No. 16-545

IN THE

Supreme Court of the United States

BANK OF AMERICA CORPORATION, ET AL.,

Petitioners,

v.

ELLEN GELBOIM, ET AL.,

Respondents.

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

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Can the victims of a price-fixing conspiracy—those who pay or receive the fixed prices—show antitrust injury in a suit against the price fixers?

2. Did plaintiffs plausibly allege a conspiracy among the defendants under the particular facts of this case?

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BRIEF IN OPPOSITION

This case arises from an ongoing multi-district litigation consolidating claims brought by many different plaintiffs regarding an alleged conspiracy among the defendant banks to suppress the London Interbank Offered Rate (LIBOR). The plaintiffs (respondents here) range from individual holders of LIBOR-based bonds to large-scale institutional investors conducting LIBOR-denominated interest-rate swaps to purchasers of Euro-dollars futures contracts that settled based on LIBOR. Although there are differences among these plaintiffs and their claims, for present purposes they all assert the same, simple antitrust theory: that they were paid less because the banks conspired to suppress a price component in the LIBOR-based financial instruments they held. In the simplest terms, the plaintiffs are price-fixing victims bringing a classic price-fixing claim against the price-fixers under the Sherman Act. The Second Circuit thus correctly described plaintiffs' theory of antitrust injury as "uncomplicated," Pet. App. 15; the leading treatise calls cases like this one "easy," 2 Phillip E. Areeda & Herbert Hovenkamp, Antitrust Law ¶391b (4th ed. 2016); and that treatise's author and other leading antitrust experts appeared as *amici* in this case to urge the very result the Second Circuit unanimously reached below.

Indeed, the district court's holding that these plaintiffs could not assert antitrust injury was the outlier, and the Second Circuit's reversal brought this case in line with every applicable Supreme Court and appellate precedent. This explains why petitioners make no serious suggestion of a circuit split. Instead,

they argue that the antitrust-injury decision below was simply wrong, relying almost entirely on a case from this Court that (a) does not mention the words "antitrust injury"; (b) does not appear in the Second Circuit's decision; and (c) was barely even mentioned in petitioners' own briefing below. *See NYNEX Corp. v. Discon, Inc.*, 525 U.S. 128 (1998). As the plaintiffs have consistently highlighted, petitioners have yet to cite *a single case* holding that a plaintiff who pays or receives a collusively fixed price nonetheless lacks antitrust injury—a startling hole that remains in their petition here. The first question presented thus seeks splitless error correction without a whiff of error, asking this Court to go where *no court* has gone before.

The case for certiorari is even weaker, however, when it comes to petitioners' second, *Twombly*-related question. On this plainly fact-bound issue, the Second Circuit applied the firmly established plausibility standard and held that while "[c]lose cases abound on this issue … this is not one of them." Pet. App. 36. The decision below in fact identified "numerous allegations" in the complaints that "clear the bar of plausibility," including allegations of a "common motive to conspire" and a "high number" of concrete, inappropriate, inter-firm communications. As the recitation of this evidence in the Second Circuit's decision and the background section below makes clear, if this case does not clear the *Twombly* bar for pleading-stage plausibility, no case does.

To find otherwise, this Court would have to wade through the separate, highly detailed complaints of multiple sets of plaintiffs, amounting to thousands of pages of allegations. That exercise would not only be

burdensome, but also pointless: Even if this Court found the complaints insufficient (which they are not), they are all still subject to a liberal amendment standard below to add additional allegations. And new facts are emerging every day about defendants' long-running conspiracy. The Second Circuit was clearly correct: This case was not even close under *Twombly* and manages to become even less close with every new revelation.

Moreover, this case is poorly postured for this Court's review. It is interlocutory in the strongest possible sense: *No* possible merits decision from this Court could bring the case to a close. Instead, the MDL will continue forward on multiple, non-antitrust issues no matter what. Meanwhile, the banks are now pressing other grounds for dismissal below—including antitrust standing arguments—which could moot any decision from this Court on antitrust injury. Class certification is likewise moving forward, with expert reports due February 2017 and briefing beginning May 2017, bringing actual facts to bear on questions now presented purely as pleading issues. And multiple defendants have begun to settle these claims, raising the specter of this Court losing jurisdiction mid-stream.

This case thus presents not only two uncertworthy questions, but a bad vehicle to boot—one in which neither side's position has any chance of proving dispositive, and this Court's intervention is unlikely to develop the applicable law. Certiorari should be denied.

STATEMENT OF THE CASE

I. Background on LIBOR and the BBA

The defendants in this case are banks, all of which belonged to the British Bankers' Association (BBA). The BBA has no regulatory function or governmental oversight. Instead, it is a purely private association of horizontal competitors (that is, firms that compete directly in the same markets). Bondholders' Compl. ¶5, C.A. J.A. 203; Philadelphia Compl. ¶¶45-46, C.A. J.A. 1408.

In 1986, the BBA began publishing LIBOR as a benchmark rate intended to reflect competitive prices for funding loans in the interbank lending market in London. Bondholders' Compl. C.A. J.A. ¶¶5, 83, C.A. J.A. 203, 243; Philadelphia Compl. ¶¶38, 53, C.A. J.A. 1405, 1411. The process for setting LIBOR works as follows. Each business day, a panel of sixteen banks answers the question: "At what rate could you borrow funds, were you to do so by asking for and then accepting inter-bank offers in a reasonable market size just prior to 11 a.m.?" LIBOR is calculated as the mean of the middle eight submissions. Bondholders' Compl. ¶¶6-7, C.A. J.A. 203-05. There are different panels for different currencies; petitioners/defendants here are among the sixteen panel-member banks whose survey answers determined the US Dollar LIBOR benchmark.

The LIBOR benchmark was not simply used for informational purposes but was a component of price under the terms of countless financial instruments—including financial instruments issued and/or sold by the petitioners themselves, and over which

defendants otherwise competed. Put otherwise, LIBOR determined the amount of money petitioners paid out and respondents received under the terms of financial instruments petitioners regularly issued. For example, issuers of floating-rate debt commonly set the interest-rate terms in their instruments as a spread over LIBOR (i.e., LIBOR + X basis points); that LIBOR-denominated term is effectively the "price" to borrow money under such a bond or loan. LIBOR is also incorporated into Eurodollar futures contracts as the determinative settlement price term, and LIBOR determines the return on derivatives agreements such as interest-rate swaps, where a party pays a fixed rate and receives back a floating rate tied to LIBOR. *See, e.g.*, Exch. Compl. ¶¶11, 204-06, C.A. J.A. 294, 383-84; Philadelphia Compl. ¶¶6-7, C.A. J.A. 1396.

LIBOR's privileged status as a widely used component of price in financial instruments stemmed from three key rules designed to ensure the integrity of the LIBOR-setting process—that is, to ensure that LIBOR in fact reflected competitive conditions in the interbank lending markets. The essence of the plaintiffs' complaints is that the banks secretly conspired to violate these rules and manipulate LIBOR, turning it from a benchmark that accurately represented competitive forces of supply and demand in interbank lending into a tool for fixing prices.

First, the BBA's rules required each panel-member bank to truthfully report its projected borrowing costs based solely on its own assessment of the London interbank lending market. Baltimore Compl. ¶¶59-60, C.A. J.A. 1033-34; Second Exch. Compl. ¶65, C.A. J.A. 1200-01. As several defendants

acknowledged in recent non-prosecution agreements with the United States, panel-member banks were thus forbidden from misstating their costs. Philadelphia Compl. ¶¶38-39, C.A. J.A. 1405. This rule was meant to ensure that LIBOR reflected the actual price of borrowing through competition, rather than manipulated prices set through collusion. *Id.* ¶38.

Second, the BBA mandated that panel-member banks' submissions remain independent and confidential until after LIBOR was calculated and published each day. Exch. Compl. ¶53, C.A. J.A. 304. As several of the respondents have admitted, under the LIBOR rules, "from at least 2005 to the present, each Contributor Panel bank must submit its rate without reference to rates contributed by other Contributor Panel banks." Baltimore Compl. ¶61, C.A. J.A. 1034. This rule served an obvious but critical purpose: It prevented collusion by ensuring that the banks could not coordinate their LIBOR submissions through advance circulation.

Finally, the BBA required transparency by simultaneously publishing all the confidential submissions after the benchmark-setting process was completed each day. Exch. Compl. ¶6, C.A. J.A. 292. This rule was meant to prevent banks from individually misusing the LIBOR process, and to backstop the other two requirements, by making "the process and the individual panel bank submissions transparent on an ex post basis, to the capital markets and the panel banks themselves." Philadelphia Compl. ¶41, C.A. J.A. 1406. Accordingly, a single bank that tried to move LIBOR by submitting artificial "rates that were noticeably

lower than the other panel banks would … risk attention from the media or government regulators that could lead to exposure of its illicit submissions." *Id.* ¶195, C.A. J.A. 1460. This created a powerful incentive against unilateral efforts to manipulate LIBOR: In the absence of collusion, a panel-member bank could expect to be caught red-handed making anomalous submissions, which could result in that bank getting banned from the LIBOR-setting process. *See* Baltimore Compl. ¶75, C.A. J.A. 1039.

II. The Conspiracy to Fix LIBOR

Respondents' complaints, which total many hundreds of pages, contained numerous allegations that the banks flagrantly violated the BBA rules designed to ensure LIBOR's integrity and instead colluded to suppress LIBOR.

One critical aspect of those pleadings was evidence of the banks' clear motive to jointly suppress LIBOR in concert. The LIBOR panel banks are horizontal competitors in the market for financial instruments expressly tied to LIBOR. Baltimore Compl. ¶346, C.A. J.A. 1161. For example, the banks issue LIBOR-based bonds in exchange for cash, borrowing the money at a price (i.e., a total amount of interest) determined explicitly by reference to LIBOR. Bondholders' Compl. ¶¶1, 167, C.A. J.A. 201, 277. Additionally, in many swap transactions, the bank receives a fixed income stream in exchange for a variable stream that is tied to LIBOR. Philadelphia Compl. ¶¶6-8, C.A. J.A. 1396-97. In all these kinds of transactions, the defendant banks compete to borrow money or purchase income streams as cheaply as possible.

The banks thus had a direct financial interest in suppressing LIBOR: As borrowers or purchasers paying a LIBOR-denominated floating rate, the banks had a substantial interest in keeping LIBOR down. Bondholders' Compl. ¶11, C.A. J.A. 206. During the relevant period—stretching from no later than August 2007 to at least May 2010—the banks earned billions of dollars in net interest revenue, and a rate increase of just one percent would have cost many of the defendant banks several hundreds of millions of dollars each. *See, e.g.*, *id*. ¶69, C.A. J.A. 239-40.

Meanwhile, the financial crisis created a second incentive to suppress LIBOR: If the banks had accurately reported their interbank borrowing costs during that period, it would have signaled their poor financial condition to the markets, leading to further increases in their borrowing costs, and the risk of even-more-serious consequences like those that took down Lehman Brothers. The banks' LIBOR submissions were a critical, publicly scrutinized barometer of their health during the financial crisis. *See* Philadelphia Compl. ¶¶191-96, C.A. J.A. 1458-60; Baltimore Compl. ¶¶67-77, C.A. J.A. 1035-40.

By working together to submit suppressed LIBOR bids, however, the defendants could inflate their apparent creditworthiness and deflate their borrowing costs. Bondholders' Compl. ¶¶11, 68-69, C.A. J.A. 206, 238-40; Philadelphia Compl. ¶¶186-96, C.A. J.A. 1457-60. Indeed, various respondents have *admitted* acting on precisely these motives in government investigations that have been conducted into their inappropriate behavior surrounding the LIBOR benchmarks. *Id.* ¶¶192-94, C.A. J.A. 1459.

For example, as the Second Circuit emphasized, when a panel bank was asked by the Wall Street Journal why its LIBOR submissions were inaccurate and suppressed, a senior manager wrote internally that "the answer would be because ***the whole street was doing the same and because we did not want to be an outlier in the libor fixings, just like everybody else***." Pet. App. 37, n.19.

As the complaints allege, the banks needed to collude to suppress LIBOR; if any one bank had tried to suppress LIBOR on its own, without coordination, it would have risked sticking out from the others, drawing exactly the media and financial-market scrutiny the banks were seeking to avoid. In the words of one manager who oversaw his bank's falsification of LIBOR submissions: "[I]n the current environment no bank can be seen as an outlier. The submissions of all banks are published and we could not afford to be significantly away from the pack." *Id.* ¶195, C.A. J.A. 1460. The complaints allege that the banks managed to avoid the danger of sticking out from the "pack" by violating the BBA's rules and sharing their supposedly confidential LIBOR submissions in advance, enabling them to submit suppressed but coordinated LIBOR quotes to keep their credit outlook up and their borrowing costs down. Bondholders' Compl. ¶¶10-11, 44-47, C.A. J.A. 206, 213-17.

In addition to the evidence of motive and opportunity above, the complaints identified two other categories of evidence establishing this LIBOR-fixing conspiracy.

First, the complaints exhaustively recount the results of numerous governmental investigations into

the banks' collusive LIBOR-fixing scheme. Among these are settlements that continue to yield *billions* in penalties paid to antitrust enforcement authorities and other regulators around the world, as well as further information (and admissions) from defendants about their egregious misconduct. *See, e.g.*, Philadelphia Compl. ¶¶94-184, C.A. J.A. 1424-57; Ben Protess et al., *Deutsche Bank to Pay $2.5 Billion Fine to Settle Rate-Rigging Case*, N.Y. Times (Apr. 23, 2015), http://www.nytimes.com/2015/04/24/business/dealbook/deutsche-bank-settlement-rates.html. These include price-fixing allegations in which the U.S. Department of Justice charged that LIBOR is a "key price component" in defendants' LIBOR-based financial instruments. Baltimore Compl. ¶¶122-25, C.A. J.A. 1057-58 (quoting Criminal Information).

Among other revelations in these various criminal and regulatory investigations were chat messages and emails among bank employees—cited in the complaints—acknowledging that a "pack" or "cartel" of banks was suppressing LIBOR. One bank employee gloated: "It's just amazing how LIBOR fixing can make you that much money … It's a cartel now in London." Philadelphia Compl. ¶140, C.A. J.A. 1441. Bank employees likewise recognized that LIBOR was "a made up number," and that "the whole street was doing the same" thing to keep the entire "pack" of banks' submissions at artificially low rates. *Id.* ¶127, C.A. J.A. 1436. A senior LIBOR submitter at Barclays recognized that the rates he was being asked to submit were "dishonest by definition" and "nowhere near the clearing rates for unsecured cash." Baltimore Compl. ¶86a, C.A. J.A. 1043. Barclays, in

turn, was among the banks that admitted to the Justice Department that it made false submissions during the relevant period at the direction of senior management because it believed it would suffer a competitive disadvantage if it did not join the conspiracy. *Id.* ¶85, C.A. J.A. 1042. One Barclays manager even candidly conceded that Barclays was "guilty" of being part of a "pack" that suppressed LIBOR: "[T]o the extent that, um, the LIBORs have been understated, are we guilty of being part of the pack? You could say we are." *Id.* ¶104, C.A. J.A. 1427.

The complaints also cited evidence from the government investigations that the banks violated the BBA's independence and confidentiality rules by coordinating their LIBOR submissions. For example, the U.S. Commodity Futures Trading Commission found that, after Barclays was savaged in the financial press for its relatively high LIBOR submissions, "Senior Barclay's Treasury managers provided the submitters with the general guidance that Barclays's submitted rates should be within ten basis points of the submissions by the *other* U.S. Dollar panel banks." *Id.* ¶100, C.A. J.A. 1426 (emphasis added). But there was no way for Barclays to stay "within ten basis points" of other banks' submissions unless Barclays knew in advance—in violation of the independence and confidentiality rules—where the other banks would submit on a particular day. *Id.* ¶¶100-03, 114, C.A. J.A. 1425-27, 1431. Similarly, UBS managers directed its LIBOR submitters to stay in "the middle of the pack," Second Exch. Compl. ¶104, C.A. J.A.1235—a directive impossible to accomplish unless the UBS LIBOR

submitters knew in advance where the "pack" would report LIBOR on a given day. This is strong evidence of a coordinated effort to violate the BBA's rules in order to suppress LIBOR.

Another example of direct collusion comes from an episode at Barclays described in the investigating agencies' settlement documents, and cited in detail in the complaints below. On November 29, 2007, each bank substantially increased its LIBOR submission, causing LIBOR to spike. Barclays' submitter initially planned to submit a rate of 5.50, but was overruled by a senior executive on a conference call because "this would have been 20 basis points above the next highest submission." Baltimore Compl. ¶108, C.A. J.A. 1052 (quoting FSA findings). A review of the banks' one-month LIBOR submissions that day—information made public only later—confirmed that 5.50 was, indeed, exactly 20 points higher than the next-highest submission. It is thus clear that Barclays knew what the next-highest submission would be, which is possible only if it knew *every* other panel-bank submission in advance. *Id.* ¶109, C.A. J.A. 1052. And Barclays plainly used that information to adjust its own submission and come in lower than a truthful report would have required, *id.*, which is exactly the kind of coordinated price manipulation that the BBA rules (and the antitrust laws) are supposed to prevent.

Finally, the complaints also contain extremely detailed statistical analyses that corroborate their conspiracy allegations—taking them well beyond conclusory allegations of a conspiracy or the like. One striking example is that, historically, LIBOR moved in virtual lockstep with the Federal Reserve

Eurodollar Deposit Rate (FRED)—a broader market survey of lending costs to banks for Eurodollar deposits—with LIBOR consistently just above FRED. Bondholders' Compl. ¶¶41-44, C.A. J.A. 212-13. However, the start of the conspiracy in August 2007 marked a striking divergence between LIBOR and FRED, with the spread turning suddenly negative and remaining that way for several years. *Id.* ¶¶44-48, 52, C.A. J.A. 213-18. The spread returned to normal only around October 2011—immediately after the European Commission raided banks in its LIBOR investigation. *See id.* ¶44 n.21, C.A. J.A. 213.

The detailed statistical analysis also supports the allegations in the complaints about the banks' collusive violation of the BBA's independence and confidentiality rules. For example, those analyses show that UBS's LIBOR submitters were uncannily able to comply with the directive to stay in the "middle of the pack"—actually submitting daily rates that were *identical* to the subsequently published, average LIBOR benchmark for over 200 business days in a row. *Id.* ¶109, C.A. J.A. 1236. Even at the pleading stage, plaintiffs submitted expert analyses in their complaints to show a *less than 1% chance* that UBS could have submitted *exactly* the published LIBOR rate for such a long period of time by looking only to the previous day's published LIBOR submissions, without advance knowledge of the supposedly confidential LIBOR submissions of the other banks. *See id.* ¶110, C.A. J.A. 1237 (expert analyses so finding). Clearly, such evidence makes it plausible that the banks were coordinating their LIBOR submissions during this period to achieve their anticompetitive motives. Pet. App. 38.

The complaints also contain several other corroborative analyses that support the collusive suppression of LIBOR. *See* Bondholders' Compl. ¶¶36-111, C.A. J.A. 210-58. Although it exceeds the scope of this opposition (and the opinion below) to walk through each of these analyses in detail, finding *against* the plaintiffs on *Twombly* grounds would of course require this Court to scrutinize *all* the allegations of *all* the many complaints.

III. Respondents' Antitrust Injuries

The defendants' conspiracy to suppress the LIBOR benchmark by making coordinated, lower LIBOR submissions caused a straightforward antitrust injury to the plaintiffs. These plaintiffs purchased and/or held financial instruments in which LIBOR is a component of price. Defendants' collusive suppression of LIBOR thus fixed the prices in the plaintiffs' LIBOR-based transactions at non-competitive levels, depriving the plaintiffs of money by causing them to receive less and/or pay more. Exch. Compl. ¶¶14-15, C.A. J.A. 295-96; Bondholders' Compl. ¶¶173-75, C.A. J.A. 278-79. This is the most basic possible antitrust injury imaginable: Respondents paid more or received less than they otherwise would have because of the banks' collusion to suppress LIBOR. Put otherwise, the plaintiffs' asserted antitrust injury was that they lost money as the victims of "a horizontal price-fixing conspiracy, 'perhaps the paradigm of an unreasonable restraint of trade.'" Pet. App. 15 (quoting *NCAA v. Bd. of Regents of Univ. of Okla.*, 468 U.S. 85, 100 (1984)).

IV. Decisions Below

The district court agreed with the banks' theory that, because LIBOR-setting is not itself a competitive process, coordinated suppression of LIBOR could never give rise to antitrust injury. Pet. App. 66. In a subsequent decision, it held that no plaintiff had even plausibly alleged a conspiracy under *Twombly*. *See In re LIBOR-Based Fin. Instruments Antitrust Litig.*, No. 11-MDL-2262-NRB, 2015 WL 4634541, at *41-44 (S.D.N.Y. Aug. 4, 2015). A unanimous panel of the Second Circuit reversed both determinations.

On the issue of antitrust injury, the court of appeals recognized that respondents had pleaded an "uncomplicated" price-fixing case, alleging that "the Banks, as sellers, colluded to depress LIBOR, and thereby increased the costs to [respondents], as buyers, of various LIBOR-based financial instruments, a cost increase reflected in reduced rates of return." Pet. App. 15. In response to defendants' argument that "LIBOR is not itself a price," the court observed that "LIBOR forms a component of the return from various LIBOR-denominated financial instruments, and the fixing of a component of price violates the antitrust laws." *Id.* (citing *Catalano, Inc. v. Target Sales, Inc.*, 446 U.S. 643, 648 (1980); *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 222 (1940)).

Recognizing that price-fixing conspiracies among horizontal competitors are "unlawful per se, that is without further inquiry," Pet. App. 16, the Second Circuit rejected the notion that the "unfamiliar context" of LIBOR warranted a novel departure from this long-settled rule, relying on this Court's nearly

identical holding in *Arizona v. Maricopa County Medical Society*, 457 U.S. 332 (1982). *See id.* at 349 ("We are equally unpersuaded by the argument that we should not apply the *per se* rule in this case because the judiciary has little antitrust experience in the health care industry. The argument quite obviously is inconsistent with *Socony–Vacuum*. In unequivocal terms, we stated that, '[w]hatever may be its peculiar problems and characteristics, the Sherman Act, so far as price-fixing agreements are concerned, establishes one uniform rule applicable to all industries alike.'" (alteration in original) (quoting *Socony–Vacuum*, 310 U.S. at 222)).

The Second Circuit noted that where buyers or sellers on the opposite side of the market from defendants allege that, due to defendants' conspiracy, they "must pay prices that no longer reflect ordinary market conditions, they suffer 'injury of the type the antitrust laws were intended to prevent and that flows from that which makes defendants' acts unlawful,'" a quintessential antitrust injury. Pet. App. 18 (citing, e.g., *Brunswick Corp. v. Pueblo Bowl–O–Mat, Inc.*, 429 U.S. 477, 489 (1977)).

The Second Circuit also addressed the banks' argument that plaintiffs "remained free to negotiate the interest rates attached to particular financial instruments," noting that "'[a]ny combination which tampers with price structures is engaged in an unlawful activity," a conclusion that has been "settled by Supreme Court precedents beginning with *Socony-Vacuum*, the 'seminal case' holding that horizontal 'price fixing remains *per se* unlawful.'" Pet. App. 19, 20. *Socony-Vacuum* itself was a case, like this one, in which defendants tampered with the price structure

of a market by colluding to alter a benchmark incorporated into contracts prevalent in that market. The Second Circuit recognized that here, as in *Socony*, "'the fact that sales on the spot markets were still governed by some competition [wa]s of no consequence.'" Pet App. 21 (quoting *Socony-Vacuum*, 310 U.S. at 220); *see also id.* at 26 ("*Socony-Vacuum* allows an antitrust claim based on the influence that a conspiracy exerts on the starting point for prices.").

The Second Circuit also dismissed the banks' principal antitrust-injury argument here—that there could be "no anticompetitive harm" from collusive manipulation of LIBOR because LIBOR-setting was a "cooperative endeavor." Pet. App. 23. The court held that it would violate the core principle of *Socony-Vacuum*—that the "machinery employed by a combination for price-fixing is immaterial"—if the banks could avoid liability for a price-fixing conspiracy under the Sherman Act as long as they did it by corrupting a cooperative rate-setting process. *Id.* (quoting *Socony-Vacuum*, 310 U.S. at 223). The Second Circuit specifically pointed to the allegations that the banks had circumvented the LIBOR-setting rules that required the banks to act *independently*, thus turning the LIBOR-setting process "into collusion" prohibited by the antitrust laws. *Id.* at 24.

Finally, the Second Circuit noted that the district court and the banks had mistakenly relied on this Court's decisions in *Brunswick* and *Atlantic Richfield Co. v. USA Petrol. Co.* ("*ARCO*"), 495 U.S. 328 (1990), both of which were cases recognizing that "*competitors* who complain of low fixed prices do not suffer antitrust injury." Pet. App. 27. The Second

Circuit recognized, in contrast, that "[t]he Sherman Act safeguards *consumers* from marketplace abuses," *id.* at 28, and because plaintiffs here are essentially "consumers claiming injury from a horizontal price-fixing conspiracy," they "have accordingly plausibly alleged antitrust injury."[1]

Turning to the *Twombly* question, the Second Circuit held that while "[c]lose cases abound on this issue," "this is not one of them." *Id.* at 36 The court observed that the plaintiffs' complaints "contain numerous allegations that clear the bar of plausibility," and "evince a common motive to conspire—increased profits and the projection of financial soundness—as well as a high number of interfirm communications, including Barclays' knowledge of other banks' confidential individual submissions in advance." *Id.* at 36, 37. The court further noted the voluminous economic evidence in the complaints—such as the LIBOR-FRED divergence—"further supporting an inference of conspiracy." *Id.* at 38. And it highlighted the evidence that LIBOR-fixing was functioning in London as "a cartel" and other, similar observations

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[1] As noted above, supra p. 16, the Second Circuit conceptualized the plaintiffs as "consumers" who overpaid for their financial instruments because they received rate payments under the terms of those instruments that had been suppressed by defendants' conspiracy. Plaintiffs who held debt instruments or made loans could equally be understood as lenders who received prices for the use of their money that were fixed at suppressed levels. In either event, plaintiffs are not making *competitor* claims but rather archetypical, consumer-type antitrust claims as those who pay or receive the fixed price.

coming from the mouths of the banks' own personnel. *See id.* at 36 n.19.

The Second Circuit emphasized that its decision was "narrow," *id.* at 38, and that several issues required further factual development, including an evaluation of antitrust standing under this Court's decision in *Associated General Contractors of California, Inc. v. California State Council of Carpenters*, 459 U.S. 519, 535 n.31 (1983). In a footnote, Judge Lynch dissented from the part of the Second Circuit's decision discussing unbriefed aspects of antitrust standing—a discussion that was avowedly dicta—but otherwise joined the panel's decision in full. *Gelboim v. Bank of Am.*, 823 F.3d 759, 777 n.17 (2d Cir. 2016).

Defendants did not seek rehearing or a stay or at any time note their intention to seek certiorari. Instead, they followed the court of appeals' decision with renewed motions to dismiss all of the antitrust claims on antitrust standing grounds, along with motions to dismiss for lack of personal jurisdiction. Those motions are now awaiting decision in the district court. Meanwhile, discovery is proceeding, and class certification motions will be filed within the next six months.

REASONS TO DENY THE WRIT

Both questions presented seek fact-bound error correction without any genuine circuit split. Nor was there any error below: The court of appeals, supported by the nation's leading antitrust scholars, correctly characterized its decision on these points as "uncomplicated" and not "close." Indeed, the main issue of antitrust law petitioners present is an

antitrust-injury theory on which *not one appellate decision in the nation*'s *history* has reached the result they seek. The key precedent they cite is not even about antitrust injury and was barely mentioned below. In addition, this fragile interlocutory posture presents a poor vehicle for addressing these questions, even if they were certworthy. The petition should thus be denied.

I. Petitioners' Antitrust Injury Issue Is Splitless, Fact-bound, and Correctly Decided Below.

A. There is no contrary controlling authority in any court.

Petitioners' first question presented relates to whether the Second Circuit correctly determined that plaintiffs who assert that they paid or received a fixed price have pleaded antitrust injury in a suit against the defendants who fixed that price. On this principal question, there is no circuit split. Every case addressing an allegation of antitrust injury by a plaintiff who pays or receives a price the defendants have fixed has found both a Sherman Act violation and antitrust injury. Indeed, the leading treatise in the field identifies such claims as "easy" cases of antitrust injury, 2 Areeda & Hovenkamp, *supra*, ¶391b, and even called out the district court's contrary decision in this case as "troublesome" before it was unanimously reversed by the Second Circuit. *Id*. ¶337a n.3. Professor Hovenkamp thus joined an *amicus curiae* brief, filed on behalf of numerous leading antitrust experts, urging the Second Circuit to take the exact position it adopted below. Brief for *Amici Curiae* Scholars Darren Bush et al., *Gelboim*, 823 F.3d 759 (No. 13-3565), ECF No. 368.

Petitioners not only fail to identify a single appellate decision reaching the antitrust injury result they favor, but also ignore decisions of other circuits that line up perfectly with the decision below. The most relevant example is the Ninth Circuit's decision in *Knevelbaard Dairies v. Kraft Foods, Inc.*, 232 F.3d 979 (9th Cir. 2000), which the Second Circuit expressly relied on below. Pet'rs' App. 20 n.11. In *Knevelbaard*, the defendants conspired to suppress a benchmark (there, the price of bulk cheese), which was used as a component of price for products sold by the plaintiffs (there, milk), and the Ninth Circuit held that the milk producers who thus received a suppressed price could validly assert antitrust injury in a suit against the conspirators. *See Knevelbaard*, 232 F.3d at 988-89. Other than the product market, those facts are indistinguishable from the facts presented here. And numerous other cases—including this Court's own decision in *Socony-Vacuum*—are similarly in accord. *See infra* p.26.

Petitioners pretend this vast body of precedent does not exist, making no effort to distinguish this case from a wealth of similar price-fixing cases in which similarly situated plaintiffs have all been allowed to assert their antitrust injuries. Instead, they cherry-pick snippets from other areas of antitrust law to manufacture an artificial tension between those decisions and the decision below. These arguments have no substance.

For example, consider the asserted tension between this case and the D.C. Circuit's decision in *Rambus Inc. v. FTC*, 522 F.3d 456 (D.C. Cir. 2008). Critically, *Rambus* did not involve (a) antitrust injury; (b) horizontal price-fixing; (c) a conspiracy

claim; or (d) any manipulation of a price. It thus says *nothing* about this case or the rationale the Second Circuit adopted below. In *Rambus*, the issue was whether an otherwise lawful monopolist's unilateral conduct had an anticompetitive effect under monopolization precedents. These are simply two different cases presenting very different theories of antitrust liability. Defendants do not even suggest that the D.C. Circuit would have reached a contrary result in this case, because nothing in *Rambus* (or any other case) remotely supports that proposition.

Similarly, in a footnote string cite that is notable for its lack of detail (Pet. 21 n.6), petitioners point to other *non-price-fixing* cases that present no challenge to the decision below. *See Forsyth v. Humana, Inc.*, 114 F.3d 1467 (9th Cir. 1997) (Section 2 monopolization case); *Schuylkill Energy Res., Inc. v. Pa. Power & Light Co.*, 113 F.3d 405 (3d Cir. 1997) (same); *Schachar v. Am. Acad. Of Ophthamology, Inc.*, 870 F.2d 397, 400 (7th Cir. 1989) (non-price-fixing Section 1 case involving competitors, not consumers). Nor do defendants' final remaining cases for this supposed circuit split involve price-fixing (Pet. 24-25), or anything close to the antitrust-injury question at issue here. *See Novell, Inc. v. Microsoft Corp.*, 731 F.3d 1064, 1080 (10th Cir. 2013) (no injury if plaintiff's harm would have occurred regardless of monopolist's misconduct); *Bassett v. Nat'l Collegiate Athletic Ass'n*, 528 F.3d 426, 434 (6th Cir. 2008) (no injury in boycott case where plaintiff did not plead that defendant's conduct had an effect on the relevant market); *McDonald v. Johnson & Johnson*, 722 F.2d 1370, 1374 (8th Cir. 1983) (undertaking an efficient *standing*, not antitrust

injury, analysis); *Turner v. Johnson & Johnson*, 809 F.2d 90, 102 (1st Cir. 1986) (no causal connection between alleged antitrust violation and plaintiffs' harm).

Here, respondents' injuries arise from the plainest of plain-vanilla price-fixing claims, in a direct parallel to cases like *Catalano*, *Socony-Vacuum*, and *Mandeville Island Farms Inc. v. Am. Crystal Sugar Co.*, 334 U.S. 219 (1948). Every court in the nation would find antitrust injury under such facts, and petitioners cite no case with a holding or fact-pattern suggesting otherwise.[2]

B. This question is plainly fact-bound.

In addition to presenting no division of controlling authority, petitioners' first question presented is indisputably factbound. Petitioners' *own* argument is that while the victims of a horizontal price-fixing conspiracy would ordinarily present a valid claim of antitrust injury, there is some special aspect of the LIBOR-setting process that places it outside the normal rules. Not only does *Maricopa County* reject this argument that different product markets demand different antitrust rules, 457 U.S. at 349, but petitioners' argument also amounts to a

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[2] Petitioners do cite three district court cases involving collusion with respect to financial benchmarks, *see* Pet. 34, but those Southern District of New York cases relied on the reversed district court decision here. Other courts in the district had disagreed. *See In re Foreign Exch. Benchmark Rates Antitrust Litig.*, 74 F. Supp. 3d 581, 595-97 (S.D.N.Y. 2015). The only disagreement that has ever existed was thus isolated to—and resolved by—the Second Circuit itself.

request that this Court establish a one-case-only exception to the *per se* rule governing every other price-fixing case. This exercise in ad hoc exception-making would not clarify the law; it would only help resolve cases about LIBOR, nearly all of which have been consolidated in this very MDL. The only people for whom the question presented will matter are the parties, making this case unfit for this Court's review.

C. The decision below is correct.

As explained above, there exists no reported decision prior to the district court's opinion below holding that a plaintiff who pays or receives a fixed price lacks antitrust injury in a suit against the price fixers. That lack of precedent not only suggests that this case is unfit for certiorari, but that the Second Circuit was quite correct to reverse on the merits.

The petition's primary argument is that, because the LIBOR-setting process was not *itself* competitive, an agreement to fix LIBOR could not impair competition or cause antitrust injury. On this view, antitrust injury only arises when defendants have subverted a previously competitive process, even if the direct result of their conspiracy among horizontal competitors is to fix a component of price in their shared market—the archetypical anticompetitive effect. As the Second Circuit held, that argument not only ignores the allegations of the complaints, but would turn decades of this Court's precedent on its head.

As an initial matter, petitioners' factual premise is simply incorrect. The BBA required the panel banks to act *independently* in setting LIBOR, but the

defendants violated that rule and instead *colluded* with each other to set the rate. This was, as the Second Circuit observed, a "crucial allegation" that differentiates this case from others involving cooperative conduct in which safeguards against anticompetitive, concerted action have not been subverted. Pet. App. 24.

Petitioners also ignore an inviolate rules of antitrust law—namely, that price-fixing is *per se* unlawful no matter how it is accomplished. *See Socony-Vaccum*, 310 U.S. at 223. Accordingly, when defendants turn an otherwise lawful cooperative process into a vehicle to fix prices, they cause antitrust injury to plaintiffs who pay or receive those prices—no different than they would if defendants fixed those prices in the proverbial smoked-filled room. Hijacking a rate-setting mechanism in order to fix prices is plainly actionable under the rule laid down in *Socony-Vacuum*, and it would introduce new and deep uncertainty into one of the most settled aspects of antitrust law for this Court to consider holding otherwise. Indeed, it is notable that, while the petition references this Court's decision in *Socony-Vacuum*, it ignores the critical language that should end the matter—that "the machinery employed by a combination for price-fixing is immaterial." 310 U.S. at 223.

Indeed, *Socony-Vacuum* itself demonstrates the artificiality of the distinction defendants urge this Court to draw. There, the conspiracy affected prices in plaintiffs' contracts because they were based on published spot-market gas prices, *Socony-Vacuum*, 310 U.S. at 198 & n.46; here, the conspiracy affected prices in plaintiffs' financial contracts because they

were based on published LIBOR rates. Both conspiracies had the same anticompetitive object: to manipulate a benchmark price in order to manipulate contracts that incorporate it. Defendants argue that the cases are nonetheless distinguishable because the *means* used to reach that end were very slightly different: manipulation of competitive transactions in a spot market vs. coordinated false reporting in the LIBOR-setting process. Pet. 15. But the whole point of *Socony-Vacuum* is that "the machinery employed" in a price-fixing conspiracy does not matter. This Court cannot accept the banks' effort to distinguish *Socony-Vacuum* based on facts that decision *itself* says are immaterial to its holding.

It's easy to see why. Under defendants' proposed rule, a conspiracy to manipulate published index prices by one mechanism (say, engineering a "buying program" to take distressed gasoline off the market, as in *Socony-Vacuum*) would be price-fixing, but a conspiracy to manipulate published index prices by another mechanism (say, agreeing to lie about market prices to the journals publishing spot market prices) would not be price-fixing or cause antitrust injury, even though the anticompetitive object, anticompetitive effect, and anticompetitive harm to the plaintiffs all remain the same. This is exactly the type of distinction without a difference that *Socony-Vacuum* explicitly rejected, and that no court in history—before the district court below—had ever accepted.

The banks' theory also fudges the applicable competitive baseline. To the extent the banks are allowed to cooperate through the LIBOR-fixing process, it is because the BBA's independence and

confidentiality rules create a pro-competitive benefit—establishing a useful benchmark for market conditions that participants can use to set floating rates. But when the banks circumvented those rules and colluded to move LIBOR where they wanted, LIBOR-setting became a vehicle for price fixing, and any pro-competitive benefit disappeared. As Justice Sotomayor has explained, once the pro-competitive benefits of a cooperative activity among horizontal competitors falls away, all that is left is a naked price fixing conspiracy—one that obviously restrains competition relative to the purely competitive baseline that would otherwise prevail. *See Major League Baseball Prop. v. Salvino*, 542 F.3d 290, 338 (2d Cir. 2008) (Sotomayor, J., concurring in judgment) (under ancillary restraint analysis, per se illegality may be found where naked restraint is not reasonably necessary to achieve procompetitive benefit). And that is exactly what happened here.

Accordingly, this Court has long and often held that cooperative activities—like those engaged in by trade associations or other groups of horizontal competitors—can give rise to actionable violations of Section 1 of the Sherman Act in circumstances similar to these. *See, e.g.*, *MCI Telecomms. Corp. v. AT&T Co.*, 512 U.S. 218, 233 (1994) ("The Court itself has policed trade associations and rate bureaus under the antitrust laws precisely because the sharing of pricing information can facilitate price fixing[.]"); *Allied Tube & Conduit Corp. v. Indian Head, Inc.*, 486 U.S. 492, 506-08, 509 (1988) ("[P]rivate standard-setting by associations comprising firms with horizontal and vertical business relations is permitted at all under the

antitrust laws only on the understanding that it will be conducted in a nonpartisan manner offering procompetitive benefits. … [T]he hope of procompetitive benefits depends upon the existence of safeguards sufficient to prevent the standard-setting process from being biased by members with economic interests in restraining competition.”); *Am. Column & Lumber Co. v. United States*, 257 U.S. 377, 410-12 (1921) (holding that trade association’s “central clearing house for information on prices, trade statistics and practices” amounted to a conspiracy to restrict competition when used to control prices). If anything, this case is much easier than these precedents because the result of defendants’ effort to misuse their trade association is a straightforward price-fixing conspiracy—one that they tellingly kept secret until antitrust enforcement authorities uncovered it.

Relatedly, petitioners ignore the fact that LIBOR was not simply a financial benchmark compiled for educational purposes, but instead was an express component of price in financial instruments *defendants themselves sold or issued*. That means that, at the very moment defendants were acting in concert to manipulate LIBOR, they were moving the price terms in their LIBOR-based markets to the detriment of the plaintiffs on the other side of those price terms. That is both a classic Sherman Act violation and a classic case of antitrust injury.

The Second Circuit also properly rejected the argument that respondents could still have “negotiated” prices despite the banks fixing one of the key components of the price, and that this somehow immunized the banks from liability. Pet. App. 15-16.

This Court has expressly held that fixing a component of price amounts to price fixing even if competition remains over final prices, and every relevant court of appeals decision is in accord. *See, e.g.*, *Catalano*, 446 U.S. at 648; *In re High Fructose Corn Syrup Antitrust Litig.*, 295 F.3d 651, 656 (7th Cir. 2002) (Posner, J.) ("An agreement to fix list prices is … a per se violation of the Sherman Act even if most or for that matter all transactions occur at lower prices.").[3] Although these cases involved the separate question of whether the defendants' conduct was *per se* illegal, not antitrust injury, the very reason that fixing part of price is *per se* illegal is that it "entails an obvious risk of anticompetitive impact." *Catalano*, 446 U.S. at 649; *see also Copperweld Corp. v. Indep. Tube Corp.*, 467 U.S. 752, 768 (1984); *Socony-Vacuum*, 310 U.S. at 218. With over a century's worth of this Court's precedents attesting to the "obvious" and "inherent" risk of anticompetitive impact from horizontal price fixing, the plaintiffs who (like the plaintiffs here) are victimized by such horizontal price fixing can surely plead at least a plausible antitrust injury. Finally, it is important to note that the cases relied upon most heavily by petitioners are radically different from the case at bar. In both *Brunswick*, 429 U.S. 477, and *ARCO*, 495

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[3] *See also, e.g., In re Flat Glass Antitrust Litig.,* 385 F.3d 350, 362-63 (3d Cir. 2004); *In re Yarn Processing Patent Validity Litig.*, 541 F.2d 1127, 1136 (5th Cir. 1976); *Plymouth Dealers' Ass'n of N. Cal. v. United States*, 279 F.2d 128, 132 (9th Cir. 1960).

U.S. 328—the principal authorities relied on by defendants below and by the district court—the plaintiffs were the defendants' *competitors*, complaining about more, not less, competition. That is not the kind of loss the antitrust laws were enacted to prevent. Here, the plaintiffs are not competitors but essentially consumers—the ones who pay or receive the price defendants have fixed. If *Brunswick* and *ARCO* have any relevance in this case, it is only in demonstrating that plaintiffs here are *exactly* those the law expects to bring claims of antitrust injury under the Sherman Act.

It is also telling that defendants now rely most heavily of all on *NYNEX*, 525 U.S. 128, a case that is not about antitrust injury, a horizontal conspiracy, price-fixing, price benchmarks, or anything else at issue here. *NYNEX* involved a vertical restraint between a single supplier and buyer, and this Court refused to apply the *per se* rule because of the critical differences between vertical and horizontal restraints, and the absence of any "agreement on price or price levels." *Id.* at 136. Once again, if the actual holding of *NYNEX* suggests anything about this case, it is that the Court is careful to limit the *per se* rule to "certain kinds of agreements [that] will so often prove so harmful to competition and so rarely prove justified that the antitrust laws do not require proof that an agreement of that kind is, in fact, anticompetitive in the particular circumstances"—like horizontal price-fixing agreements of the kind alleged here. *Id.* at 133.

II. Petitioners' *Twombly* Issue Is Splitless, Fact-bound, and Correctly Decided Below.

Perhaps because petitioners have no supporting precedent for their antitrust-injury theory, they seek to manufacture a circuit conflict on a second question about the standard governing *Twombly* claims. In their view, the Second Circuit applied an impermissible version of *Twombly* in which the plaintiffs can pass the pleading stage whenever unilateral conduct and conspiracy are equally plausible. The problem is that the Second Circuit did not apply that standard and it would not matter if it did. Instead, the Second Circuit applied the settled plausibility standard and concluded that, in any event, this was not even a "close case" on *Twombly* grounds. Pet. App. 36.

As the decision below makes abundantly clear, this case involved not only plausible *allegations* of illicit communications of price information between defendants, but *actual evidence* of such, derived from government investigations. That evidence made the inference of conspiracy not only plausible but overwhelming: There was evidence that defendants had shared their confidential bids in advance, that they had engaged in a high number of inappropriate, inter-firm communications, and that management affirmatively directed the banks' LIBOR submitters to operate as "a pack," leading bank personnel themselves to privately conclude that LIBOR was functioning as a "cartel." These allegations are all but ignored in the petition, which addresses the plausibility of a host of detailed complaints by cherry-picking only the allegations it wants to discuss.

This mountain of applicable evidence means that there is no question presented regarding the appropriate plausibility standard. Under the most onerous version of *Twombly* defendants could dream of, plaintiffs would prevail; indeed, this evidence would easily suffice to survive summary judgment, or even prevail *at trial*. And that is before plaintiffs have been granted even initial merits discovery. Petitioners point to a single word in the Second Circuit's decision to support their allegation of a circuit conflict. In response to their argument that the facts alleged might also be explained by independent action, the court below responded: "Maybe." That equivocal hat-tip to the banks' argument is not a holding, dictum, or anything else that could warrant this Court's review. And in any event, the court went on to explain precisely what it meant: At the motion to dismiss stage, respondents "must only put forth sufficient factual matter to plausibly suggest an inference of conspiracy, *even if* the facts are susceptible to an equally likely interpretation." Pet. App. 38. That is a correct statement of the standard applied in every circuit—the question at the pleading stage is whether a conspiracy has been plausibly alleged, not whether one contested explanation of the facts is *more* plausible than any other.[4]

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[4] *See, e.g.*, *SD3, LLC v. Black & Decker (U.S.) Inc.*, 801 F.3d 412, 425 (4th Cir. 2015) ("[I]t is not our task at the motion-to-dismiss stage to determine whether a lawful alternative explanation appear[s] more likely from the facts of the complaint."); *Evergreen Partnering Grp., Inc. v. Pactiv Corp.*, 720 F.3d 33, 45-46 (1st Cir. 2013); *Watson Carpet & Floor*

In fact, this is the only thing that separates the pre-discovery plausibility standard from the kind of "probability" standard this Court affirmatively rejected in *Twombly* itself. *See Bell Atl. Corp. v. Twombly,* 550 U.S. 544, 556 (2007) ("Asking for plausible grounds to infer an agreement does not impose a probability requirement at the pleading stage; it simply calls for enough fact to raise a reasonable expectation that discovery will reveal evidence of illegal agreement."). Indeed, even the cases on which the petition principally relies make this point, and *favorably cite* to the standard applied in the Second Circuit. *See SD3*, 801 F.3d at 425 ("Post–*Twombly* appellate courts have often been called upon to correct district courts that mistakenly engaged in this sort of premature weighing exercise in antitrust cases.").

At best, petitioners' citations stand for the proposition that a mere allegation of parallel conduct, which would be consistent with either collusion or independent action, does not plausibly suggest conspiracy. Plaintiffs' complaints go far beyond such bare allegations. But even if that were debatable, this case would involve nothing more than testing the application of a settled rule to one complicated set of facts—a plea for simple error correction in a case the court below unanimously said was not even close.

Moreover, this fact-bound exercise would be not only burdensome for this Court and unimportant for

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Covering, Inc. v. Mohawk Indus., 648 F.3d 452, 458 (6th Cir. 2011).

the law, but also pointless for this very case. New facts about defendants' conspiracy are constantly emerging as confidential prosecutions around the world conclude and more details of defendants' conduct are released in government disclosures or settlement agreements. Plaintiffs retain a liberal right to amend their complaints to add any additional allegations that might be required. *Foman v. Davis*, 371 U.S. 178, 182 (1962). Accordingly, this is a poor vehicle for providing even the factbound error correction defendants seek.

III. This Interlocutory Appeal Is a Poor Vehicle as a Whole.

Apart from the issues raised above, this case is also a poor vehicle to decide the questions presented.

Most importantly, this case is in an interlocutory posture, and "the Court ordinarily declines to exercise its discretionary certiorari power to review federal court judgments that are not final in nature." Stern & Gressman, SUPREME COURT PRACTICE 74 (8th ed. 2002); *see also, e.g., Bhd. of Locomotive Firemen & Enginemen v. Bangor & Aroostock Ry.*, 389 U.S. 327, 328 (1967) (per curiam); *Mount Soledad Mem'l Ass'n v. Trunk*, 132 S. Ct. 2535, 2536 (2012) (Alito, J., statement respecting denial); *Va. Military Inst. v. United States*, 508 U.S. 946 (1993) (Scalia, J., opinion respecting denial).

Indeed, this case is interlocutory in the strongest possible sense: *Every* merits holding this Court might make will leave the MDL intact. If this Court were to affirm, defendants could still prevail on other grounds—making this Court's earlier intervention pointless. And if this Court were to reverse, many

plaintiffs would still be proceeding against the defendants on claims of fraud or other theories, making this Court's early intervention unhelpful in bringing the case to a close. This case thus presents a particularly weak argument for immediate intervention.

Second, many defendants have begun actively settling the claims at issue in this case, presenting the risk that the ground of any grant may shift below this Court's feet. Among other things, settlements typically involve the release of further information regarding defendants' conduct, and those facts will in turn affect the *Twombly* issue petitioners have raised. Simply put, this case is actively evolving, providing highly uncertain terrain for immediate certiorari review.[5]

Finally, while petitioners characterize the questions presented as of exceptional importance, the

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[5] These settlements unambiguously refute the silly suggestion (Pet. 4) that this case might somehow "bankrupt" sixteen of the world's richest institutions. In similarly complex litigation involving these same banks' anticompetitive manipulation of other financial benchmarks, the plaintiffs and the banks have resolved the banks' liabilities through large settlements with no obvious detriment to the banks or their businesses. *See, e.g.*. Katy Burne, "Banks Finalize $1.86 Billion Credit-Swaps Settlement," Wall St. J. (Oct. 1, 2015), http://www.wsj.com/articles/wall-street-banks-in-credit-swaps-settlement-1443708335; Bob Van Voris, "HSBC, Barclays Among Banks in $2 Billion Currency Accord," Bloomberg (Aug. 13, 2015), https://www.bloomberg.com/news/articles/2015-08-13/bank-foreign-exchange-case-settlements-reach-2-billion-lawyer. These banks are, unfortunately, old hands at facing serious antitrust liability—and have nonetheless flourished.

Second Circuit correctly understood them as merely applying well-established principles of law to the "unfamiliar context" of this case. As the Second Circuit observed, there is no basis to apply new rules of engagement, designed to insulate defendants from their conspiratorial acts, simply because those acts arose in the financial markets context or caused more harm than if the benchmark was used to price milk or chocolate. At bottom, this is a straightforward case in which defendants violated well-worn principles of this Court's antitrust jurisprudence, and cause these plaintiffs to suffer the paradigmatic form of antitrust injury. Having presented their case as exceptional and uniquely narrow even in their petition, defendants are certain to narrow their position even further at the merits stage, so that all that will be left is a highly fact-bound application of settled law to what the court of appeals and the nation's leading scholars correctly agree are "easy" facts.

CONCLUSION

The petition should be denied.

Respectfully submitted,

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