, 600 F.2d 1148, 1169 (5th Cir. 1979); *Thompson* v. *1-800 Contacts, Inc.*, 2018 WL 2271024, at *10 (D. Utah May 17, 2008).

Notably, that vastly increased damages exposure will be present in *every* case in which plaintiffs can plausibly allege fraudulent concealment—even those cases in which (unlike here) the plaintiffs' claims are timely, in the sense that they have suffered injury from an overt act within the four-year limitations period. *Thompson*, 2018 WL 2271024, at *10. The

Fourth Circuit's decision therefore allows plaintiffs across the board to seek treble damages for many years or even decades of alleged conduct (and potentially to obtain those damages by ultimately establishing a secret agreement). And, of course, that exposure is even further increased where, as is often the case, the plaintiff brings the action as a putative class action, rendering damages potentially available to the numerous members of a class that spans years or decades. The ability of plaintiffs to dramatically increase the damages they seek will create overwhelming pressure to settle and avoid the risk of a crushing verdict. See Joshua B. Gray & Michelle H. Seagull, *Class Action Reaction: Amended Rule 23 Enhances Judicial Supervision in Class Litigation*, 18-SPG Antitrust 91, 95 (2004) ("Once a class is certified, there is enormous pressure on defendants to settle, particularly in antitrust litigation where there is not only the risk of classwide damages, but also the likelihood that those damages will be trebled."). This case again proves the point: Plaintiffs seek treble damages going back to 2000 on behalf of a class of "thousands." Compl. ¶¶ 227, 231.

That greatly increased damages exposure—arising from nothing more than paper-thin allegations of an unwritten agreement—erodes much of the protection against settlement pressures that this Court established in *Twombly*. There, the Court tightened the pleading standards for allegations of conspiracy, recognizing that the leniency of the prior standard had enabled plaintiffs to use bare-bones allegations of conspiracy to withstand a motion to dismiss and then extract settlements from deep-pocketed defendants, regardless of the actual merits of their claims. 550 U.S. at 557. But even though plaintiffs must plausibly al-

lege a conspiracy after *Twombly*, the decision below allows them to significantly lengthen the damages period through easy-to-make allegations of fraudulent concealment that (under the decision below) will be plausible in every case. And the decision also allows plaintiffs to resurrect claims that (while perhaps plausibly alleged) should be long since time-barred. In those ways, the decision reinstates the very disproportionate settlement pressure about which the *Twombly* Court was concerned. Defendants will face severe pressure to settle cases seeking ruinous damages, regardless of whether plaintiffs will ultimately be able to prove fraudulent concealment or prove their stale substantive allegations.

2. Making matters worse, virtually all companies with a nationwide footprint are exposed to the severe consequences imposed by the Fourth Circuit's decision. The Clayton Act's relaxed venue and personal jurisdiction rules will enable plaintiffs to file their actions in the Fourth Circuit in a wide range of cases. The courts of appeals generally construe Section 12 of the Clayton Act, 15 U.S.C. 22, to permit venue and personal jurisdiction in every district in which the defendant "inhabits," is "found," or "transacts business." *KM Enters., Inc.* v. *Global Traffic Techs., Inc.*, 725 F.3d 718, 724-725 (7th Cir. 2013); see *id.* at 726-728 (discussing circuit split on whether Section 12 permits even broader venue). A defendant can be sued, for instance, in any district in which it sells or ships products, promotes its products, or maintains an office. See *Daniel* v. *Am. Bd. of Emergency Med.*, 428 F.3d 408, 430 (2d Cir. 2005).[5] Thus, any company that does

[5] The Fourth Circuit has not addressed how to interpret Section 12, but there is no reason to believe it would not follow the majority approach.

business nationwide can be sued in the Fourth Circuit—and there is every reason to believe that plaintiffs will quickly take advantage of the Fourth Circuit's highly plaintiff-favorable fraudulent concealment doctrine by filing suit there.

Unless this Court intervenes, therefore, a broad swath of U.S. companies could be subject to disproportionate settlement pressures arising from suits seeking treble damages spanning decades of conduct and thousands of class members. The resulting harm to defendants "is obvious." *Twombly*, 550 U.S. at 559. But the Fourth Circuit's decision will also harm the consumers that the Sherman Act was designed to protect, as the costs of settling such cases are often passed onto companies' customers. Cf. *Cent. Bank of Denv., N.A.* v. *First Interstate Bank of Denv., N.A.*, 511 U.S. 164, 189 (1994) (noting, in securities law context, that increased "litigation and settlement costs" that companies sustain may "in turn [be] incurred by the company's investors").

3. This Court has repeatedly policed pleading standards to forestall just those consequences. It should do the same here.

In *Twombly*, as noted, this Court held that plaintiffs must plausibly allege facts that support an inference of conspiracy, in part out of concern that a too-lax pleading standard would allow "a plaintiff with a largely groundless claim" to move forward in litigation, inflict significant discovery expenses on the defendants, and extract a settlement. 550 U.S. at 558 (citation modified). Similarly, this Court granted review in *Dura Pharms., Inc.* v. *Broudo* to ensure that the requirements for pleading and proving loss causation in securities actions were sufficiently rigorous to prevent undue pressure to settle suits that would turn

out to be unmeritorious. 544 U.S. 336, 347 (2005). The Court did so after the United States advised that the lenient pleading standard at issue would require companies "to expend time and resources litigating, and in most cases settling, such lawsuits," thereby "harm[ing] * * * the intended beneficiaries" of the statute. Brief for the United States as Amicus Curiae at 14, *Dura Pharms. Inc.* v. *Broudo*, No. 03-932 (U.S. filed May 28, 2004) (citation modified); accord 544 U.S. at 347.

The Court should similarly intervene to set guardrails around the standard for fraudulent concealment. All of the same concerns that have prompted this Court's intervention in the past are present here. By enabling plaintiffs to plausibly allege fraudulent concealment in virtually every case, thereby making tolling the rule rather than the exception, the Fourth Circuit's decision exposes defendants in potentially every case to vastly expanded damages demands and allegations concerning ancient conduct—regardless of whether plaintiffs will ultimately be able to prove fraudulent concealment.

B. The question presented is frequently recurring.

1. The question of what a plaintiff must allege to adequately plead fraudulent concealment in a Sherman Act case recurs often. As discussed above, the courts of appeals have repeatedly confronted questions concerning the elements of fraudulent concealment — and in particular, the ways in which the doctrine interacts with the inherently hidden nature of an unlawful conspiracy. See p. *, *supra*; Areeda § 320e. More generally, large numbers of antitrust actions are filed in federal court every year, and many of those cases will include allegations of fraudulent concealment,

which is "often a concern in antitrust litigation." Amber Davis-Tanner, *Antitrust Law—Affirmative Acts and Antitrust—The Need for a Consistent Tolling Standard in Cases of Fraudulent Concealment*, 33 U. Ark. Little Rock L. Rev. 331, 331 (2011); Donald W. Hawthorne, *Recent Trends in Federal Antitrust Class Actions*, 24 Antitrust 58, 58-59 (2010). As explained above, plaintiffs may now opt to bring many of these cases in the Fourth Circuit, where the decision below will govern, or in circuits that have not yet considered whether an unwritten agreement constitutes fraudulent concealment, where the decision below may serve as persuasive authority.

2. The standards governing fraudulent concealment also arise frequently in other federal statutory contexts—and the decision below will likely have significant implications in those contexts. The doctrine of fraudulent concealment "is read into every federal statute of limitation." *Holmberg* v. *Armbrecht*, 327 U.S. 392, 397 (1946); see *id.* at 396. The Fourth Circuit's decision thus has obvious implications for other federal statutory conspiracy claims, including Section 2 claims concerning conspiracies to monopolize and civil RICO claims. See, *e.g.*, *Aurora Astro Prods. LLC* v. *Celestron Acquisition, LLC*, 691 F. Supp. 3d 1132, 1146, 1150-1151 (N.D. Cal. 2023); *Montuoro* v. *Samson*, 1993 WL 171331, at *1 (4th Cir. May 21, 1993); *Kia America, Inc.* v. *DMO Auto Acquisitions, LLC*, 2025 WL 968786, at *7-8 (D.N.H. Mar. 31, 2025).

Beyond conspiracy claims, the decision below would permit similar allegations—such as secret meetings or secret communications—to suffice for fraudulent concealment of a variety of federal violations. See p. *, *supra*. Such allegations can and have

been made in cases arising under a wide variety of federal statutes, including the Commodity Exchange Act, see *Sullivan* v. *Barclays*, 2017 WL 685570, at *26 (S.D.N.Y. Feb. 21, 2017) (describing plaintiffs' allegation that "defendants pursued the Euribor scheme in secret"); the Truth in Lending Act, see *Marangos* v. *Swett*, 2008 WL 4508542, at *6 (D.N.J. Sep. 29, 2008) (describing plaintiff's allegation that defendant "withheld information"); and the Real Estate Settlement Procedures Act, see *Whitley* v. *Taylor Bean & Whitacker Mortg. Corp.*, 607 F. Supp. 2d 885, 900 (N.D. Ill. 2009) (describing plaintiffs' allegation that defendants "concealed 'secret transactions'").

In sum, courts are frequently confronted with questions whether and when secretive behavior or silence rise to the level of fraudulent concealment. This Court's review is urgently needed to establish that mere silence does not constitute fraudulent concealment, thus ensuring that plaintiffs cannot revive long-since-stale claims that Congress intended to be time-barred.

C. This case is an ideal vehicle.

This case squarely presents the question whether an unwritten agreement can serve as the basis for fraudulent concealment. The court of appeals' holding that this case is not time-barred rests solely on the court's conclusion that allegations of an unwritten agreement are sufficient; the court did not identify, much less rely on, any allegations of deceptive behavior or affirmative misrepresentations. And a ruling in petitioners' favor would entirely dispose of plaintiffs' claims, as the named plaintiff's most recent injuries date from 2013, and therefore are time-barred unless the limitations period is tolled by fraudulent concealment.

The interlocutory nature of the decision below presents no barrier to review. Although the Court sometimes hesitates to review interlocutory decisions, it has routinely reviewed interlocutory decisions like the one at issue here, including in *Twombly* and *Dura Pharmaceuticals*, where the court of appeals has reversed the dismissal of a complaint; the decision presents important questions concerning standards of pleading and proof; and the decision has immediate consequences for the petitioners in the form of significant settlement pressure. See, *e.g.*, *Dura Pharms.*, 544 U.S. at 340; *Twombly*, 550 U.S. at 553; *Cent. Bank of Denv.*, 511 U.S. at 168-169; R. Stern & E Gressman, *Supreme Court Practice* 4-55 to 4-57 (11th ed. 2019). The Court should do the same here.

CONCLUSION

For the foregoing reasons, the Court should grant the petition for a writ of certiorari.

Respectfully submitted,

MATTHEW S. HELLMAN
DOUGLAS E. LITVACK
ELIZABETH B. DEUTSCH
JENNER & BLOCK LLP
1099 New York Ave. NW
Suite 900
Washington, DC 20016
(202) 639-6000

DONALD B. VERRILLI, JR.
Counsel of Record
GINGER D. ANDERS
MUNGER, TOLLES & OLSON LLP
601 Massachusetts Ave. NW
Suite 500E
Washington, DC 20001-5369
(202) 220-1100
Donald.Verrilli@mto.com

Counsel for Petitioners

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ADAM BLOCK SCHWARTZ
TODD STENERSON
DAVID HIGBEE
DJORDJE PETKOSKI
JOSEPH PAUL SAMUELS
ALLEN OVERY SHEARMAN
STERLING US LLP
1101 New York Ave., NW
Washington, DC 20005
Tel: (202) 508-8000

SIMA NAMIRI-KALANTARI
CROWELL & MORING LLP
515 South Flower Street
40th Floor
Los Angeles, CA 90071
Tel: (213) 622-4750

CHAHIRA SOLH
CROWELL & MORING LLP
3 Park Plaza
20th Floor
Irvine, CA 92614
Tel: (949) 263-8400

BRIAN ANDREW HILL
BRIAN J. WHITTAKER
NIXON PEABODY LLP
799 9th Street NW
Suite 500
Washington, DC 20000
Tel: (202) 585-8000

ALLISON W. REIMANN
GODFREY & KAHN, S.C.
One East Main Street
Suite 500
Madison, WI 53703
Tel: (608) 257-3911

SEAN O'D. BOSACK
CHRISTIE B. CARRINO
GODFREY & KAHN, S.C.
833 East Michigan Street
Suite 1800
Milwaukee, WI 53202
Tel: (414) 273-3500

MICHAEL A. DOORNWEERD
GABRIEL K. GILLETT
JENNER & BLOCK LLP
353 North Clark Street
Chicago, IL 60654
Tel: (312) 923-2631

DAVID G. BARGER
GREENBERG TRAURIG, LLP
1750 Tysons Boulevard
Suite 1000
McLean, VA 22102
Tel: (703) 749-1307

ATTISON L. BARNES, III
KRYSTAL B. SWENDSBOE
SCOTT M. MCCALEB
JON W. BURD
WILEY REIN LLP
2050 M Street, NW
Washington, DC 20036
Tel: (202) 719-7000

BENJAMIN L. HATCH
CASEY ERIN LUCIER
MCGUIREWOODS LLP
888 16th Street, NW
Washington, DC 20006
Tel: (202) 857-1700

J. BRENT JUSTUS
NICHOLAS J. GILES
JOSHUA D. WADE
W. COLE GEDDY
MCGUIREWOODS LLP
Gateway Plaza
800 East Canal Street
Richmond, VA 23219
Tel: (804) 775-1018

CHRISTOPHER C. BREWER
RYAN P. PHAIR
MICHAEL F. MURRAY
CRAIG Y. LEE
PAUL HASTINGS LLP
2050 M Street NW
Washington, DC 20036
Tel: (202) 551-1700

PERRY LANGE
JENNIFER MILICI
JOHN W. O'TOOLE
WILMER CUTLER
PICKERING HALE AND
DORR LLP
2100 Pennsylvania
Avenue, NW
Washington, DC 20037
Tel: (202) 663-6000

WILLIAM DEVINNEY
WILLIAM DEVINNEY
PLLC
2221 Benedictine Court
Vienna, VA 22182
Tel: (703) 489-0587

MATTHEW J. MACLEAN
ALVIN DUNN
PILLSBURY WINTHROP SHAW
PITTMAN LLP
1200 Seventeenth Street, NW
Washington, DC 20036
Tel: (202) 663-8183

WILLIAM LAWLER
AMANDA C. DELAPERRIERE
BLANK ROME LLP
1825 Eye Street, NW
Washington, DC 20006
Tel: (202) 420-2249