No. 25-293

In the Supreme Court of the United States

GENERAL DYNAMICS CORPORATION, et al.,
Petitioners,

v.

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

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTION PRESENTED

The consensus among the courts of appeals is that an antitrust plaintiff can sufficiently allege fraudulent concealment by alleging affirmative acts of concealment by the defendant, so long as the plaintiff also satisfies the other requirements of the doctrine. Did the Fourth Circuit err in applying that factbound, consensus standard to the specific allegations in this case?

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INTRODUCTION

The basic problem with this petition is that its purported question presented is not, in fact, presented.

The petitioners frame the question as "[w]hether plaintiffs adequately plead that defendants engaged in fraudulent concealment [in antitrust cases] by alleging that defendants maintained an unwritten agreement," Pet. i, and assert that the Fourth Circuit adopted a categorical rule whereby "plaintiffs' *mere allegation* that the defendants' purported agreement is *unwritten* is *sufficient* to invoke the doctrine of fraudulent concealment and toll the limitations period," *id.* at 2 (first and third emphases added). The petition then launches an all-out attack on this purported rule, charging that it creates a circuit split, urgently requires review, and is inconsistent with (unwritten) congressional intent.

But the Fourth Circuit never adopted this rule. Instead, it applied a factbound, consensus standard under which: (a) affirmative acts to cover up an antitrust conspiracy can be sufficient to allege fraudulent concealment; and (b) a wide range of conduct can be evidence of an affirmative cover up, including efforts to conceal evidence and avoid a paper trail. That's the same rule applied by the circuits that the petitioners invoke.

Further, the court below expressly rejected the rule that the petitioners say it adopted. The court held that merely alleging an unwritten agreement is *insufficient* to adequately allege fraudulent concealment: "Even if a plaintiff adequately alleges" that there was "a non-ink-to-paper agreement, the plaintiff must still allege facts sufficient to infer that the defendants performed the acts *with the intent to* prevent or deceive others from discovering their scheme." Pet. App. 18a. This helps ensure "that the defendant did more than engage in mere

silence," but was instead actively working to cover up its illegal conduct. *Id.*

This is plain from the face of the opinion. The court explained that the petitioners had affirmatively acted to "*cover[] up* their … conspiracy by, among other things, carefully avoiding putting anything in writing," as well as stratagems like "using coded language" and secretly enforcing the conspiracy through "private phone calls between high-level executives and unofficial retribution." *Id.* at 5a, 18a. These numerous affirmative acts taken specifically to evade detection were more than mere silence. Even the dissent—on which the petitioners heavily rely—admitted that such coded language and covert phone calls could be affirmative acts of concealment. *Id.* at 31a n.5 (Diaz, C.J., dissenting).

The Fourth Circuit didn't hold that just any such allegations would be sufficient, either. Instead, plaintiffs must satisfy both the general plausibility requirement and Rule 9(b)'s particularity standard, which were met here in part because "[r]ather than pleading based on information and belief, the bulk of [the respondent's] allegations are quotes from interviews with industry insiders." *Id.* at 17a.

That's not all. To sufficiently allege fraudulent concealment, a plaintiff "must still" provide sufficient allegations that the defendant took these actions with the intent to conceal its unlawful conduct, "[o]therwise the plaintiff will have failed to show that the defendant *fraudulently* concealed facts." *Id.* at 18a. And the court repeatedly made clear that merely alleging an unwritten agreement is insufficient: "For allegations of unwritten agreements, it will sometimes be difficult to infer fraudulent intent." *Id.* at 19a. Then on top of that, before the statute is tolled, plaintiffs' claims will still "be

dismissed if they failed to exercise due diligence." *Id.* at 22a.

The Fourth Circuit applied these consensus requirements to a complaint with over 65 pages of detailed factual allegations, drew certain reasonable inferences in the respondent's favor, and concluded that she sufficiently alleged that the petitioners affirmatively acted to conceal their conspiracy to suppress the wages of naval engineers.

The petitioners don't challenge the federal circuits' consensus affirmative-acts standard for fraudulent concealment. Instead, their real challenge is aimed at the way that the court below applied this context-dependent standard to the specific factual allegations in this case. But this Court rarely grants petitions where the "asserted error" is "the misapplication of a properly stated rule of law" to the facts of a case. S. Ct. R. 10. That's especially true because this is a highly factbound question on which there has not yet been any chance for factual development. As a leading treatise (on which the petitioners rely) explains, "the line between active and passive concealment is very fine indeed." Areeda & Hovenkamp, Antitrust Law § 320e.

Because the petition's arguments about a circuit split, importance, and the merits all rest on a supposed rule that the court below never adopted—and because those arguments are wrong on their own terms in any event—the petition for a writ of certiorari should be denied.

STATEMENT

A. Legal Background

In interpreting statutes of limitations, this Court has long held that it could not "believe that Congress intended to give immunity to those who for the period named in the

statute might be able to conceal their fraudulent action from the knowledge of the [victim]." *Exploration Co. v. United States*, 247 U.S. 435, 449 (1918).[1] As a result, "the fraudulent concealment tolling doctrine is to be read into every federal statute of limitations, including that in the Sherman Act." Pet. App. 8a. This prevents defendants from "concealing a fraud … until such time as the party committing the fraud could plead the statute of limitations to protect it." *Bailey v. Glover*, 88 U.S. 342, 349 (1874).

In the antitrust context, there is a consensus among the courts of appeals that "affirmative acts" of concealment can warrant tolling the statute of limitations. Pet. App. 9a & n.4. Under this standard, "a plaintiff must prove that the defendants affirmatively acted to conceal their antitrust violations." *Id.* at 9a. These acts need not be separate from any underlying conspiracy, however, and "the plaintiff's proof may include acts of concealment involved in the antitrust violation itself." *Id.* Some courts offer an additional path to tolling, under which a plaintiff could also "merely … prove that a self-concealing antitrust violation has occurred." *Id.*[2]

To satisfy the fraudulent concealment standard, the Fourth Circuit and other courts require three elements: "(1) the party pleading the statute of limitations fraudulently concealed facts that are the basis of the plaintiff's claim, and (2) the plaintiff failed to discover

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[1] Unless otherwise noted, all internal quotation marks, citations, alterations, brackets, and ellipses have been omitted from quotations throughout this brief.

[2] No court of appeals has adopted a third standard sometimes discussed, in which defendants must have "engaged in fraudulent concealment separate and apart from the antitrust conspiracy." Pet. App. 8a–9a. Nor have the petitioners ever advocated for such a standard. Pet. App. 48a n.9.

those facts within the statutory period, despite (3) the exercise of due diligence." Pet. App. 7a. Under the Fourth Circuit's test, satisfying the first element requires that a plaintiff allege that the affirmative acts were intended to *conceal*. *Id.* at 18a.

Under this doctrine, "courts often toll the limitation period in the case of secret conspiracies." Areeda § 320e. Courts conduct a highly factbound inquiry, in which "the line between active and passive concealment is very fine indeed." *Id.* Even in the circuits on which the petitioners rely, courts have explained that "it is generally inappropriate to resolve the fact-intensive allegations of fraudulent concealment at the motion to dismiss stage, particularly when the proof relating to the extent of the fraudulent concealment is alleged to be largely in the hands of the alleged conspirators." *In re Cathode Ray Tube (CRT) Antitrust Litig.*, 738 F. Supp. 2d 1011, 1024 (N.D. Cal. 2010). And the additional elements, such as due diligence, are also highly "fact-based questions." *Klehr v. A.O. Smith Corp.*, 521 U.S. 179, 196 (1997).

B. Factual background

For decades, the nation's largest shipbuilders secretly conspired to suppress the wages of naval engineers by agreeing not to poach one another's employees. Pet. App. 3a. This allowed them to reap the profits of government contracts without paying a competitive wage to the employees necessary for this work.

1. The shipbuilding industry is highly consolidated. The largest shipbuilders "own the five major private U.S. shipyards that build warships." Pet. App. 2a–3a. The vast majority of all naval engineers work for these

shipbuilders or naval-engineering consultancies, often working as contractors for the federal government. *Id.*[3]

For the last decades, high "barriers to entry" have created "an industry-wide shortage of naval engineers." J.A. 68, 86. Only a "small handful of colleges and universities in the United States … offer accredited training in naval engineering." J.A. 72. And "naval engineers generally must hold a security clearance because of the sensitive nature of their work," such that "naval engineers must also generally be U.S. citizens." J.A. 69. That contrasts with other industries, which "fill engineering talent needs by recruiting globally." *Id.*

In a functioning market, this shortage would result in "a high degree of labor mobility in which [the petitioners] would have competed aggressively to lure away each other's employees by offering better salaries and benefits." Pet. App. 3a. "In other industries, similarly specialized requirements generate cottage industries of recruiters whose full-time job is to convince skilled workers to leave their employers to accept substantially higher salaries with competitors." J.A. 43. Naval engineers, however, "generally spend their entire careers without being solicited by a rival firm." Pet. App. 3a. And petitioners "maintained relatively uniform compensation structures" with salaries "far below what would be available in a competitive market." *Id.*

The petitioners were able to achieve this result by textbook anti-competitive behavior. As the dominant players in this industry, they had a longstanding "'gentlemen's agreement' not to poach naval engineers from other conspirators." J.A. 42. This "no-poach

[3] The petitioners are major shipbuilders and naval-engineering consultancies. Pet. ii.

conspiracy" "prohibits any [conspirator] from actively recruiting naval engineers from other [conspirators], in spite of the obvious incentives for companies in need of scarce naval engineering talent to do so." J.A. 74.

Any exceptions to this agreement were "tightly controlled." J.A. 77. "The primary exception was that Defendants could hire employees who applied for a position on their own." *Id.* And "the no-poach agreement was still enforced even in those situations" to ensure this remained an exception, not the rule. Pet. App. 4a; J.A. 75.

This conspiracy was effective because of the highly consolidated and tight-knit nature of the industry. The co-conspirators "together control approximately 75 percent of the relevant market." J.A. 106. Naval engineers had few other places to go, and "would not be able, and were not able, to defeat such artificial compensation suppression by switching their employment to non-conspiring employers." J.A. 107. In addition, because naval engineering requires extensive specialization, the petitioners could suppress wages "without causing too many such workers to switch employment to occupations in other industries or other countries." *Id.*

2. The petitioners were able to maintain this conspiracy by concealing it. They did so in part "by carefully avoiding putting anything in writing." J.A. 96. This was "an unwritten 'gentlemen's agreement' among themselves and their executives," J.A. 45–46, and it was "passed on only as verbal instructions from executives to managers." J.A. 76. Witness after witness attested to this. *See, e.g.*, J.A. 46 ("They don't put that in writing."); J.A. 78 (this was a "non-ink-to-paper" agreement).

The petitioners would also "often use coded language" to refer to the no-poach agreement. J.A. 46; *see*

also J.A. 75. And to ensure secrecy while enforcing compliance, the conspiracy was "enforced when necessary by phone calls among high-level employees." J.A. 76; *see also* J.A. 77, 101.

The petitioners engaged in further misdirection by including provisions in contracts called "teaming agreements" that made it appear that poaching was only prohibited when companies were "working on the same project." J.A. 46. "The no-poach provisions in these teaming agreements were much more limited than the deliberately concealed 'gentlemen's agreement' that forbade active recruitment among all [the petitioners]" all of the time. *Id.* The teaming agreements thus served to "create[] the false impression that workers could be solicited and recruited by rivals who were not working on their projects." *Id.* As a result, "employees were led to mistakenly believe that the teaming agreements were the only recruiting restrictions in place." J.A. 85–86. And the petitioners also issued numerous public statements that they complied with antitrust laws and offered competitive wages. J.A. 96–101.

Through these means, the conspiracy was effectively concealed undetected for decades.

C. Procedural history

1. The named plaintiff, Susan Scharpf, is a former naval engineer. She only learned of the conspiracy after her period of employment, following an "investigation [that] uncovered direct evidence of the conspiracy, gathered from eyewitness industry participants." J.A. 75. She then brought antitrust claims under the Sherman Act. 15 U.S.C. § 1. The complaint included detailed allegations of the steps the petitioners had taken to fraudulently conceal the conspiracy. J.A. 95–103. The

district court, however, dismissed the claims as untimely under the 4-year statute of limitations. 15 U.S.C. § 15b.

2. The Fourth Circuit reversed, holding that under the affirmative-acts standard, the respondent had sufficiently alleged fraudulent concealment.

As to the first element—whether a defendant "fraudulently concealed facts that are the basis of the plaintiff's claim," Pet. App. 7a—the court explained that, under its caselaw and that of other courts, actions like "'secret agreements and covert price-setting sessions' could count as proof of fraudulent concealment," depending on the circumstances. Pet. App. 10a (quoting *Texas v. Allan Constr. Co.*, 851 F.2d 1526, 1531–32 (5th Cir. 1988)). The court rejected the petitioners' proposed "blanket rule" that "a secret agreement … is not an affirmative act of concealment." Pet. App. 11a. Drawing on decades of circuit precedent, the court held that there was "no valid reason" to draw a bright-line rule "between those conspiracies in which the conspirators document their antitrust violations and subsequently shred those documents, from those in which the conspirators are careful not to write down evidence of their antitrust violations in the first place." *Id.* at 12a (quoting *Supermarket of Marlinton, Inc. v. Meadow Gold Dairies, Inc.*, 71 F.3d 119, 125 (4th Cir. 1995)).

Instead, "an agreement that is kept non-ink-to-paper to avoid detection *can* qualify as an affirmative act of concealment," depending on the context and plausibility of the allegations. *Id.* at 7a (emphasis added). Here, the respondent extensively alleged that the petitioners had "creat[ed] an illicit no-poach agreement that they deliberately kept non-ink-to-paper." *Id.* 16a. And the court explained that the petitioners' actions in this case were more than mere silence: "Instead, [the petitioners]

allegedly *covered up* their no-poach conspiracy by, among other things, carefully avoiding putting anything in writing" as well as "using coded language to refer to it." *Id.* at 18a. Sustained (and successful) acts to execute this kind of cover-up could constitute affirmative acts of concealment. The "plausibility" of these allegations was "strengthen[ed]" by the fact that "the bulk of [the] allegations are quotes from interviews with industry insiders." *Id.* at 17a.

This was not enough for fraudulent concealment, however. "Even if a plaintiff adequately alleges affirmative acts, such as a non-ink-to-paper agreement, the plaintiff must still allege facts sufficient to infer that the defendants performed the acts *with the intent to* prevent or deceive others from discovering their scheme." *Id.* at 18a. This is necessary "to show that the defendant *fraudulently* concealed facts that are the basis of the plaintiff's claim, and that the defendant did more than engage in 'mere silence.'" *Id.* (quoting *Wood v. Carpenter*, 101 U.S. 135, 143 (1879)).

Because "[c]ourts usually must infer intent from circumstantial evidence," this too is a factbound inquiry, and the court detailed a set of relevant considerations that were "not an exhaustive list." *Id.* at 18a–19a. In doing so, it made clear that not all allegations of unwritten agreements will qualify: "For allegations of unwritten agreements, it will sometimes be difficult to infer fraudulent intent: perhaps the agreement was so vague that there was no reason to commit it to paper, or maybe it was just simpler for the defendants to communicate orally." *Id.*

Here, several pieces of circumstantial evidence supported an inference of fraudulent intent. When "an unwritten agreement allegedly ha[s] well-defined rules,

was in effect for an extended period, or had many participants, it would be easier to infer fraudulent intent." *Id.* That was true in this case, as "it is hard to imagine that a decades-old multilateral agreement … would remain unwritten merely for the sake of convenience." *Id.* at 20a. This was particularly true given that the rule had specific exceptions. *Id.*

The court also looked to the fact that conspirators "would often use coded language" as further evidence of intent. *Id.* And it noted that other courts outside the Fourth Circuit had found similar allegations to be affirmative acts of fraudulent concealment. *Id.* at 21a (citing *In re Animation Workers Antitrust Litig.*, 123 F. Supp. 3d 1175, 1201 (N.D. Cal. 2015)).

Further, it concluded that the "obvious illegality" of the "no-poach agreement also weighs in favor of finding that [the petitioners'] affirmative acts were intended to conceal or deceive." *Id.* at 21a. If a defendant was operating in a legal grey area, the court explained, "it is more difficult to infer that an affirmative act was intended to avoid detection, as defendants may have not even realized that their actions were illegal." *Id.* at 19a–20a (compiling cases). In contrast, when the alleged antitrust violations are obviously illegal, as here, then "a court should more readily infer that an affirmative act was intended to avoid detection." *Id.* at 20a.

As to the third element, diligence, the court explained that "[e]ven though Plaintiffs alleged an affirmative act of concealment with particularity and with the requisite intent, their claim must be dismissed if they failed to exercise due diligence in uncovering the alleged conspiracy." Pet. App. 22a. The petitioners claimed that the specific allegations in the complaint were sufficient to show that the respondent was on inquiry notice, but the

court held that this question presented "issue[s] of fact" that were "not amenable to resolution on the pleadings" and required further factual development. *Id.* at 23a–24a.

The dissent (like the petitioners) did not disagree with the affirmative-acts standard. Instead, it argued that the majority had applied that standard too leniently. Nevertheless, the dissent acknowledged that the allegations around "coded language" and "enforce[ment] through private phone calls between high level executives" were "more like 'affirmative acts' of concealment." Pet. App. 31a n.5 (Diaz, C.J., dissenting). The dissent only faulted those allegations for being "inadequate under the particularity requirements of Rule 9(b)." *Id.*

The petitioners sought en banc review, but no judge on the court of appeals voted in favor of rehearing the case. Pet. App. 57a. The petitioners then filed a petition for certiorari in this Court.

REASONS FOR DENYING THE PETITION

This petition can be denied for the simple reason that it does not present the question presented. The Fourth Circuit never adopted a categorical rule that the mere allegation of an unwritten agreement is sufficient, on its own, for fraudulent concealment. Nor would this case present such a question, as the complaint went well beyond allegations that the no-poach agreement was unwritten.

That sinks the petition. The petitioners' supposed split rests on a rule that the Fourth Circuit didn't adopt. Instead, the Fourth Circuit applied the same factbound, context-dependent rule as the other courts of appeals that the petitioners invoke. The petitioners' claims of urgency and importance rest on the same purported rule that the

Fourth Circuit didn't adopt. And their attacks on the merits of decision below are more of the same.

I. This petition doesn't present the question presented.

A. According to the petitioners, the "question presented" is: "Whether plaintiffs adequately plead that defendants engaged in fraudulent concealment … by alleging that defendants maintained an unwritten agreement." Pet. i. This is repeated throughout the petition and forms the entire basis for the petitioners' claims of certworthiness: "This Court's review is urgently needed to establish that *mere silence* does not constitute fraudulent concealment." *Id.* at 33 (emphasis added); *see, e.g.*, *id.* at 2 (court below "h[eld] 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" (first emphasis added)); *id.* at 11 (Fourth Circuit held that "*the mere fact* of an unwritten agreement suffices to establish fraudulent concealment" (emphasis added)).

B. But the Fourth Circuit held no such thing. The court only held that "an agreement that is kept non-ink-to-paper to avoid detection *can* qualify as an affirmative act of concealment," depending on the context and allegations. Pet. App. 7a (emphasis added). But to adequately allege *fraudulent* concealment, "*[e]ven if* a plaintiff adequately alleges" that there is "a non-ink-to-paper agreement, the plaintiff *must still* allege facts sufficient to infer that the defendants performed the acts *with the intent to* prevent or deceive others from discovering their scheme." Pet. App. 18a (first and second emphases added). In the Fourth Circuit's own words, this is necessary because a plaintiff must allege "that the defendant did more than engage in 'mere silence.'" *Id.*

(quoting *Wood*, 101 U.S. at 143). The court then applied this standard and held that, drawing certain reasonable inferences in the respondent's favor, the specific allegations here were sufficient at this early stage of the litigation.

To begin, in determining that the respondent sufficiently alleged affirmative acts of concealment, the Fourth Circuit did not rely on silence alone. It explained that the petitioners had actively "*covered up* their no-poach conspiracy by, among other things, carefully avoiding putting anything in writing *and* using coded language to refer to it." Pet. App. 18a (second emphasis added). The petitioners also "avoided detection by transmitting the agreement orally from executives to managers and by referring to it obliquely." *Id.* at 17a. And to further conceal the conspiracy, the agreement was enforced "through private phone calls between high-level executives and unofficial retribution." *Id.* at 5a.

This kind of long-running, elaborate cover-up is much more than "the mere fact of an unwritten agreement." Pet. 11. As noted above, even the dissent acknowledged that "coded language" and enforcing the agreement "through private phone calls between high-level executives" were "more like affirmative acts of concealment." Pet. App. 31a n.5 (Diaz, C.J., dissenting). It just faulted those specific allegations for a lack of "particularity" under Rule 9(b). *Id.* But whether those specific allegations were made with sufficient particularity in this specific case is, of course, the exact kind of question that does not warrant certiorari.[4]

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[4] The Fourth Circuit drew on its preexisting caselaw under which a "relaxed (but not eliminated) Rule 9(b) particularity standard"

Moreover, rather than holding that any allegation of an unwritten agreement suffices, the court concluded that the specific allegations here were sufficiently plausible because "[r]ather than pleading based on information and belief, the bulk of [the] allegations are quotes from interviews with industry insiders." *Id.* at 17a. Indeed, the secret agreement was attested to by "multiple industry insiders," with each of the engineering firms implicated by statements from at least one witness. Pet. App. 4a; *see* J.A. 78–79.

It is true that the court drew on decades-old circuit precedent that rejected a categorical difference "between those conspiracies in which the conspirators document their antitrust violations and subsequently shred those documents, from those in which the conspirators are careful not to write down evidence of their antitrust violations in the first place." Pet. App. 12a (quoting *Marlinton*, 71 F.3d at 125). But in doing so, it simply did not adopt the contrary rule that the mere allegation of an unwritten agreement is sufficient.

This is further confirmed by the court's analysis of intent, which a plaintiff "must still allege" to satisfy the first element, as "[o]therwise the plaintiff will have failed to show that the defendant *fraudulently* concealed facts that are the basis of the plaintiff's claim." Pet. App. 18a. This ensures that defendants were actively engaged in efforts to cover up their unlawful conduct, rather than merely silent. *Id.* In this analysis, the court again looked to the full mix of facts and "circumstantial evidence." *Id.*

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applies to "cases involving alleged fraud by omission or concealment" because "the necessary facts … will often be in the sole possession of the defendant." Pet. App. 6a–7a. The petitioners have not disputed that caselaw.

And the court again made clear that alleging an unwritten agreement alone is not necessarily enough: "For allegations of unwritten agreements, it will sometimes be difficult to infer fraudulent intent." *Id.* at 19a. Instead, courts must look to a range of factors that are "not … exhaustive," including the length, breadth, and complexity of the conspiracy, as well as the nature of the wrongdoing and whether its illegality was evident. *Id.* at 19a–20a.

Finally, the same goes for the third element, due diligence: "*Even though* Plaintiffs alleged an affirmative act of concealment with particularity and with the requisite intent, their claim must be dismissed if they failed to exercise due diligence in uncovering the alleged conspiracy." Pet. App. 22a (emphasis added). "Due diligence" is a "fact-based question," as this Court has acknowledged. *Klehr*, 521 U.S. at 196. Here again, the court reviewed the mix of evidence and concluded that there were "issue[s] of fact" that were "not amenable to resolution on the pleadings" and required further factual development. Pet. App. 23a–24a.

C. In sum, from top to bottom, the Fourth Circuit's opinion is clear that it was not adopting a categorical rule that "plaintiffs adequately plead that defendants engaged in fraudulent concealment … by alleging that defendants maintained an unwritten agreement." Pet. i. That is true no matter how many times the petition repeats claims like "[t]he 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." *Id.* at 33 (emphasis added).

At times, the petitioners seem to more forthrightly acknowledge that the Fourth Circuit required more than just an unwritten agreement to toll the limitations period.

Pet. 20. But they then hurry to assert that "[i]t is no answer to point to the other elements of fraudulent conspiracy"—such as "intent to conceal" and "due diligence"—because the Fourth Circuit's application of those elements in "the decision below makes clear that they pose no meaningful hurdle at the pleading stage." *Id.*

This is puzzling for several reasons. As an initial matter, intent to conceal isn't a separate element. It's required for the first element of *fraudulent* concealment, Pet. App. 18a, as the petitioners elsewhere recognize, Pet. 5. But if the petitioners aren't actually challenging the Fourth Circuit's conclusion that the respondent sufficiently alleged fraudulent intent, then the petition would only be seeking review of the application of one sub-part of one of three necessary elements of a highly factbound standard. This would dramatically undercut any claims of importance and urgency, as the other aspects of the test would triage for precisely the kinds of issues that the petitioners invoke.

This would also scuttle the petitioners' argument that the Fourth Circuit failed to properly require more than "mere silence," Pet. 11, as the Fourth Circuit required fraudulent intent to ensure the allegations were more than just "mere silence," Pet. App. 18a. So if the petitioners aren't challenging the court below's application of that requirement, this argument evaporates.

More fundamentally, if the petitioners aren't challenging the Fourth Circuit's analysis of intent, their question presented is even more plainly not presented here. The court below could not have been clearer that merely "alleging that defendants maintained an unwritten agreement" without sufficiently alleging fraudulent intent does *not* "adequately plead that

defendants engaged in fraudulent concealment." Pet. i; *see* Pet. App. 18a. As a result, answering that question would have no bearing on the outcome below.

D. The petitioners, understandably, disagree with the conclusion that the Fourth Circuit reached when it applied the affirmative-acts standard to the case-specific allegations here. But that is not the stuff of certiorari. *See* S. Ct. R. 10.

Just last term, this Court dismissed as improvidently granted a petition claiming that a lower court had applied an overly lenient standard for pleadings that created a circuit split and exposed defendants to "extortionate settlements" and "fishing expeditions" in discovery. *NVIDIA Corp. v. E. Ohman J:Or Fonder AB*, No. 23-970, Pet. 32. As here, the petitioners called for a categorical rule "as a matter of law" about the kinds of evidence that could be sufficient. *Id.* at 4. On closer inspection, after briefing on the merits and oral argument, the Court recognized that the case was simply a dressed up request to review the application of general pleading standards to case-specific allegations. *NVIDIA Corp. v. E. Ohman J:Or Fonder AB*, 604 U.S. 20, 20 (2024). This case comes to the Court on the same path, replete with warnings that the Fourth Circuit's application of the affirmative-acts standards to the allegations here leaves defendants exposed to "costly settlements" and "discovery expense[s]," and a request to adopt a categorical rule that certain kinds of evidence are insufficient as a matter of law. Pet. 26. But as in *NVIDIA*, the petitioners' complaints are little more than requests for splitless error-correction and are no more worthy of review.

II. The circuits are not split.

The Fourth Circuit's actual ruling—alleging that a defendant intentionally covered up a conspiracy can in

certain circumstances be sufficient for fraudulent concealment—does not create any circuit split. All the circuits the petitioners invoke have held the same. None have adopted the petitioners' categorical rule where preventing the creation of a paper trail, conspiring to keep agreements secret, and covert communications are all equivalent as a matter of law to "mere silence," and thus can never rise to the level of fraudulent concealment no matter the context.

A. *Fifth Circuit.* The Fifth Circuit has "held that evidence of efforts aimed at keeping … price-fixing activities secret … could count as proof of fraudulent concealment." *Allan*, 851 F.2d at 1531–32. This could be satisfied through "evidence of secret agreements and covert price-setting sessions." *Id.* (quoting *Greenhaw v. Lubbock Cnty. Beverage Ass'n*, 721 F.2d 1019, 1030 (5th Cir. 1983), *abrogated on other grounds by Int'l Woodworkers of Am., AFL-CIO & its Loc. No. 5-376 v. Champion Int'l Corp.*, 790 F.2d 1174 (5th Cir. 1986)). This was entirely consistent with the rule that "[c]oncealment by defendant only by silence is not enough" and that there must be "some trick or contrivance tending to exclude suspicion and prevent inquiry." *Id.* at 1529.

The Fifth Circuit rejected the same kind of argument presented by the petitioners here that this standard was too low "because almost every price-fixing conspiracy involves some efforts aimed at secrecy." *Id.* at 1532. "[N]o other approach is better principled or more workable," as "the equitable doctrine of fraudulent concealment recognizes that th[e] benefit" of a statute of limitations "should not be available to a wrongdoer who takes undue advantage of the statute by *attempting to conceal* his conduct." *Id.* (emphasis added).

Courts within the Fifth Circuit have applied this standard. "Despite the need to prove affirmative acts … such proof is no tall order in most price fixing cases." *In re Catfish Antitrust Litig.*, 826 F. Supp. 1019, 1030–31 (N.D. Miss. 1993). Instead, "[p]roof of fraudulent concealment is found with any evidence of efforts designed to keep price fixing activities secret." *Id.* (citing *Allan*, 851 F.2d at 1532; *Greenhaw*, 721 F.2d at 1030); *see also In re Lease Oil Antitrust Litig. No. II*, 1998 WL 690947, at *7–8 (S.D. Tex. 1998) (same). This could include "a pattern of conduct by defendants which included face-to-face meetings and telephone calls—all conducted under the cloak of secrecy." *In re Catfish Antitrust Litig.*, 826 F. Supp. at 1030–31. And even when courts held that fraudulent concealment was insufficiently alleged, this reflected the absence of "specific allegations [that the defendants] attempted to keep their agreements secret, or even intended their agreements to be secret." *In re Pool Prods. Distrib. Mkt. Antitrust Litig.*, 940 F. Supp. 2d 367, 400–02 (E.D. La. 2013).

The petitioners ignore *Allan* and instead rely entirely on an unpublished decision, *Rx.com v. Medco Health Sols., Inc.*, 322 F. App'x 394, 397 (5th Cir. 2009). But *Rx.com* expressly applied *Allan*, holding only that "the secret communications" and public communications by the defendants in that case were equivalent only to "silence" and "denial of wrongdoing." *Id.* Whether or not that unpublished decision was correct as to those facts, it doesn't displace the standard under Fifth Circuit precedent. And understandably, in the wake of *Rx.com*, courts in the circuit have continued to affirm the validity of prior cases holding that "face-to-face meetings and telephone calls-all conducted under the cloak of secrecy" or "covert price-setting sessions and secret agreements"

could be sufficient. *In re Pool Prods.*, 940 F. Supp. 2d at 401. And even if there were any lack of clarity in the Fifth Circuit after *Rx.com*, that would simply be an argument for further percolation.

B. *Sixth Circuit.* Like the Fourth and Fifth Circuits, the Sixth Circuit has also adopted the "affirmative acts" standard and held that "[m]ere silence" is insufficient. *Carrier Corp. v. Outokumpu Oyj*, 673 F.3d 430, 446–47 (6th Cir. 2012). The Sixth Circuit's application of that standard to specific factual scenarios also aligns with the Fourth Circuit's. In *Carrier Corp.*, the court denied a motion to dismiss where the plaintiffs had alleged that the defendants "cover[ed]-up" their conspiracy by "establish[ing] security rules *to prevent a paper trail* and used a coding-system to hide the identity of the [participants]." 673 F.3d at 447 (emphasis added). Those constituted "active steps to hide evidence," and "hiding evidence" can constitute fraudulent concealment. *Id.*

That's consistent with the Fourth Circuit's conclusion that the respondent sufficiently alleged that the petitioners "*covered up* their no-poach conspiracy" by preventing a paper trail through "carefully avoiding putting anything in writing" and hid the conspiracy through stratagems like often "using coded language." Pet. App. 18a. While the petitioners point out that *Carrier Corp.* rejected allegations of "covert meetings" as insufficient, Pet. 12–13, it did so in large part on the case-specific basis that the allegations about these meetings "lack[ed] the requisite particularity," *Carrier Corp.*, 673 F.3d at 447. Such unspecific allegations of "simply meeting in secret" were not sufficient to rise to the level of "taking active steps to hide evidence." *Id.* And any difference between decisions as to the levels of

evidence that are sufficient is a factbound question about whether specific allegations suffice to meet the standard.[5]

C. *Ninth Circuit.* The Ninth Circuit has also adopted the affirmative acts standard. And in applying that standard to the facts of particular cases, courts in the circuit have found that a variety of affirmative acts to keep an antitrust conspiracy secret—including using coded language, hiding evidence, and preventing the creation of a paper trail—can rise to the level of fraudulent concealment depending on the circumstances.

For example, a conspirator's covert use of "plain white envelopes" to send secret information to competitors was evidence of fraudulent concealment. *E.W. French & Sons, Inc. v. Gen. Portland Inc.*, 885 F.2d 1392, 1399–400 (9th Cir. 1989). Similarly, it was sufficient to allege that conspirators kept no minutes at meetings, agreed to keep the scheme secret by communicating verbally, and that participants were instructed to delete emails after reading. *In re Capacitors Antitrust Litig.*, 106 F. Supp. 3d 1051, 1065 (N.D. Cal. 2015).

Other decisions are of a piece. *See, e.g.*, *In re Rubber Chems. Antitrust Litig.*, 504 F. Supp. 2d 777, 788 (N.D. Cal. 2007) (relying on allegations of "numerous affirmative acts of concealment in furtherance of the conspiracy … including secret meetings to set prices" and "agreement not to publicly discuss the nature of the scheme"); *In re Animation Workers*, 123 F. Supp. 3d at 1201 ("These factual allegations raise the reasonable inference that Defendants took affirmative steps to

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[5] Elsewhere in the petition, the petitioners cite an unpublished Sixth Circuit decision applying Michigan law, which accordingly could not create any circuit split. *See Chandler v. Wackenhut Corp.*, 465 F. App'x 425, 427 (6th Cir. 2012).

conceal the details of their conspiracy by intentionally choosing to meet in-person or over the telephone, rather than risk memorializing details about the alleged conspiracy."); *In re Coordinated Pretrial Proc. in Petroleum Prods. Antitrust Litig.*, 782 F. Supp. 487, 489–90 (C.D. Cal. 1991) (reasonable juror could find "an affirmative act" based on efforts by executives "surreptitiously to contact each other" in a way that would ensure that "no telephone company record of the call would be made"); *In re Cathode Ray Tube*, 738 F. Supp. 2d at 1024 (allegations that "[d]efendants took steps to keep their meetings secret, such as varying meeting locations, limiting meeting attendees, avoiding note-taking, and agreeing to maintain the secrecy of meeting" were evidence of fraudulent concealment).[6]

The petitioners cite cases for the general proposition that a plaintiff must "plead[] and prove[] that the defendant actively misled her." Pet. 14 (quoting *Thorman* v. *Am. Seafoods Co.*, 421 F.3d 1090, 1095 (9th Cir. 2005)). But as the Ninth Circuit has explained, this can be shown if a defendant "fraudulently *concealed* the existence of a cause of action" by "us[ing] fraudulent means to keep the plaintiff unaware of his cause of action." *Hexcel Corp. v. Ineos Polymers, Inc.*, 681 F.3d 1055, 1060 (9th Cir. 2012) (emphasis added). As the cases above illustrate, courts in

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[6] Some courts have, in particular cases, included other facts in the mix alongside these affirmative acts of concealment, such as statements by defendants that they are in "compliance with applicable antitrust laws" and are paying competitive wages. *In re Animation Workers*, 123 F. Supp. 3d at 1200. But the particular admixture of allegations in any given case that met the standard will inevitably be a factbound, case-specific question. And this would in any event make little difference here, where the complaint includes detailed allegations of just such statements. J.A. 96–101.

the Ninth Circuit have held that this includes hiding evidence or preventing the creation of a paper trail. "Taking steps to ensure that a conspiracy remains secret is qualitatively different from failing to disclose a secret conspiracy." *In re Animation Workers*, 123 F. Supp. 3d at 1202; *see also In re Petroleum Prods.*, 782 F. Supp. at 491 (any "suggestion that the failure to make written records is not an affirmative act is nothing more than semantic quibbling"). So while courts may reach different results on different facts and at different stages of the litigation, there is simply no categorical rule of the kind that the petitioners request.

On top of this—and contrary to the petitioners' insistence that catastrophe will ensue if fraudulent concealment is not resolved at the motion to dismiss stage, Pet. 26—in the Ninth Circuit "[o]rdinarily, a defendant has an extremely difficult burden to show that fraudulent concealment allegations are barred as a matter of law." *In re Petroleum Prods.*, 782 F. Supp. at 489 (quoting *Volk v. D.A. Davidson & Co.*, 816 F.2d 1406, 1417 (9th Cir. 1987)). That's especially true before discovery, as evidence will often be "largely in the hands of the alleged conspirators." *In re Cathode Ray Tube*, 738 F. Supp. 2d at 1024.

In sum, the rule across these circuits is consistent: Concealing a conspiracy by preventing a paper trial, hiding evidence, or using coded language can, depending on the circumstances, meet the standard for fraudulent concealment.[7] But perhaps the most telling indication that

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[7] The petitioners, in a footnote, assert in passing that the Third Circuit's articulation of the fraudulent-concealment standard in a non-antitrust case "strongly suggests that merely maintaining an

the petitioners seek splitless error correction is their petition itself: It spends four pages on an asserted split, Pet. 12–15, before launching into nearly twenty pages on merits and importance, *id.* at 15–34.

III. This case is a bad vehicle.

Even if the Fourth Circuit had applied the petitioners' imagined rule, this case would still be a bad vehicle for addressing that standard. That's because the allegations in this case don't present the question whether "mere allegation that the defendants' purported agreement is *unwritten* is sufficient to invoke the doctrine of fraudulent concealment and toll the limitations period." Pet. 2.

To begin, there are the allegations regarding "coded language," secret phone calls, and unofficial retaliation that even the dissent acknowledged could amount to affirmative acts. Pet. App. 31a n.5 (Diaz, C.J., dissenting).

On top of that, there are additional allegations on which the Fourth Circuit did not find it necessary to rely. Take the "teaming agreements" where petitioners included express no-poach provisions that were far more limited than the actual hidden gentleman's agreement to *never* engage in poaching. J.A. 46. These "created the false impression that workers could be solicited and

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unwritten agreement would be insufficient to demonstrate affirmative concealment." Pet. 14 n.3. But the Third Circuit has left open whether an even more lenient "self-concealing" standard could be sufficient. *In re Cmty. Bank of N. Virginia Mortg. Lending Pracs. Litig.*, 795 F.3d 380, 402 (3d Cir. 2015). Further, as the petitioners concede, it has not yet applied the factbound fraudulent concealment standard in an analogous case. And in any event, the petitioners' passing suggestion suffers from the same flaw as the rest of the petition: There would still be no conflict with the decision below, which did not hold that merely alleging an unwritten agreement is sufficient.

recruited by rivals who were not working on their projects," even though the opposite was true. *Id.* This led "employees … to mistakenly believe that the teaming agreements were the only recruiting restrictions in place." J.A. 85–86.

Similarly, other courts have held that a defendant's assertions that they are complying with the relevant laws and providing competitive wages can, under certain circumstances, provide further evidence of fraudulent concealment. *See, e.g.*, *In re Animation Workers*, 123 F. Supp. 3d at 1200. Here, the co-conspirators assured the plaintiff and the public that they complied with antitrust laws and offered competitive wages. J.A. 96–101.

While the Fourth Circuit didn't rely on these allegations, they make this case an even less suitable vehicle for resolving the question whether "merely" alleging an unwritten agreement is sufficient.

Finally, the interlocutory posture of this case makes it an especially poor vehicle. The Fourth Circuit reversed the grant of a motion to dismiss and remanded to the district court. This Court "generally await[s] final judgment in the lower courts before exercising [its] certiorari jurisdiction." *Virginia Mil. Inst. v. United States*, 508 U.S. 946 (1993) (Scalia, J., statement regarding denial of certiorari). The petitioners even acknowledge as much. Pet. 34. This caution is especially warranted here, as the petitioners are asking this Court to wade into factbound questions before a factual record has even been developed.

IV. There is nothing urgent or important about reviewing the sufficiency of the case-specific allegations here.

There is nothing urgent or important about reviewing the Fourth Circuit's determination that the specific allegations in this case were sufficient to meet a consensus standard. The court below did not create a "new tool" or a "new means" for alleging fraudulent concealment. Pet. 3, 26. Instead, it "reaffirm[ed]" own prior caselaw from 1995, Pet. App. 16a (citing *Marlinton*, 71 F.3d at 125), and drew on caselaw in other circuits, including the Fifth and the Ninth. *See, e.g.*, Pet. App. 10a–12a, 21a.

Similarly overstated are the petitioners' warnings that the opinion below allows plaintiffs to generically allege an unwritten agreement to pressure defendants with discovery "regardless of" the merits of their fraudulent concealment argument or their substantive claims. Pet. 12, 31. As explained, the Fourth Circuit never applied such a standard.

Further, any allegations about unwritten agreements must still meet the relevant pleading standards for particularity and plausibility. Merely alleging the existence of an unwritten agreement simply won't provide the kind of specificity required by Rule 9(b). And here, the respondent met that bar by relying extensively on allegations based on eyewitnesses, including numerous "quotes from interviews with industry insiders." Pet. App. 17a.

Not only that, but alleging fraudulent concealment is not, of course, sufficient on its own to withstand a motion to dismiss for failure to state a claim or allege a conspiracy. Plaintiffs must still satisfy the regular strictures of *Twombly* to allege an actual conspiracy and a violation of antitrust law. *Bell Atl. Corp. v. Twombly*, 550

U.S. 544, 557 (2007). Nothing in the Fourth Circuit's decision about tolling the statute of limitations changed that, nor could it.

Finally, the petitioners make the puzzling claim that this Court should take this case because it might shed light on the pleading standard for fraudulent concealment in other areas of the law. But the petitioners' main merits arguments are focused on interpreting fraudulent concealment in light of the antitrust statutes specifically. Pet. 16–22. Their question presented is similarly limited to section 15b's statute of limitations. *Id.* at i. The Fourth Circuit (and its prior *Marlinton* case on which it drew) also focused on how to approach fraudulent concealment in the antitrust context. And in any event, this Court does not normally take cases just because of the possibility of hypothetically shedding light on issues outside of the question presented (for which the petitioners have made no separate showing of certworthiness).

V. The Fourth Circuit correctly applied the consensus standard to the allegations in this case.

Finally, even if this Court were in the business of error correction, there is no error to correct. The Fourth Circuit did not err in holding that, drawing certain reasonable inferences in the respondent's favor, she had sufficiently alleged fraudulent concealment based on the petitioners' sophisticated, years-long scheme to conceal their no-poach agreement.

A. The Fourth Circuit's conclusion is consistent with the longstanding principle that the "purpose of the fraudulent concealment tolling doctrine is to prevent a defendant from 'concealing a fraud … until' the defendant 'could plead the statute of limitations to protect it.'" *Marlinton*, 71 F.3d at 122 (quoting *Bailey*, 88 U.S. at 349). Parties should not be rewarded by the statute of

limitations for "conceal[ing] their fraudulent action from the knowledge of the [victim]." *Exploration Co.*, 247 U.S. at 449.

Because the doctrine is focused on *concealment*, the Fourth Circuit reasonably concluded that there is "no valid reason" to draw a categorical line between "conspiracies in which the conspirators document their antitrust violations and subsequently shred those documents," and conspiracies where the same information is concealed because "the conspirators are careful not to write down evidence of their antitrust violations in the first place." Pet. App. 12a.

As the Fourth Circuit explained, this kind of affirmative "cover[]-up" is much more than "mere silence"; it involves numerous affirmative acts taken specifically to evade detection. Pet. App. 18a; *see also, e.g.*, *In re Animation Workers*, 123 F. Supp. 3d at 1202 ("[T]aking steps to ensure that a conspiracy remains secret is qualitatively different from failing to disclose a secret conspiracy."). At the risk of repetition, these include using coded language and oblique references, ensuring the agreement was enforced via phone calls between executives at different companies, conveying the agreement orally between executives and managers at the same company. *See supra* 13–16. These aren't remaining silent, they are active steps to cover one's tracks and prevent a paper trail. These steps have (and are intended to have) the same concealing effect as hiding or destroying written evidence, which even the petitioners would appear to accept can be sufficient.

Similarly, the Fourth Circuit's conclusion that the respondent sufficiently alleged intent tracks the kind of "judicial experience and common sense" that courts apply to allegations and inferences at the pleading stage.

Ashcroft v. Iqbal, 556 U.S. 662, 679 (2009): It stands to reason that an unwritten agreement is more likely to indicate intentional concealment when the conduct is clearly illegal and the agreement is longstanding, complex, and involves many parties.

And the petitioners' blanket rule in which a cover-up like this is categorically insufficient would reward defendants who successfully hid their conduct for years through keeping everything out of writing, only talking in person or by phone, and using coded language—"conceal[in] their fraudulent action," exactly what this doctrine exists to prevent. *Exploration Co.*, 247 U.S. at 449. Such a per se rule would be especially unsuitable the pleading stage, which calls for a holistic, "context-specific" inquiry of the allegations and accompanying inferences as a whole. *Iqbal*, 556 U.S. at 679. Indeed, even under the heightened pleading standards in securities cases, this Court has rejected such "bright-line rule[s]" as "at odds with the need to "review all the allegations holistically." *Matrixx Initiatives v. Siracusano*, 563 U.S. 27, 48–49 (2011). And this blanket pleading rule would be particularly inappropriate because evidence of the methods of fraudulent concealment will often be "largely in the hands of the alleged conspirators." *In re Cathode Ray Tube*, 738 F. Supp. 2d at 1024.

B. In asking this Court to reverse, the petitioners rely primarily on a convoluted argument about "Congress's clearly expressed intent." Pet. 21; *see also id.* at 16 ("Congress's intent in establishing the limitations period."). Congress's supposedly "clearly expressed" intent about how to apply the fraudulent concealment doctrine, however, is not written down in the statue. With statutes of limitations as elsewhere, such "speculation as to Congress' intent" is not how this Court approaches

statutory interpretation. *Corner Post, Inc. v. Bd. of Governors of Fed. Rsrv. Sys.*, 603 U.S. 799, 815 (2024).

Instead, the petitioners' search for this unspoken intent relies on a series of assumptions based on the assertion that a cause of action under section 15(b) accrues from the date of injury, rather than its discovery. Pet. 17. That is an unsettled question. *See, e.g.*, *In re Copper Antitrust Litig.*, 436 F.3d 782, 789–90 (7th Cir. 2006). But in any event, the Fourth Circuit did not apply a discovery rule—it did not hold that the respondent's claims "beg[an] to run on the date an alleged … violation is discovered." *Rotkiske v. Klemm*, 589 U.S. 8, 14 (2019). Instead, it required affirmative acts of fraudulent concealment made with fraudulent intent, neither of which are required for an ordinary discovery rule.

The petitioners also assert that the Fourth Circuit's reading renders section 15b's "statute of limitations … all but meaningless." Pet. 16. But section 15b applies to "any cause of action under section 15, 15a, or 15c," 15 U.S.C. § 15(b), which encompass "any person who shall be injured … by reason of anything forbidden in the antitrust laws," *id.* § 15(a).

That covers a wide range of claims that do not involve secret or unwritten agreements at all, as numerous recent cases reflect. *See, e.g.*, *Nat'l Collegiate Athletic Ass'n v. Alston*, 594 U.S. 69, 80 (2021) (involving "NCAA rules that limit the compensation [student-athletes] may receive in exchange for their athletic services"); *Apple Inc. v. Pepper*, 587 U.S. 273, 278–79 (2019) (allegations that Apple "unlawfully used its monopoly power to force iPhone owners to pay Apple higher-than-competitive prices for apps"); *Leegin Creative Leather Prods., Inc. v. PSKS, Inc.*, 551 U.S. 877, 883–85 (2007) (written policies vertically setting minimum prices). This illustrates what

this Court has also observed: "[T]ypical antitrust cases" do not "involve fraud claims." *Klehr*, 521 U.S. at 191. In all such cases, the statute of limitations is certainly not "meaningless." Pet. 16.

Even as to cases involving unwritten agreements, the statute of limitations maintains vitality. For one, the plaintiff must have exercised due diligence and not slept on their rights. Further, the Fourth Circuit was clear that merely alleging an unwritten agreement is not enough. It is true that a number of secret illegal antitrust conspiracies will involve unwritten agreements. But the petitioners cite no circuit to have adopted the rule that section 15(b) must prohibit tolling except for only the most "extraordinary" secret illegal conspiracies. Pet. 17. To the contrary, "courts often toll the limitation period in the case of secret conspiracies." Areeda § 320e. And even the courts on which the petitioners rely have rejected as "unpersuasive" the idea that fraudulent concealment should not be satisfied by frequent features of secret conspiracies. *Allan*, 851 F.2d at 1532.

Finally, the petitioners (at 23–24) invoke the standards for fraud claims based on misrepresentations. Mostly, this just rehashes the same contention that fraudulent concealment requires more than "mere silence," but rather "some *trick* or *contrivance*." Pet. 23 (quoting *Wood*, 101 U.S. at 143). As explained, the Fourth Circuit expressly held that "mere silence" is not enough. Pet. App. 18a. Moreover, in 1879 when this Court in *Wood* used the term "contrivance," as today, this simply meant a "thing contrived, planned, or invented," such as "a scheme" or "a stratagem." Contrivance, *The Century Dictionary: An Encyclopedic Lexicon of the English Language* (1895); *cf.* Contrivance, *American Heritage Dictionary* (5th ed. 2011). That's consistent with the

Fourth Circuit's understanding that "the doctrine of fraudulent concealment is designed to prevent conspirators who take steps to avoid detection from hiding behind the statute of limitations." Pet. App. 15a. Here, the petitioners' elaborate, decades-long efforts for hiding their conspiracy would certainly qualify as a scheme or strategy.

And to the extent that the petitioners at times appear to advocate a categorical rule that fraudulent concealment can only be satisfied if the defendant makes a misrepresentation directly to the plaintiff—rather than any other kinds of acts of concealment—that would be inconsistent with cases in the circuits on which they rely, where "hiding evidence" can be fraudulent concealment. *Carrier Corp.*, 673 F.3d at 447; *see also Allan*, 851 F.2d at 1531–32. This Court should not grant certiorari based on a purported split, just so that the petitioners can then pivot to advocating a theory that the courts on which they rely have not adopted.

CONCLUSION

This Court should deny the petition for certiorari.

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