

No. 14-540

IN THE
Supreme Court of the United States

PANASONIC CORPORATION, ET AL.,
Petitioners,

v.

SAMSUNG ELECTRONICS CO., LTD.,
Respondent.

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

**BRIEF OF *AMICUS CURIAE*
GENERIC PHARMACEUTICAL ASSOCIATION
IN SUPPORT OF PETITIONERS**

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INTEREST OF THE *AMICUS CURIAE*¹

The Generic Pharmaceutical Association (“GPhA”) is a nonprofit, voluntary association representing nearly 100 manufacturers and distributors of finished generic pharmaceutical products, manufacturers and distributors of bulk active pharmaceutical chemicals, and suppliers of other goods and services to the generic pharmaceutical industry. GPhA’s members provide American consumers with generic drugs that are just as safe and effective as their brand-name counterparts, but substantially less expensive. GPhA members’ products account for roughly 80% of all prescriptions dispensed in the United States but only 27% of the money spent on prescriptions. In this way, the products sold by GPhA members save consumers nearly \$200 billion each year. GPhA’s core mission is to improve the lives of consumers by providing timely access to affordable pharmaceuticals. GPhA regularly participates in litigation as *amicus curiae*, taking legal positions that are adopted by GPhA’s Board of Directors and reflect the position of GPhA as an organization. See, e.g., *FTC v. Actavis, Inc.*, No. 12-416; *Caraco Pharm. Labs., Ltd. v. Novo Nordisk A/S*, No. 10-844; *PLIVA, Inc. v. Mensing*, No. 09-993.

¹ All parties received timely notification of GPhA’s intent to file this brief, and all parties consent to its filing. No counsel for a party authored any part of this brief, and no such counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amicus curiae*, its members, or its counsel made a monetary contribution to the brief’s preparation or submission.

SUMMARY OF ARGUMENT

The Ninth Circuit’s decision widens a circuit split on an often-litigated exception to the Clayton Act’s four-year statute of limitations for antitrust actions for damages, one for “continuing violations.” Now six circuits have weighed in on the breadth of the “continuing violations” exception, which was first announced by this Court in *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 401 U.S. 321 (1971). Where there is a continuing conspiracy to violate the antitrust laws, a “continuing violation” can restart the statute of limitations “each time a plaintiff is injured by an act of the defendants.” *Id.* at 338. The majority of circuits have held close to this Court’s language in *Zenith Radio*, requiring a new and independent “overt act” to restart the statute, and not merely a reaffirmation of a pre-limitations action. A distinct minority (consisting of the Third Circuit and now the Ninth) has broadened the exception to allow “reaffirmations” of prior acts—and, read most expansively, even *inaction*—to restart the limitations period.

Clarifying the breadth of the “continuing violations” exception is important to GPhA’s members, which regularly defend against antitrust claims based on settlements of patent litigation executed and made public long ago. GPhA’s members increasingly face stale claims, on which plaintiffs rely on arguments echoing the broadest language in the decision below—including that allegedly supracompetitive prices resulting from pre-limitations agreements are enough to restart the statute, Pet. App. 8a–9a, and that refusing to “breach[an] allegedly anti-competitive contract” can

give rise to a continuing violation, *id.* at 8a. The split that petitioners identify about what constitutes an “act of the defendants” has caused the lower courts to reach irreconcilable results in pharmaceutical cases. Some courts have allowed plaintiffs to wait more than *twice as long* as the limitations period allows before suing over a pharmaceutical settlement agreement. Applying reasoning like the Ninth Circuit’s, these courts effectively have held that merely by remaining in force, the settlement agreement amounts to an “act of the defendants” within the limitations period, no matter when the defendants actually signed the agreement. While this split goes unresolved, GPhA’s members undergo needless litigation and expensive discovery into long-ago settlements, and face the threat of an adverse treble-damages judgment that could amount to billions of dollars. This Court should step in now to resolve the conflict.

Review is especially appropriate in this case because of the Ninth Circuit’s misapplication of this Court’s decisions. This Court has repeatedly rejected attempts to extend the Clayton Act’s four-year statute of limitations indefinitely. The decision below is also at odds with the reasons Congress adopted a federal statute of limitations for antitrust actions—to provide uniformity where before there was none, and to establish a predictable rule of repose. The issue has now percolated long enough. The Ninth Circuit’s decision furnishes a prime vehicle for this Court to clarify the breadth of the continuing violations exception—and to ensure that the exception does not become the rule.

ARGUMENT

A. The Ninth Circuit Decision Widens The Conflict Among The Circuits On When And How Continuing Violations Can Extend The Clayton Act's Four-Year Statute Of Limitations

The Ninth Circuit's decision places into sharp focus the widening conflict among the circuits on what kinds of action by the defendant—or even *inaction*—can revive an antitrust action otherwise barred by the four-year statute of limitations. On one side of the divide, most circuits hold that a defendant does not revive a time-barred claim unless it does something new during the limitations period. Two circuits, including the Ninth Circuit here, have taken the opposite position: that a defendant need not do anything new at all. In their view, even a long-ago agreement can still be actionable, if during the last four years a defendant has reaffirmed the agreement, passively collected payments under the contract, or even just failed to breach the contract—*i.e.*, done *nothing at all*. The Ninth Circuit's decision deepening that circuit conflict warrants this Court's review.

The Clayton Act's limitations provision is straightforward on its face: Any action for money damages under the antitrust laws “shall be forever barred unless commenced within four years after the cause of action accrued.” 15 U.S.C. § 15b. Ordinarily, the limitations period “begins to run when a defendant commits an act that injures a plaintiff's business.” *Zenith Radio*, 401 U.S. at 338; *Klehr v. A.O. Smith Corp.*, 521 U.S. 179, 188 (1997).

But this Court has held that some new acts can effectively reset the statute of limitations. This Court first recognized the so-called “continuing violation” exception in *Zenith Radio*, where it noted that, where there is “a continuing conspiracy to violate the antitrust laws,” the limitations period may restart “each time a plaintiff is injured by an act of the defendants.” *Zenith Radio*, 401 U.S. at 338; see Pet. 12–13. The exception does not make acts performed outside the limitations period actionable, but it permits a plaintiff to recover for injury caused by certain *new* acts that the defendant performs within the limitations period. *Id.* (“[A] cause of action accrues to him to recover the damages caused by that act.”); see *Klehr*, 521 U.S. at 189.

The contours of this exception are particularly important for cases, such as this one, that challenge contracts entered into, and made public, long ago. In these types of antitrust actions, defendants enter into an agreement, such as the patent-pooling and licensing agreement in the decision below. At that point, the “act of the defendants” is complete. The *effects* of that agreement may be felt immediately, but they also may continue into the future. The question presented by the petition is whether those *effects* that merely flow from the agreement can restart the Clayton Act’s statute of limitations, regardless of whether a plaintiff first felt those effects outside the limitations period. In other words, how broadly may courts define an “act of the defendants” that restarts the statute of limitations without causing the “continuing violations” exception to swallow the Clayton Act’s “ordinary” four-year time-bar? *Zenith Radio*, 401 U.S. at 338; see *Klehr*, 521 U.S. at 189.

As petitioners have shown, there is a deep split in authority on the breadth of this exception. Pet. 2. Courts have diverged widely on what kinds of “act[s] of the defendants” can restart the limitations period, and, as a result, varying tests have emerged to determine when to apply the “continuing violations” exception. The majority rule, followed by the Fifth, Sixth, Eighth, and Tenth Circuits, requires something more than simple adherence to a contract to restart the limitations period. In these circuits, an “act of the defendants” must be an “overt act” that causes new injury to give rise to the “continuing violations” exception. Pet. 15–18. An “overt act” is “a new and independent act” by defendants “that is not merely a reaffirmation of a previous act.” *Z Techs. Corp. v. Lubrizol Corp.*, 753 F.3d 594, 600 (6th Cir. 2014) (quoting *DXS, Inc. v. Siemens Med. Sys., Inc.*, 100 F.3d 462, 467 (6th Cir. 1996)); see also *Champagne Metals v. Ken-Mac Metals, Inc.*, 458 F.3d 1073, 1088 (10th Cir. 2006); *Varner v. Peterson Farms*, 371 F.3d 1011, 1019 (8th Cir. 2004); *Al George, Inc. v. Envirotech Corp.*, 939 F.2d 1271, 1274 (5th Cir. 1991) (per curiam). The overt act within the limitations period must be more than “merely the abatable but unabated inertial consequence[] of some pre-limitations action.” *Al George*, 939 F.2d at 1274 (quoting *Poster Exch., Inc. v. Nat’l Screen Serv. Corp.*, 517 F.2d 117, 128 (5th Cir. 1975)).

The majority rule is in accord with the leading antitrust treatise. “The courts consistently hold that if the monopoly is created by a single identifiable act and is not perpetuated by an ongoing policy, the statute of limitation runs from the time of commission of the act, notwithstanding that high prices may last indefinitely into the future.” Phillip

E. Areeda & Herbert Hovenkamp, *Antitrust Law* ¶ 320(c)(4) (2014 ed.); see, e.g., *Midwestern Mach. Co. v. Nw. Airlines, Inc.*, 392 F.3d 265, 272 (8th Cir. 2004) (“[E]xposing a firm to perpetual liability under the Clayton Act simply because its business history includes a merger would chill pro-competitive business combinations.”).

The Third Circuit has parted with the majority rule, and instead broadened the kinds of acts that can give rise to the “continuing violations” exception. It did not go so far as to hold that the “inertial consequences” of a pre-limitations act can restart the statute of limitations. However, it held that *Zenith Radio*’s “act of the defendants” requirement can be met where a defendant’s recent acts are “merely ‘reaffirmations’ of acts done or decisions made outside the limitations period.” *West Penn Allegheny Health Sys. v. UPMC*, 627 F.3d 85, 106–107 (3d Cir. 2010); Pet. 14–15. In other words, the Third Circuit requires an “act” by the defendants within the limitations period, but it need not be new in kind to restart the running of the statute.

In the decision below, the Ninth Circuit adopted yet another approach to the predicate act requirement, and one that can be read even more broadly than that of the Third Circuit. Pet. App. 1a. Plaintiff Samsung filed suit in June 2010, seven years after Samsung signed defendant Panasonic’s allegedly anti-competitive licensing agreement in 2003, and more than ten years after Panasonic formed the patent-pooling group that created the licensing agreement. *Id.* at 5a. Panasonic’s group amended that licensing agreement in the fall of 2006, but Samsung did not sign. *Ibid.* Samsung began

paying royalties under the 2003 licensing agreement in late 2006. *Ibid.* Panasonic moved to dismiss the suit as untimely, citing the Clayton Act’s four-year statute of limitations. The district court granted Panasonic’s motion, but the Ninth Circuit reversed. While purporting to honor the majority view that a “continuing violation” requires an overt act by the defendants akin to those in the Fifth, Sixth, Eighth, and Tenth Circuits, *id.* at 6a, the court of appeals used expansive language to revive the lawsuit, holding that not only did “[t]he adoption of the 2006 license” (which Samsung never signed) constitute an overt act, but so too did “the attempt to enforce either license by collecting royalty payments.” *Id.* at 8a–9a. The Ninth Circuit reasoned that the passive receipt of royalty payments pursuant to a pre-limitations agreement suffices to trigger the continuing violations exception; in its words, a defendant’s refusal to “breach[an] allegedly anti-competitive contract” is overt enough. *Id.* at 8a; *id.* at 10a (reasoning “license itself did not permanently and finally control the acts of the SD Defendants”).

The Ninth Circuit’s decision, if left unreviewed, can be read by putative antitrust plaintiffs to significantly expand the number of cases in which they may invoke the “continuing violations” exception, breathing new life into otherwise time-barred antitrust actions. Pet. 20–21. Like the Third Circuit’s approach, the Ninth Circuit’s decision threatens to relegate the Clayton Act’s four-year statute of limitations to a small minority of cases rather than keeping with the “ordinary” rule. *Klehr*, 521 U.S. at 189. And because of the highly permissive venue provision in the federal antitrust laws, see 15 U.S.C. § 22 (allowing antitrust actions to

be brought “in any district wherein [a corporation] may be found or transacts business”), these broad views of the continuing violations doctrine invite plaintiffs to forum-shop. Those pernicious effects will continue until this Court settles the matter.

**B. This Conflict Has Already Led To Widely
Disparate Results In Pharmaceutical
Antitrust Litigation**

The effects of the circuit conflict resonate well beyond the standard-setting and patent-pooling contexts discussed in the petition. The current wave of pharmaceutical antitrust litigation, following on this Court’s decision in *FTC v. Actavis*, 133 S. Ct. 2223 (2013), illustrates the disparate results that the circuit split produces. Antitrust plaintiffs routinely sue pharmaceutical companies based on settlement agreements that are more than four years in the past, and claim that merely continuing to abide by that settlement keeps the statute of limitations from expiring. See, e.g., *In re Niaspan Antitrust Litig.*, MDL No. 2460, 2014 WL 4403848, at *7 (E.D. Pa. Sept. 5, 2014) (antitrust action brought eight years after the settlement—double the period provided by the statute of limitations). Some circuits apply the correct rule to reject those arguments: the defendant must have committed some new and distinct act during the limitations period. But in others that follow overly broad reasoning like the decision below, the statute of limitations on an allegedly anticompetitive agreement literally never expires, so long as the agreement itself remains in force. Defendants in courts that follow the latter rule are stuck: they cannot obtain dismissal of stale claims, given the circuit precedent against them, and they

cannot even obtain *review* of that precedent until after litigating to final judgment on potentially colossal treble-damages liability. This Court should resolve the conflict.

Many of the cases in which GPhA members litigate these continuing-violation issues challenge settlements of patent litigation between brand and generic drug companies. Typically in these cases, a settlement agreement licenses the generic drug product to come to market before the patent expires, but not right away. Plaintiffs then challenge that agreement as anticompetitive—in some cases, many years after the agreement is signed and made public. The plaintiffs advance reasoning like the Ninth Circuit’s here, based on an overly broad conception of what constitutes an “act of the defendants” during the limitations period. *Zenith Radio*, 401 U.S. at 338.

Some courts properly reject those arguments and hold that a lawsuit is untimely when the defendants have done nothing during the limitations period but abide by their years-old settlement agreement. One case properly applying the continuing violations doctrine—and reaching a decision that directly conflicts with the decision below in this case—is *In re Ciprofloxacin Hydrochloride Antitrust Litigation* (“*Cipro*”), 261 F. Supp. 2d 188 (E.D.N.Y. 2003). The facts presented by *Cipro* are very similar to those raised in the Petition. *Cipro* involved an alleged “reverse payment” settlement agreement in which Bayer, the seller of a branded product, entered into a patent settlement and license agreement in 1997 that permitted the generic drug maker Barr to start selling generic ciprofloxacin product in 2003; prior to

that date, Bayer would sell the only version of that product. *Id.* at 197. Several groups of purchasers filed antitrust claims, alleging that the agreement suppressed generic competition and thus caused them to overpay for the medication. *Id.* at 199.

The antitrust action was filed far more than four years after Bayer and Barr entered into the challenged agreement. *Id.* at 218–219. Plaintiffs argued that, even so, the complaint was timely because Bayer had continued to make payments to Barr under the settlement agreement within the prior four years, which they claimed restarted the limitations period. *Id.* at 227. The *Cipro* court rejected that argument, stating that a continuing violation occurs only when there is a “new and independent act that is not merely a reaffirmation of a previous act” and that “inflict[s] new and accumulating injury on the plaintiffs.” *Id.* at 228 (internal citations and quotation marks omitted). The court held—in marked contrast to the Ninth Circuit’s decision below—that ongoing payments under the settlement agreement “are not sufficient to extend or restart the limitations period because the performance of an allegedly anticompetitive, pre-existing contract is not a new predicate act.” *Id.* at 229; accord *In re Buspirone Patent Litig.*, 185 F. Supp. 2d 363, 379 (S.D.N.Y. 2002) (holding that even though the brand company “made settlement payments thereafter, such payments are mere consequences of the original Agreement and do not restart the statute of limitations” (citations omitted)).

But other decisions in pharmaceutical antitrust cases have taken a very different tack. Several

recent cases have—like the decision below—applied such a broad conception of continuing violations that they render the four-year limitations period essentially meaningless. One particularly telling example is the recent *Niaspan* decision. *In re Niaspan Antitrust Litig.*, MDL No. 2460, 2014 WL 4403848 (E.D. Pa. Sept. 5, 2014). That case challenges a series of alleged “reverse payment” settlement agreements that the parties entered into in April 2005. *Id.* at *5. The plaintiffs alleged that, under the agreements, the generic competitor would not launch its product until September 2013, in return for receiving certain payments from the brand company. The first antitrust lawsuit challenging these agreements was not filed until April 2013—eight years after the agreements were signed. *Id.* at *6. When the defendants moved to dismiss based on the Clayton Act’s statute of limitations, the court denied their motion. Following *West Penn*, it held that each sale of the brand product to the purchaser plaintiffs, at prices presumably higher than the purchasers would have paid for a generic product had it been available, caused a new cause of action to accrue. *Id.* at *8.

The *Niaspan* decision could not have survived in the Fifth, Sixth, Eighth, and Tenth Circuits, where a defendant must commit some overt act within the limitations period to apply the continuing violations exception. But instead, relying on the contrary line of cases exemplified by the Third Circuit’s precedent in *West Penn*, the *Niaspan* decision insisted that the limitations period was reset every time the parties simply adhered to the settlement agreement—which allowed the brand-name manufacturer to maintain

its alleged patent monopoly and thus continue charging an alleged monopoly price. See *id.* at *7–8.

Decisions like *Niaspan* irreconcilably conflict with *Cipro* (and countless other cases outside the pharmaceutical context), because the mere inability to buy a generic was not alleged to be anything other than an “abatable but unabatable inertial consequence” of a settlement that occurred outside the limitations period. *Cipro*, 261 F. Supp. 2d at 229 (quoting *Al George*, 939 F.2d at 1275). Even so, other courts addressing pharmaceutical antitrust claims have taken positions similar to *Niaspan*. See, e.g., *In re Nexium (Esomeprazole) Antitrust Litig.*, 968 F. Supp. 2d 367, 399–400 (D. Mass. 2013) (recognizing that “courts are generally fairly hostile to invocations of the continuing-violation exception in instances where a plaintiff fails to allege that the defendant committed overt act[s] separate and apart from the initial act giving rise to the original injury” but holding that every time plaintiffs purchased the brand product and thus allegedly were “overcharged,” they suffered a new injury); *In re Skelaxin (Metaxalone) Antitrust Litig.*, No. 1:12-md-2343, 2013 WL 2181185, at *29 (E.D. Tenn. May 20, 2013) (“Plaintiffs should be allowed to proceed with their claims because—even if most or all of the overt acts alleged as part of the continuing conspiracy occurred outside the limitations period—Plaintiffs have sufficiently alleged those acts resulted in Plaintiffs being overcharged for metaxalone well into the limitations period.”); accord *In re K-Dur Antitrust Litig.*, 338 F. Supp. 2d 517, 551 (D.N.J. 2004). Notably, the *Skelaxin* court expressly relied on a number of decisions applying the Third Circuit’s wrongheaded rule. 2013 WL 2181185, at *28.

These cases demonstrate that the “continuing violation” exception to the four-year period of repose has begun to gain traction among plaintiffs. Plaintiffs, in the context of nationwide class actions, are reviving claims that are up to eight years old. See, *e.g.*, *In re Skelaxin*, 2013 WL 2181185, at *8 (suit filed over six years after settlement agreement). And, fueled by decisions akin to those in the Third Circuit and the Ninth Circuit decision below, plaintiffs continue to bring stale claims based on pharmaceutical settlement agreements more than four years old at the time of suit. See, *e.g.*, Mem. of Law in Support of Defs’ Mot. to Dismiss the Direct Purchaser Class Pls’ Consolidated Am. Class Action Compl., *In re Aggrenox Antitrust Litig.*, No. 14-md-2516, 2014 WL 4795720 (D. Conn. filed July 15, 2014); Mem. of Law in Support of Defs’ Omnibus Mot. to Dismiss the Direct Purchaser Pls’ and End-Payor Pls’ Consolidated Am. Compls., *In re Solodyn Antitrust Litig.*, No. 1:14-md-2503, Dkt. 111 (D. Mass. filed Nov. 24, 2014). Their arguments echo the broadest reasoning in the decision below—that *not breaching* the agreement (by not launching a generic drug prior to the license date)—is an “act” that can restart the statute of limitations.² See, *e.g.*, End-Payor Class Pls’ Mem. in Opp. to Defs’ Mot. to Dismiss, *In re Aggrenox*, 2014 WL 4795688 (D. Conn. filed Aug. 22, 2014) (“[Generic defendant] has not

² This reasoning also appears in *Oliver v. SD-3C LLC*, which is also before this Court on a petition for a writ of certiorari (No. 14-641). See 14-641 Pet. App. 8a n.5, 751 F.3d 1081, 1087 n.5 (9th Cir. 2014) (“[T]he license itself did not permanently and finally control the acts of Defendants. Defendants could have ceased charging the price-fixed price at any time.” (internal citations and quotation marks omitted)).

entered the market because it is continuously adhering to an agreement not to enter—an agreement that it could have renounced and quit adhering to at any time. . . . [Defendant’s] continuous refusal to enter continually re-sets the statute of limitations.”).

The circuit split over the “continuing violation” exception therefore is causing GPhA and its members real harm every day, as they are forced to litigate stale claims in a number of courts and face demands for billion-dollar sums of treble damages. And even if appellate review were possible before final judgment, circuit precedent makes that avenue likely fruitless. It is this Court that must step in, or else companies like GPhA’s members will face years of unnecessary litigation that the uniform federal statute of limitations is intended to prevent.

C. The Ninth Circuit Decision Is At Odds With This Court’s Precedents

The decision below is at odds with decisions of this Court, which have repeatedly rejected interpretations of the Clayton Act that would effectively eradicate any limitations period. See *Rotella v. Wood*, 528 U.S. 549, 554 (2000) (noting “last predicate act” is “at odds with” the Clayton Act because it can “extend[] the limitations period to many decades, and so beyond any limit that Congress could have contemplated”); *Klehr*, 521 U.S. at 187 (rejecting a RICO exception to § 15b of the Clayton Act that would “create[] a limitations period that . . . can continue indefinitely”).

The Ninth Circuit’s rule, read expansively, is at least as corrosive of the Clayton Act’s statute of

limitations as the one this Court rejected in *Klehr*. There the Court grappled with the meaning of § 15b’s “accrual” language in the context of a civil Racketeering Influenced and Corrupt Organizations Act (“RICO”) claim.³ The Third Circuit had announced a “last predicate act” rule that allowed for successive “accrual” dates, permitting a claim to accrue not only when a plaintiff is injured from a RICO violation, but also whenever the defendant commits another predicate act continuing the pattern of criminal or fraudulent activity. The Court rejected the Third Circuit’s rule because a “series of predicate acts . . . can continue indefinitely” and thereby “conflicts with a basic objective—repose—that underlies limitations periods.” *Klehr*, 521 U.S. at 187. It also was “inconsistent” with the ordinary understanding of the Clayton Act in antitrust actions, wherein “accrual” happens at one, defined point in time: “[W]hen a defendant commits an act that injures a plaintiff’s business.” *Id.* at 188 (quoting *Zenith Radio*, 401 U.S. at 338).

Read expansively, the decision below could allow payments made pursuant to an agreement a plaintiff signed more than four years prior to the suit to restart the statute of limitations every time a payment is made—no matter how far into the future payments go, and no matter how distant in the past the first payment was made and despite the fact that the amount of the payments was set in the original contract. Courts may read its language as allowing a plaintiff to sit on its claim for ten years before

³ There is no RICO-specific statute of limitations, so courts apply the Clayton Act. *Agency Holding Corp. v. Malley-Duff & Assocs., Inc.*, 483 U.S. 143, 156 (1987).

initiating suit, as long as some injury is felt within the limitations period. That is just the kind of situation this Court’s decision in *Klehr* sought to prevent. The reasoning is also at odds with this Court’s recent decision in *Petrella v. Metro-Goldwyn-Mayer, Inc.*, which reinforced the straightforward rule that “[a] claim ordinarily accrues ‘when [a] plaintiff has a complete and present cause of action.’” 134 S. Ct. 1962, 1969 (2014) (quoting *Bay Area Laundry & Dry Cleaning Pension Trust Fund v. Ferbar Corp. of Cal.*, 522 U.S. 192, 201 (1997)). “In other words, the limitations period generally begins to run at the point when ‘the plaintiff can file suit and obtain relief.’” *Id.* (quoting *Bay Area Laundry*, 522 U.S. at 201).

The decision below also undercuts the rule that antitrust plaintiffs “bring their claims *promptly*” in order to test the competitive merits of business practices that were entered in good faith before such practices exert any claimed negative consequences and before the participants develop a justifiable reliance that their conduct is proper. See, e.g., *Areeda & Hovenkamp*, *supra*, ¶ 320a (“especially important” that antitrust challenges be “timely made” to “minimiz[e] the social costs of any antitrust violation but giv[e] the parties repose for conduct that is lawful.”). Even assuming the Ninth Circuit was correct that damages were speculative until Samsung started selling SD cards in 2006—a point petitioners thoroughly refute, Pet. 24–29—Samsung could easily have filed a timely suit within four years of signing the 2003 agreement even if it had waited until it started selling SD cards. Pet. 35. “Diligent” pursuit of private antitrust claims serves the goals of the antitrust laws; dilatory efforts do not. See

Rotella, 528 U.S. at 557 (noting private enforcement of antitrust laws and RICO “share a common congressional objective of encouraging civil litigation to supplement Government efforts to deter and penalize the respectively prohibited practices” and thus encourage “diligent” pursuit of private claims). The rule adopted by the Ninth Circuit is at odds with the purpose of “encouraging potential private plaintiffs diligently to investigate” and instead permits plaintiffs with all the necessary elements of a claim “simply to wait, ‘sleeping on their rights,’” as damages accumulate and witnesses and memories fade. See *Klehr*, 521 U.S. at 187 (quoting *Wilson v. Garcia*, 471 U.S. 261, 271 (1985)).

**D. The Ninth Circuit Decision Erodes The
Purposes Of A Federal Statute Of
Limitations For Antitrust Actions For
Damages**

Congress adopted the statute of limitations to bring uniformity and predictability to the law of repose for antitrust actions. The Ninth Circuit’s decision erodes both of those purposes.

Originally, there was no federal statute of limitations for private antitrust actions for damages. State statutes filled that void but “bred confusion in the computation of the period within which a private suit was required to be brought.” *Greyhound Corp. v. Mt. Hood Stages, Inc.*, 437 U.S. 322, 334 (1978). They created a balkanized landscape of choice-of-law and limitations decisions that engendered gamesmanship and needless litigation. “[T]o eliminate this confusion,” Congress enacted “a uniform period of limitations of four years.” *Id.*

Another goal was predictability in application. Twice, Congress rejected proposed language that would have started the running of the statute not just from the date of accrual, but also from the date a plaintiff discovered or should have discovered the facts giving rise to its claim. See H.R. 7905, 81st Cong., 2d Sess. (1950); S. 1910, 81st Cong., 1st Sess. (1949). Critics of the discovery rule observed that its application would effectively nullify an accrual-based rule. See, e.g., *To Amend the Sherman and Clayton Acts to Provide a Uniform Period of Limitations Within Which Treble-Damage Actions May be Instituted Under the Antitrust Laws: Hearing on S. 1910 Before the Subcomm. of the S. Comm. on the Judiciary*, 81st Cong., 1st Sess. 54 (1949) (statement of Joseph W. Burns, counsel to Am. Potash & Chem. Corp.). One opponent ironically predicted a circuit split over an equitable tolling provision. *A Bill to Amend the Clayton Act With Respect to the Recovery of Triple Damages Under the Antitrust Laws, and For Other Purposes: Hearings on H.R. 7905 and H.R. 8763 Before the Subcomm. on Study of Monopoly Power of the H. Comm. on the Judiciary*, 81st Cong., 2d Sess. 59 (1950) (statement of Walton Hamilton).

The decision below accomplishes just the opposite of Congress's goals. Instead of uniformity, there are now three different paths lower courts have taken to decide whether to revive a stale claim pursuant to the continuing violations exception. Instead of predictability, the Ninth Circuit's decision adds to confusion in the lower courts over when the continuing violations exception may apply. It also uproots settled expectations by re-opening potential antitrust liability for contracts that were executed

long ago, and makes it increasingly difficult for companies to order their affairs to ensure compliance with the antitrust laws. This Court should grant review to restore predictability, and genuine repose, to the antitrust laws.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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* Admitted only in California. Application to the D.C. Bar is pending; practice supervised by William M. Jay.