No. 25-293

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

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INTRODUCTION

Respondent's arguments against review all depend on a revisionist account of the Fourth Circuit's ruling. As respondent would have it, the court held only that an unwritten agreement "*can* qualify" as an affirmative act of fraudulent concealment if combined with additional affirmative acts that cumulatively amount to a "cover[] up." Opp.13-14. But that is not true. The Fourth Circuit unambiguously held that "[p]laintiffs adequately allege that Defendants engaged in affirmative acts by creating an illicit no-poach agreement that they deliberately kept non-ink-to-paper." App.16a. It is thus crystal clear that in the Fourth Circuit the bare allegation of "creating an illicit * * * agreement" and choosing not to put it "to paper" will "adequately allege" fraudulent concealment. A plaintiff need not allege a trick or contrivance of any kind to survive a motion to dismiss. Fraudulent concealment no longer requires a fraudulent act.

Once the Fourth Circuit's decision is seen for what it is—a radical expansion of fraudulent concealment that will permit plaintiffs to survive a motion to dismiss in virtually all antitrust conspiracy cases—the urgent need for this Court's review should be apparent. The Fourth Circuit's holding is impossible to reconcile with Congress's choice in the Clayton Act to impose a four-year limitations period that runs from the occurrence of an antitrust violation, not its discovery. It is also irreconcilable with the long-established principle that fraudulent concealment requires "some trick or contrivance intended to exclude suspicion and prevent inquiry"—that is, something more than merely keeping a conspiracy secret. *Wood* v. *Carpenter*, 101 U.S. 135, 143 (1879). And respondent's effort to explain away the conflict with the Fifth, Sixth, and

Ninth Circuits fails for the same reason. Those circuits all require allegations of an affirmative "trick or contrivance" that the Fourth Circuit has eliminated. Respondent's case would never survive a motion to dismiss on timeliness grounds in those circuits.

The Fourth Circuit's expansive reconfiguration of fraudulent concealment gravely threatens the important interests that statutes of limitations exist to protect. Antitrust plaintiffs will surely beat a path to the Fourth Circuit because they know that they can seek treble damages based on long-stale claims stretching back years or decades and be confident that they will survive a motion to dismiss—and thereby exert enormous settlement pressure—by alleging nothing more than an antitrust conspiracy that the conspirators chose not to put to paper.

ARGUMENT

I. The Fourth Circuit Held Erroneously That Bare Allegations Of An Unwritten Conspiracy Establish Fraudulent Concealment.

A. 1. Try as she might, respondent cannot obscure the Fourth Circuit's unambiguous holding that an unwritten agreement is—*by itself*—an affirmative act of fraudulent concealment for purposes of tolling the statute of limitations. Indeed, the Fourth Circuit said so repeatedly: "[p]laintiffs adequately allege that Defendants engaged in affirmative acts by creating an illicit no-poach agreement that they deliberately kept non-ink-to-paper," App.16a; conspirators who "avoid creating evidence of their conspiracy * * * commit[] an affirmative act of fraudulent concealment," App.15a-16a; "a plaintiff adequately alleges affirmative acts, such as a non-ink-to-paper agreement," App.18a.

Lest there be any doubt, leading authorities have read the Fourth Circuit's decision in exactly this way. The most prominent federal jury instructions cite it as establishing that an "unwritten agreement among defendants to avoid creating evidence of an antitrust conspiracy constituted an affirmative act of fraudulent concealment that tolled the statute of limitations." 4 Leonard B. Sand, et al., *Modern Federal Jury Instructions—Civil* ¶ 79.08 cmt. (2025); see also 72 A.L.R. Fed. 430 (2025) (describing the Fourth Circuit as holding that the "alleged creation of an illicit no poach agreement that [defendants] deliberately kept non-ink-to-paper was an affirmative act of fraudulent concealment that would trigger tolling").

2. Respondent nonetheless insists that the court of appeals required "more" than an unwritten agreement. Opp.14; *id*. at 13-18. The above quotations refute that assertion. In all events, the allegations that respondent identifies as providing the "more" do nothing of the sort. Every one is merely an intrinsic feature of any alleged illegal conspiracy.

Respondent tries to squeeze something out of the Fourth Circuit's references to "coded language." Opp.2, 14. But the court never suggested that those allegations were *necessary* to establish fraudulent concealment. Quite the opposite. App.16a. Anyway, allegations that petitioners used "euphemisms and code words" (for example, by stating that the companies had "relationship[s]" with each other), J.A.46, 97, are just alternative ways to say that petitioners, like all alleged conspirators, did not "advertise their [alleged] purpose to the world." *Grunewald* v. *United States*, 353 U.S. 391, 402 (1957). After all, "every conspiracy is by its very nature secret." *Ibid*. Such allegations

are therefore no different from "pretend[ing] and profess[ing]" that transactions are "*bona fide*," which this Court has already held insufficient for fraudulent concealment. *Wood*, 101 U.S. at 142-143 (citation modified).

Respondent also ballyhoos the Fourth Circuit's statements that petitioners allegedly "*covered up*" the conspiracy. Opp.14 (quoting App.5a, 17a-18a (emphasis in opinion)). Again, the court never suggested those allegations were *necessary* to allege an affirmative act of fraudulent concealment. The court cited them for a different purpose: to support its holding that respondent had alleged an unwritten agreement with sufficient particularity to satisfy Rule 9(b). App.16a-18a (allegations concerning "avoiding putting anything in writing," "transmitting the agreement orally," and "referring to [the conspiracy] obliquely"); *id*. at 17a (discussing Rule 9(b)). Once again, those allegations are merely different ways of saying that petitioners conspired in secret and wrote nothing down. Accord App.30a-31a (Diaz, C.J., dissenting). If "avoiding" writing and conspiring "orally" are affirmative acts, the affirmative-act requirement is illusory.

Respondent next contends (Opp.15-16) that fraudulent concealment's other requirements—fraudulent intent and due diligence—provide sufficient protection against the risk of stale claims proceeding. But, of course, neither can supply the missing affirmative act. Shipbuilders Br.12. And the Fourth Circuit's ruling in this very case made clear that those nominal requirements provide no additional check at all. Pet.20. The court held that fraudulent intent could be inferred from a "well-defined" unwritten agreement itself, particularly where the agreement is "obviously illegal." App.19a-20a. That describes any alleged antitrust

conspiracy: an anticompetitive agreement likely will be both unwritten and "obviously illegal," given the well-known nature of that prohibition. The court also viewed a conspiracy's allegedly long lifespan as supporting an inference of intent; but every plaintiff hoping to resuscitate a time-barred claim or extend the damages period will allege a long-running conspiracy. The court's treatment of due diligence is even less defensible. Deeming it an issue "not amenable to resolution on the pleadings," App.22a, the court excused respondent from "having to show any diligence whatsoever"—notwithstanding her own allegations suggesting widespread knowledge of anticompetitive effects. App.34a (Diaz, C.J., dissenting). Those in-name-only requirements cannot possibly "triage" for a vitiated affirmative-act requirement. Opp.17.

The bottom line is that the Fourth Circuit squarely held that an unwritten agreement suffices as an affirmative act of fraudulent concealment. But conspiracies are by nature clandestine, not memorialized. And fraudulent concealment's other requirements pose no hurdle at the pleading stage. The decision thus leaves no "statute of limitations defense at all." App.35a (Diaz, C.J., dissenting); see Pet.18-25.

B. The Fourth Circuit's holding cannot be reconciled with the Sherman Act or with firmly established general principles of fraudulent concealment. Respondent barely argues otherwise. Opp.28-32.

Beginning with the antitrust laws, the decision below contravenes Congress's clear intent that companies should ordinarily enjoy repose from antitrust claims four years after acts that caused the alleged injury. 15 U.S.C. 15b; *Zenith Radio Corp*. v. *Hazeltine Rsch., Inc*., 401 U.S. 321, 338 (1971). Respondent suggests that Congress's intent is unknowable. Opp.31-

32. But Congress unambiguously chose a four-year limitations period that begins to run when an antitrust violation occurs, not when it is first discovered, and subject to equitable tolling only in "extraordinary circumstance[s]." *Arellano* v. *McDonough*, 598 U.S. 1, 6-7 (2023); *Klehr* v. *A.O. Smith Corp.*, 521 U.S. 179, 187 (1997). The decision below permits tolling in the *ordinary* circumstances attendant to every alleged conspiracy, and converts the statute of limitations into one triggered by discovery of the violation—not its occurrence.

The decision also runs headlong into the bedrock principle that "[c]oncealment by mere silence is not enough" to establish fraudulent concealment. *Wood*, 101 U.S. at 143. That rule follows ineluctably from the twin premises that statutes of limitations "are vital to the welfare of society," *id.* at 139, and should not be excused in the ordinary course, see *Wallace* v. *Kato*, 549 U.S. 384, 396 (2007); Chamber of Commerce Br.3-8. Without a requirement of "some trick or contrivance intended to exclude suspicion and prevent inquiry," the fraudulent-concealment doctrine would swallow the statute of limitations whole. *Wood*, 101 U.S. at 143.

Respondent occasionally acknowledges that some affirmative trick or contrivance is necessary (Opp.19, 32), but insists that any "scheme" or "stratagem" to "hid[e]" a conspiracy qualifies. Opp.32-33. That admission gives up the game. A scheme or stratagem to avoid detection is the very definition of a conspiracy. See *Grunewald*, 353 U.S. at 402. If that is all it takes to overcome the statute of limitations, then there is no statute of limitations for conspiracy claims. That is why fraudulent concealment requires more: an *affirmative act* of deception or trickery, coupled with

fraudulent intent. As Chief Judge Diaz recognized below, respondent's argument "collaps[es] the [fraudulent-concealment] analysis down to the sole question of whether a conspiracy existed," App.26a, making fraudulent concealment the "rule" rather than the "exception," *Rotella* v. *Wood*, 528 U.S. 549, 561 (2000).[1]

II. The Decision Below Created A Conflict.

Respondent's efforts to downplay the circuit conflict are equally unpersuasive. Opp.18-25. Respondent emphasizes that the circuits generally agree that fraudulent concealment requires an "affirmative act[]." Opp.1; accord Pet.5. But only the Fourth Circuit holds that an unwritten agreement alone qualifies, even absent any fraudulent trick or contrivance. The Fifth, Sixth, and Ninth Circuits have squarely held that a good deal more is required.

A. In the Sixth Circuit, secret meetings do not qualify as an "affirmative act" of fraudulent concealment because mere secrecy is not a deceptive "trick or contrivance." *Carrier Corp.* v. *Outokumpu Oyj*, 673 F.3d 430, 446-447 (6th Cir. 2012) (citation modified). Respondent (Opp.21) insists that all the Sixth Circuit held in *Carrier* was that the specific allegations of "covert meetings" at issue lacked particularity. But the Sixth Circuit unambiguously held that "simply

[1] Respondent, like the Fourth Circuit, makes much of the purported equivalence of conspirators who "shred" documents and those who avoid creating documents. Opp.29. But the former commit an *affirmative* act of destroying evidence that, coupled with evidence of intent, could constitute fraudulent concealment. The latter merely fail to make detection more likely—by following Stringer Bell's commonsense admonition that one should not take notes documenting an illegal conspiracy. *The Wire*: Straight and True (HBO, aired Oct. 17, 2004).

meeting in secret" is not "sufficiently *affirmative*" because it involves no "active steps to hide evidence." 673 F.3d at 447-448 (emphasis added). Indeed, the court emphasized that "an unwillingness to provide information is not an 'affirmative act.'" *Id*. at 447. Respondent's mischaracterizations aside, the Sixth Circuit's approach cannot be reconciled with the Fourth Circuit's holding that a secret, unwritten conspiracy qualifies as an affirmative act sufficient for tolling. App.5a, 17a-18a.

Respondent also observes (Opp.21) that the Sixth Circuit deemed *other* allegations, such as "security rules to prevent a paper trail" and a "coding-system to hide" identities, sufficient to trigger equitable tolling. *Carrier Corp.*, 673 F.3d at 447. That observation does not help respondent. The Fourth Circuit did not rely on—and respondent did not even allege—any affirmative efforts to deceive here. See pp. 3-4, *supra*. And when the Sixth Circuit has addressed allegations like respondent's, it has emphatically rejected them. See, *e.g.*, *Precious Creation, Inc.* v. *Mercantile Bank Mortg. Co.*, 731 F. App'x 498, 501 (6th Cir. 2018) ("conceal[ing] internal emails" is "nondisclosure" that "does not constitute an affirmative act of concealment"); *Estate of Abdullah ex rel. Carswell* v. *Arena*, 601 F. App'x 389, 395 (6th Cir. 2015) ("denial of an accusation of wrongdoing" is a "failure to disclose" and "not a fraudulent concealment").

B. The Ninth Circuit applies the same rule. That court has explained that "[m]erely keeping someone in the dark" is not fraudulent concealment; the defendant must "affirmatively mislead[]." *Thorman* v. *Am. Seafoods Co.*, 421 F.3d 1090, 1095 (9th Cir. 2005). Thus, allegations that a defendant "concealed" reports "by not disclosing them" to investors are insufficient.

Volk v. *D.A. Davidson & Co.*, 816 F.2d 1406, 1416 (9th Cir. 1987); see *Reveal Chat HoldCo LLC* v. *Meta Platforms, Inc.*, 2022 WL 595696, at *2 (9th Cir. 2022). Rather, the plaintiff must allege "some act of fraud over and above making the secret agreement." *Davidson* v. *Pinnacle W. Cap. Corp.*, 1997 WL 377975, at *1 (9th Cir. 1997).

Against that precedent, respondent offers (Opp.22-24) a handful of distinguishable district-court decisions. See, *e.g.*, *In re Coordinated Pretrial Procs. in Petroleum Prods. Antitrust Litig.*, 782 F. Supp. 487, 490-491 (C.D. Cal. 1991) (finding affirmative acts where defendants "redraft[ed]" documents that might be "damaging in an antitrust suit"). And the only circuit decision on which respondent relies does not remotely suggest that an unwritten agreement is sufficient. Opp.22; *E.W. French & Sons, Inc.* v. *Gen. Portland Inc.*, 885 F.2d 1392 (9th Cir. 1989). That case involved false denials of price fixing in response to direct questioning and using unmarked envelopes to send pricing information to competitors. *Id.* at 1399-1400. Here, the Fourth Circuit did not rely on direct denials or identity-obscuring acts—because respondent did not allege them.

C. Finally, respondent pins her Fifth Circuit argument (Opp.19-21) on *Texas* v. *Allan Construction Co.*, 851 F.2d 1526 (5th Cir. 1988), which cited an older decision suggesting that "secret agreements and covert price-setting sessions" might be sufficient. *Id.* at 1531-1532. But *Allan* itself recognized that fraudulent concealment requires "some trick or contrivance" and that Congress "could [not] have intended" fraudulent-concealment tolling in "every price-fixing case." *Id.* at 1529, 1531. And the Fifth Circuit has since clarified

that, under *Allan*, "secret communications" and misleading public statements are not "affirmative act[s] of concealment." *Rx.com* v. *Medco Health Sols., Inc.*, 322 F. App'x 394, 397-398 (5th Cir. 2009).

There is thus no doubt that respondent's claims would have been barred as untimely had they been brought in the Fifth, Sixth, or Ninth Circuit.

III. This Case Cleanly Presents An Issue Of Exceptional Importance.

The Fourth Circuit's vast expansion of fraudulent concealment will inflict "severe" harms on corporate defendants. Chamber of Commerce Br.3. Those consequences are a powerful reason for this Court to intervene, and there are no obstacles to this Court's review.

A. The Fourth Circuit's rule will gut any timeliness defense whenever alleged violations involve secrecy. Pet.26-27; Chamber of Commerce Br.10-11. That concern extends well beyond the Sherman Act to other statutes permitting claims involving secrecy. Pet.32-33. And the Fourth Circuit's rule will wreak special havoc in antitrust cases, as *all* plaintiffs, including those with timely claims, can now seek treble damages for the entire life of an alleged conspiracy—which can, as here, stretch back decades. Pet.27-28. Faced with such staggering risks, defendants inevitably "will be pressured into settling questionable claims." *AT&T Mobility LLC* v. *Concepcion*, 563 U.S. 333, 350 (2011); Pet.28-29; Shipbuilders Br.14-16. That is, as the Chamber of Commerce observes, "especially dangerous in large-scale class actions" like this one, "where plaintiffs can wield the specter of sprawling discovery,

massive judgments, and reputational harm to pressure defendants into settlements—regardless of the underlying merit." Br.12-13.

The resulting harms will reverberate nationwide. Given the relaxed venue and personal jurisdiction rules applicable to antitrust suits, the Fourth Circuit has rolled out the red carpet for antitrust plaintiffs, dramatically increasing the risk of ruinous liability for businesses with nationwide footprints. Pet.29-30; Shipbuilders Br.18-21. And the Fourth Circuit's rule is already influencing the law nationwide. See p. 3, *supra*.

Other than insisting (again) that the Fourth Circuit did not hold what it very clearly did, Opp.27, respondent has little response. In particular, respondent does not deny that the issue will recur frequently, often in cases with enormous stakes. The best respondent can do is to fall back on the contention that the Fourth Circuit's capacious understanding of what counts as an affirmative act will not open the floodgates because plaintiffs must also satisfy the "pleading standards for particularity and plausibility." Opp.27-28. But in this very case the Fourth Circuit made clear that those barriers are virtually nonexistent. The court expressly "relaxed" Rule 9(b)'s particularity requirement when, as here, a plaintiff alleges a "non-ink-to-paper agreement" because, in that court's view, it is "well-nigh impossible for plaintiffs to plead all the necessary facts with particularity." App.6a-7a (cita-

tion modified). And the court deemed respondent's allegations plausible because they invoked sources other than "information and belief." App.17a.

B. This case is also an ideal vehicle. The Fourth Circuit squarely held that allegations of an unwritten agreement are sufficient by themselves to invoke fraudulent concealment. That holding is outcome-determinative; without it, respondent's claims would have been dismissed as time-barred. Pet.33; see App.36a-55a.

Again, respondent has little to say, mostly arguing (Opp.25-26) that this case involves allegations beyond an unwritten agreement. But those allegations do not lessen the need for review, because the court did not treat them as necessary to allege an affirmative act. Those "additional allegations" are in any event nothing more than restatements of the assertion that petitioners kept their alleged conspiracy secret. See pp. 3-4, *supra*. And any question whether the complaint sufficiently alleges affirmative acts *under the correct legal standard* would be a question for remand. *E.g.*, *Fifth Third Bancorp* v. *Dudenhoeffer*, 573 U.S. 409, 430 (2014).

Finally, respondent asserts (Opp.26) that this Court should deny review because no "factual record" has been developed. But the Fourth Circuit's decision is harmful precisely *because* it prevents dismissal of time-barred claims on the pleadings, thereby producing the massive settlement pressure that this Court has repeatedly policed pleading standards to avoid. Pet.31-32.

CONCLUSION

The petition for a writ of certiorari should be granted.

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