No. 15-781

In the Supreme Court of the United States

DONALD L. KOCH ET AL., PETITIONERS

v.

SECURITIES AND EXCHANGE COMMISSION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether petitioners' scheme to "mark the close" of certain publicly traded stocks violated Section 10(b) of the Securities Exchange Act of 1934, 15 U.S.C. 78j(b); Rule 10b-5, 17 C.F.R. 240.10b-5; and Section 206 of the Investment Advisers Act of 1940, 15 U.S.C. 80b-6.

2. Whether the court of appeals improperly deferred to legal conclusions of the Securities and Exchange Commission.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-24) is reported at 793 F.3d 147. The order of the Securities and Exchange Commission (Pet. App. 25-105) is available at 2014 WL 1998524.

JURISDICTION

The judgment of the court of appeals was entered on July 14, 2015. A petition for rehearing was denied on September 14, 2015 (Pet. App. 163-164). The petition for a writ of certiorari was filed on December 14, 2015 (a Monday). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

The Securities and Exchange Commission (SEC or Commission) entered an order concluding that peti-

tioners had violated Section 10(b) of the Securities Exchange Act of 1934 (Exchange Act), 15 U.S.C. 78j(b); SEC Rule 10b-5, 17 C.F.R. 240.10b-5; and Section 206 of the Investment Advisers Act of 1940 (Advisers Act), 15 U.S.C. 80b-6, by engaging in a scheme to manipulate stock prices. The SEC barred petitioner Koch from participating in the securities industry in certain capacities and imposed other civil remedies on petitioners. Pet. App. 25-26. Petitioners filed a petition for review in the court of appeals, which denied the petition in relevant part. *Id.* at 23-24.

1. Under Section 10(b) of the Exchange Act, it is unlawful "[t]o use or employ, in connection with the purchase or sale of any security[,] * * * any manipulative or deceptive device or contrivance in contravention of" rules enacted by the Commission. 15 U.S.C. 78j(b). SEC Rule 10b-5 implements Section 10(b) and, as relevant here, makes it unlawful "[t]o employ any device, scheme, or artifice to defraud" or "[t]o engage in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person." 17 C.F.R. 240.10b-5(a) and (c). The Advisers Act prohibits investment advisers from "employ[ing] any device, scheme, or artifice to defraud any client or prospective client" or "engag[ing] in any act, practice, or course of business which is fraudulent, deceptive, or manipulative." 15 U.S.C. 80b-6(1) and (4). The term "manipulative" refers to conduct "intended to mislead investors by artificially affecting market activity." *Santa Fe Indus., Inc.* v. *Green*, 430 U.S. 462, 476 (1977).

The type of manipulative device at issue here is known as "marking the close." See Pet. App. 51-52.

"'Marking the close' is the practice of attempting to influence the closing price of a stock by executing purchase or sale orders at or near the close of the market." *Thomas C. Kocherhans*, Exchange Act Release No. 36556, 60 SEC Docket 2211 (Dec. 6, 1995). "The purchase of a security at the end of the trading day with the purpose of raising its reported price manipulates the market for the security because it conveys false information to the market as to the stock's price level and therefore as to the demand for the stock free of manipulative influences." Pet. App. 52 (brackets and internal quotation marks omitted).

For example, a market participant holding shares of a thinly traded stock might attempt to purchase small quantities of additional shares shortly before the market's close in order to increase the last bid or trading price for the day and, as a result, the reported closing price for the stock. If successful, the trading activity will make the value of the stock or holdings of the stock appear to be higher than it actually was on the relevant day. That could allow the market participant to avoid or reduce margin calls, *e.g.*, *In re U.S. Bancorp Piper Jaffray Inc.*, Exchange Act Release No. 46770, 78 SEC Docket 2321 (Nov. 5, 2002), maintain investor confidence in the stock, cf., *e.g.*, *Markowski* v. *SEC*, 274 F.3d 528, 529 (D.C. Cir. 2011), cert. denied, 537 U.S. 819 (2012), or achieve some other benefit from the artificially elevated stock price. The SEC has long viewed "marking the close" as a manipulative practice under the Exchange Act, Rule 10b-5, and the Advisers Act. "By artificially raising the reported price of [a given] stock at the close of the market," a trader "intentionally interfere[s] with the

factors upon which market value depends." *Kocherhans*, 60 SEC Docket at 2212.

2. In 1992, petitioner Donald L. Koch founded petitioner Koch Asset Management, LLC (KAM), an investment advisory firm, and since that time he has served as its sole investment adviser. Pet. App. 4. After the 2008 market downturn, "Koch's clients became increasingly worried that their investments would decline in value." *Id.* at 5. Koch in turn "worried that his clients would be concerned if their online account information suggested that their accounts were underperforming." *Ibid.*; see *id.* at 30. Accordingly, "[t]o ensure that his clients' accounts appeared to retain their value," he engaged in a scheme to "mark the close" of three over-the-counter stocks—High Country Bancorp, Cheviot Financial Institution, and Carver Bancorp, Inc.—in which he had previously invested client funds. *Id.* at 5.

To execute that scheme, Koch asked an employee of the broker dealer that KAM used to conduct trades how closing prices of the stocks are set. Pet. App. 33. Koch then directed the employee to engage, on the last trading day of September 2009, in trading activity designed to set a high closing price for High Country stock. *Id.* at 9, 32. That conduct successfully produced a closing price for the stock that was significantly higher than the prices at which the stock had been trading in the past or would trade for years to come, thereby inflating the portfolio values on the monthly account statements of Koch's clients by at least $1 million. See *id.* at 9, 32-34; see also Gov't C.A. Br. 10.

At the end of December 2009, Koch directed the brokerage employee to mark the close with respect to

all three stocks, although the employee did not succeed in setting the closing price for Cheviot. See Pet. App. 10-13, 34-44, 57-65. That activity increased the apparent month- and year-end value of the clients' portfolios by more than $500,000. See Gov't C.A. Br. 14. In both instances, Koch told the employee that his objective was to set certain prices at the end of the trading day and instructed him to buy only as many shares as necessary to reach that objective. See Pet. App. 9-13, 32-44. Koch's communications to the brokerage employee reflected an affirmative desire to pay prices higher than those at which the stocks had previously traded, rather than a desire to obtain the stocks at the lowest available prices. See *id.* at 12, 15, 69.

3. After investigating Koch's trading activity, the Commission instituted administrative enforcement proceedings against petitioners. Pet. App. 147-162. An administrative law judge issued an initial decision finding that petitioners had violated the Exchange Act, Rule 10b-5, and the Advisers Act by marking the close for the three stocks. *Id.* at 106-146. After conducting an independent review of the record, the Commission entered a final order concluding that petitioners had engaged in illegal market manipulation. *Id.* at 25-105.

The Commission explained that, under its precedent, liability for "marking the close" requires proof of two elements: that the trader "(i) engaged in conduct evidencing a scheme to mark the close – *i.e.*, trading at or near the close of the market so as to influence the price of a security," and "(ii) acted with scienter, defined as 'a mental state embracing intent to deceive, manipulate, or defraud.'" Pet. App. 52

(quoting *Kirlin Sec. Inc.*, Exchange Act Release No. 61135, 97 SEC Docket 1259 (Dec. 10, 2009) (quoting *Ernst & Ernst* v. *Hochfelder*, 425 U.S. 185, 193 n.12 (1976))). The Commission found that both of those elements were satisfied here.

The Commission first found that petitioners' trading activity was "consistent with a scheme to mark the close." Pet. App. 54; see *id.* at 54-66. The Commission explained, for example, that "[o]n September 30, 2009, KAM purchased 1,980 shares of High Country, the vast majority in the last four minutes of trading." *Id.* at 54. Those "purchases represented 100% of the trading volume in High Country that day and set the closing price for the stock at $23.50." *Ibid.* High Country stock had closed at $18 the previous day, and "for the remainder of 2009 the stock never traded above $20." *Ibid.* The Commission added that petitioners' activity with respect to the High Country and Carver stocks (though not the Cheviot stock) "had the effect of raising the price of the stock." *Id.* at 55; see *id.* at 63. The SEC also made clear, however, that "[a] finding that [petitioners] succeeded in raising the price of the stock is not required to prove a marking-the-close violation," *id.* at 55 n.101, because "a marking-the-close violation is not predicated upon [petitioners'] succeeding in their attempted manipulation," *id.* at 64.

The Commission further found "compelling" evidence that petitioners had acted with the requisite scienter—that is, that the trades were made for "the express purpose of setting a higher closing price." Pet. App. 55; see *id.* at 55-59, 61-62, 64-65. The SEC based that conclusion in part on contemporaneous email exchanges and phone calls between Koch and

the brokerage employee. In December 2009, for example, the "bid-ask spread" for High Country stock was at $7.20 to $7.48, and Koch told the employee: "Let's see if by the end of the day you move it to above 8 – 8, 8 and a quarter." *Id.* at 39; see, *e.g.*, *id.* at 61-62 (concluding that "telephone conversations [in the record] are persuasive direct evidence of [petitioners'] intent to mark the close of Cheviot stock on December 31, 2009"); *id.* at 64 ("Telephone conversations between Koch and [the employee] show that Koch's purpose in purchasing Carver was to set a higher closing price for the stock."). The Commission explained that "the evidence suggests that Koch was motivated to artificially raise the prices of the stocks held by KAM's clients to maintain his reputation as a skilled investment adviser" and to "avoid losing clients' investments." *Id.* at 72.

The Commission rejected petitioners' argument that manipulation could be shown only if "investors were misled" by petitioners' misconduct. Pet. App. 67-68. The Commission explained that, "[b]y engaging in transactions with the market-distorting intent of pushing up the price of the stocks that they were purchasing," petitioners had "convey[ed] false information to investors and market participants." *Ibid.* (internal quotation marks omitted). The Commission further explained that illegal manipulation need not be predicated on fictitious trades; rather, "market manipulation can occur in the context of open market transactions" where, as here, market participants seek to "artificially distort[] the price of the stocks involved" by "not participating in the market to find the best available prices but with the intent to raise the price of the stocks." *Id.* at 69. The Commission

also emphasized that "[t]he finding of manipulation here is not based solely on [petitioners'] intent to manipulate but also their conduct (*i.e.*, end-of-day trades designed to raise the stocks' prices) that furthered that manipulative intent." *Id.* at 70.

The Commission imposed five civil remedies on petitioners for the violations that it found. See Pet. App. 86-101. It censured KAM, *id.* at 86-92; barred Koch from associating with any investment adviser, broker, dealer, municipal securities dealer, municipal adviser, transfer agent, or nationally recognized statistical rating organization, *ibid.*; ordered petitioners to cease and desist from future violations of the relevant antifraud provisions, *id.* at 92-94; ordered disgorgement of $4169.78 in ill-gotten fees, *id.* at 94-99; and imposed on petitioners a civil monetary penalty of $75,000, *id.* at 99-101.

4. Petitioners filed a petition for review of the Commission's order in the court of appeals. The court denied the petition in relevant part. Pet. App. 1-24.

The court of appeals held that, in finding that petitioners had violated the securities laws, "[t]he Commission applied the correct [legal] standard and properly concluded that there is ample evidence Koch manipulated the market by marking the close." Pet. App. 8; see *id.* at 8-17. The court stated that it was "puzzled" by petitioners' claim that the Commission had "failed to find [Koch] had the intent to deceive or manipulate the market * * * because the Commission's order repeatedly made such findings." *Id.* at 13-14 (citing five findings in the Commission's order). The court rejected petitioners' contention that the Commission had "presumed manipulative intent based solely on the fact that [Koch] raised each stock's

price." *Id.* at 14. The court explained that this characterization of the SEC's analysis was demonstrably "[n]ot true" in light of the record evidence of Koch's manipulative intent. *Ibid.*

Petitioners argued that, under *Santa Fe Industries*, they "could not be liable * * * unless the Commission found that [Koch's] trades had a 'market impact.'" Pet. App. 15-16 (quoting Pet. C.A. Br. 46). The court of appeals rejected that argument, stating that "*Santa Fe* says nothing of the sort." *Id.* at 16. That decision, the court explained, established only "that 'manipulation' is a 'term of art' that refers to practices 'intended to mislead investors by artificially affecting market activity.'" *Ibid.* (quoting *Santa Fe Indus.*, 430 U.S. at 476). The court concluded that *Santa Fe Industries* does not "require the SEC to prove actual market impact, as opposed to *intent* to affect the market." *Ibid.* In the alternative, the court further held that, "assuming *arguendo* that *Santa Fe* imposes a market impact requirement, it is met here" because petitioners' scheme "'artificially affect[ed] market activity.'" *Ibid.* (brackets in original) (quoting *Santa Fe Indus.*, 430 U.S. at 476). In support of that alternative rationale, the court noted the Commission's finding that petitioners' scheme had produced "inflated prices" on both the September and December trading dates. *Ibid.*

The court of appeals further explained that, although Koch had "take[n] issue with how the Commission interpreted the evidence before it," Pet. App. 16, the court could not properly "supplant the agency's findings merely by identifying alternative findings that could be supported by substantial evidence," *id.* at 17 (quoting *Arkansas* v. *Oklahoma*, 503 U.S. 91, 113

(1992)). Summarizing its ruling on liability, the court "conclude[d] that the Commission applied the correct legal standard and that there is substantial evidence to support its decision." *Id.* at 17. The court vacated as impermissibly retroactive the portion of the Commission's order that barred Koch's association with municipal advisors and rating organizations, which were not statutorily available remedies at the time that petitioners executed their manipulative scheme. See *id.* at 20-23. In all other respects, it denied the petition for review.

ARGUMENT

The court of appeals correctly upheld the Commission's determination that petitioners had "marked the close" in violation of the Exchange Act, Rule 10b-5, and the Advisers Act. Petitioners contend (Pet. 15-21) that the court of appeals misconstrued this Court's decision in *Santa Fe Industries, Inc.* v. *Green*, 430 U.S. 462 (1977), because the Commission assertedly did not prove that petitioners' scheme had produced "an artificial price or another form of deception in the market place" (Pet. i). Petitioners further contend (Pet. 22-30) that the court of appeals gave unwarranted deference to the SEC's legal conclusions. Both arguments lack merit, and the decision below does not conflict with any decision of this Court or another court of appeals. Further review is not warranted.

1. The court of appeals correctly affirmed the Commission's conclusion that petitioners had violated the Exchange Act, Rule 10b-5, and the Advisers Act through the manipulative device of "marking the close."

a. Both the Exchange Act and the Advisers Act prohibit "manipulative" practices. See p. 2, *supra*.

Congress's basic purpose in outlawing such practices was to preserve "markets where prices may be established by free and honest balancing of investment demand with investment supply." H.R. Rep. No. 1383, 73d Cong., 2d Sess. 10 (1934). Congress thus intended to proscribe the "full range of ingenious devices that might be used to manipulate securities prices." *Santa Fe Indus.*, 430 U.S. at 477.

In accordance with that objective, this Court has held that a market transaction is manipulative if it is "intended to mislead investors by artificially affecting market activity." *Santa Fe Indus.*, 430 U.S. at 476; see *Ernst & Ernst* v. *Hochfelder*, 425 U.S. 185, 199 (1976) ("intentional or willful conduct designed to deceive or defraud investors by controlling or artificially affecting the price of securities"). Courts of appeals have held that practices are manipulative if they are "aimed at deceiving investors as to how other market participants have valued a security," *ATSI Communications, Inc.* v. *Shaar Fund, Ltd.*, 493 F.3d 87, 100 (2d Cir. 2007), or if they "creat[e] a false impression of supply and demand for [a] security," *GFL Advantage Fund, Ltd.* v. *Colkitt*, 272 F.3d 189, 207 (3d Cir. 2001), cert. denied, 536 U.S. 923 (2002).

In this case, the Commission explained that "marking the close" is an illegal manipulative practice and a means of deception because it distorts the "unimpeded interaction of real supply and real demand." Pet. App. 68. When a trader marks the close, he deliberately seeks to engineer a closing price different from the price that the forces of supply and demand would naturally produce. The trader exploits the facts that stocks in a fluid market must be valued at specific moments in time, and that closing prices for particular

days (such as the last day of a month, quarter, or calendar year) are reported to investors and commonly treated as important indicia of a stock's value, to induce investors to attach unwarranted significance to what is in fact an atypical trading price. "By artificially raising the reported price of [a given] stock at the close of the market," a trader "intentionally interfere[s] with the factors upon which market value depends" and "convey[s] false information to the market as to the stock's price level and therefore as to the demand for the stock free of manipulative influences." *Thomas C. Kocherhans*, Exchange Act Release No. 36556, 60 SEC Docket 2211 (Dec. 6, 1995). "Marking the close" therefore constitutes a manipulative device in violation of the Exchange Act, Rule 10b-5, and the Advisers Act.

b. Ample record evidence, including contemporaneous emails and telephone calls, established that petitioners intentionally marked the close with respect to stock in High Country, Cheviot, and Carver. See Pet. App. 8-17, 32-44, 54-66. In September 2009, for example, petitioners' trades caused High Country shares to close at $23.50, even though the stock had closed at $18 the previous day and "for the remainder of 2009 * * * never traded above $20." *Id.* at 54. The trades were prompted by an email from Koch to the brokerage employee instructing him "to attempt to raise the price of the stock 'right before' the close of the market." *Id.* at 57 (Commission order quoting email from Koch).

Similarly in December 2009, Koch instructed the brokerage employee "'to buy [High Country stock] 30 minutes to an hour before the close of market for the year,' explaining that [Koch] 'would like to get a clos-

ing price [for High Country] in the 20-25 range, but certainly above 20.'" Pet. App. 58 (Commission order quoting email from Koch) (brackets in original). Similar evidence supported the Commission's conclusions with respect to the trades in Cheviot and Carver stock. See *id.* at 8-13, 31-44, 54-66. By artificially raising the closing prices of High Country and Carver stock, the September and December trades increased the stated account values in the monthly and year-end statements of Koch's clients by $1,000,000 in September 2009 and $500,000 in December 2009. See Gov't C.A. Br. 10, 14.

The evidence before the Commission thus showed that petitioners "entered the market with the intent of raising the price of the securities they were purchasing, which is directly contrary to the intent of a purchaser who is *not* trying to manipulate the market, namely, acquiring the securities at the best available price." Pet. App. 67. That is compelling evidence that Koch directed the trades "for the exclusive purpose of setting a higher closing price," *id.* at 55, "in order to maintain his reputation and avoid losing clients' investments," *id.* at 72. Consistent with their position in this Court, see Pet. 7-8, petitioners argued below that Koch's trading activity reflected "an honest attempt to deal with a small and illiquid market," Pet. App. 16. But the court of appeals correctly recognized that, even if the evidence before the Commission was subject to plausible alternative explanations as well, the court's role with respect to pertinent factual issues was simply to determine whether the SEC's findings were supported by substantial evidence. *Id.* at 16-17. Petitioners make no effort to refute the court's conclusion (*id.* at 17) that the agency's findings satisfied

that standard. In any event, the court's factbound evaluation of the record evidence does not warrant this Court's review.

2. Petitioners contend (Pet. 15-21) that, in order to establish petitioners' liability under the Exchange Act, Rule 10b-5, and the Advisers Act, the Commission was required to prove that their scheme produced "an artificial price or another form of deception in the market place." Pet. i. Petitioners' argument is not entirely clear, but in any event it provides no basis for further review.

a. Petitioners' principal argument appears to be that the type of stock-price manipulation at issue here—timing trades around the close of a market to create a misleading impression about the value of the stock at the close of trading—does not fall within the scope of the relevant antifraud statutes because it is not the sort of "wrongful conduct" (Pet. 16) that produces "artificial" prices. Petitioners cite (Pet. 15-17) *Santa Fe Industries* and other decisions in which this Court has identified other types of wrongful conduct that violate the antifraud statues.

None of those decisions, however, provides a sound basis to conclude that petitioners' conduct did not constitute a manipulative practice. The cited decisions did not set forth any principles that would exclude marking the close from the scope of the antifraud statutes. To the contrary, as discussed above, this Court held in *Santa Fe Industries* that the term "manipulative" in Section 10(b) encompasses the "*full range* of ingenious devices that might be used to manipulate securities prices." 430 U.S. at 477 (emphasis added). Like the conduct in the cases cited by petitioners, a scheme to "mark the close" amounts to

"impermissible, prohibited fraud" (Pet. 17) because the trader seeks to convey to the market a false impression of the value or typical trading price of the relevant stocks. Such activity misleads investors who rely on the market to set prices based on the natural forces of supply and demand. See pp. 2-4, 11-12, *supra*. Petitioners cite no decision rejecting the view that such conduct is "manipulative" within the meaning of the pertinent statutory provisions.

b. The court of appeals understood petitioners to argue that they could be liable only if the Commission proved that their scheme produced an actual effect on stock prices, see Pet. App. 15-16, and passages in their certiorari petition appear to argue that liability requires a "material market impact" (Pet. 15). This case would be an unsuitable vehicle for the Court to decide whether such an impact is necessary, however, because the court of appeals correctly held in the alternative that the Commission had established a market impact here. See Pet. App. 16. The Commission found that petitioners' trades in High Country and Carver stock "had the effect of raising the stock's price" (although petitioners failed in their attempt to artificially inflate the price of the Cheviot stock). *Id.* at 55; see *id.* at 63; see also *id.* at 16 (noting Commission's finding of "inflated prices Koch achieved on September 30 and December 31").

In any event, proof of an impact on prices is not required to establish a violation of the relevant antifraud prohibitions. As the Commission explained, "a marking-the-close violation is not predicated on [petitioners'] succeeding in their attempted manipulation." Pet. App. 64. Rather, it has long been understood that an "attempted manipulation is as actionable as a suc-

cessful one," *SEC* v. *Martino*, 255 F. Supp. 2d 268, 287 (S.D.N.Y. 2003), remanded on other grounds, 94 Fed. Appx. 871 (2d Cir. 2004), because the "statutory phrase 'any manipulative or deceptive device,'" is "broad enough to encompass conduct irrespective of its outcome," *Kuehnert* v. *Texstar Corp.*, 412 F.2d 700, 704 (5th Cir. 1969).

The Court in *Santa Fe Industries* explained that the term "manipulative" refers to all practices "that are intended to mislead investors by artificially affecting market activity." 430 U.S. at 476. The court of appeals in this case focused on that sentence in *Santa Fe Industries* and correctly explained that "[t]he Court did not, by this language, require the SEC to prove actual market impact, as opposed to *intent* to affect the market, before finding liability for manipulative trading practices." Pet. App. 16. Although the court did not suggest that "only intent is necessary to violate the two antifraud statutes" (Pet. 19), it correctly held that a trader is not absolved of liability for employing a manipulative or deceptive device in connection with a securities transaction simply because his conduct does not succeed in changing a stock's closing price.[*]

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[*] Petitioners rely (Pet. 15-16) on a passage in *Santa Fe Industries* discussing the requirement that the plaintiff in a private securities-fraud action must "suffer[] an injury as a result of deceptive practices." Pet. 15 (quoting *Santa Fe Indus.*, 430 U.S. at 476). That element of a private cause of action does not apply to an enforcement action by the Commission. See *Graham* v. *SEC*, 222 F.3d 994, 1001 n.15 (D.C. Cir. 2000) ("[U]nlike a plaintiff in a private damages action, the SEC need not prove actual harm."); see also *Schellenbach* v. *SEC*, 989 F.2d 907, 913 (7th Cir. 1993) ("An action brought by the Commission, * * * unlike a private damage suit, need not include proof of harm.").

c. The court of appeals' determination that petitioners' scheme to mark the close violated the securities laws does not conflict with any decision of another court of appeals. Petitioners cite (Pet. 19-21) decisions from other circuits that they characterize as holding that "deception must be injected into the trading market to violate" the relevant antifraud provisions. Pet. 19-20. Those decisions do not support petitioners' position, however, because they additionally hold that manipulation can be established by activity that "creat[es] a false impression of supply and demand for the security." *GFL Advantage Fund*, 272 F.3d at 207. That understanding of manipulative practices is fully consistent with the decision below. The court of appeals found that petitioners had orchestrated transactions that did not reflect the true interplay of supply and demand. Rather, petitioners sought to engineer artificially high closing prices for the relevant stocks at the end of particular intervals, with the objective of inflating clients' monthly account statements and thereby misleading the clients as to the true value of their holdings.

Petitioners cite (Pet. 19-20) circuit precedents for the proposition that "moving the price" of a stock "is insufficient to establish deception." But that proposition is not disputed, and the cited decisions likewise strongly support the court of appeals' analysis in this case. In *ATSI Communications*, *supra*, for example, the Second Circuit merely affirmed the dismissal of a complaint in which the plaintiff did not "allege what the defendants did—beyond simply mentioning common types of manipulative activity"—to cause the decline in stock price on which they relied as evidence of manipulation. 493 F.3d at 103-104. Although the

Second Circuit found the plaintiff's own conclusory allegation to be insufficient, it recognized that a manipulation claim can be proved by "showing that an alleged manipulator engaged in market activity aimed at deceiving investors as to how *other market participants have valued a security*." *Id.* at 100 (emphasis added). The court explained that, in such a case, "[t]he deception arises from the fact that investors are misled to believe 'that prices at which they purchase and sell securities are determined by the natural interplay of supply and demand.'" *Ibid.* (quoting *Gurary* v. *Winehouse*, 190 F.3d 37, 45 (2d Cir. 1999)). That language describes the scheme that the SEC found in this case, in which petitioners exploited the close of the market to create a misleading impression concerning investors' valuation of the three stocks.

3. Petitioners further contend (Pet. 22-37) that the court of appeals incorrectly gave "total deference" to the Commission, Pet. 14, and "adopted the agency['s] legal conclusions without analysis," Pet. 22, particularly with respect to the court's interpretation of *Santa Fe Industries*. But the court of appeals did not state that it was affording any deference to the Commission's legal conclusions, and it did not invoke *Chevron* deference in holding that petitioners' conduct had violated the antifraud statutes and Rule 10b-5. In particular, the court rejected petitioners' interpretation of *Santa Fe Industries* without adverting to any analysis by the Commission. See Pet. App. 16 ("*Santa Fe* says nothing of the sort.").

The court of appeals did recognize that, under the familiar "substantial evidence" standard of review, the Commission's *factual* findings—including the agency's findings about Koch's intent in executing the relevant

trades—were not subject to de novo reexamination by a reviewing court. See Pet. App. 16-17. The court conspicuously declined, however, to give comparable deference to the SEC's *legal* conclusions concerning the necessary elements of a claim of unlawful manipulation. See *id.* at 17 ("We conclude that the Commission applied the correct legal standard and that there is substantial evidence to support its decision."). The asserted circuit conflict that petitioners describe concerning the deference owed to the SEC's legal conclusions in administrative enforcement proceedings (Pet. 24-28, 35-37) therefore has no bearing on this case.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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FEBRUARY 2016