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 OF *AMICI CURIAE* ANTITRUST SCHOLARS IN SUPPORT OF PETITIONERS

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QUESTION PRESENTED

Amici address the need for the Court's review of the following question, which is contained within the question presented by Petitioners:

Whether the Second Circuit erred when it extended the *Per Se* Rule of antitrust liability to the collaborative process by which a crucial financial benchmark is set?

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Alaska Elec. Pension Fund v. *Bank of Am. Corp.*, 175 F. Supp. 3d 44 (S.D.N.Y. 2016) 21

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Brooke Grp. Ltd. v. *Brown & Williamson Tobacco Corp.*, 509 U.S. 209 (1993) 4

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Page(s)

Cal. Dental Ass'n v. *FTC*,
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Cont'l T.V., Inc. v. *GTE Sylvania Inc.*,
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Copperweld Corp. v. *Indep. Tube Corp.*,
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Dr. Miles Medical Co. v. *John D. Park & Sons Co.*,
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FTC v. *Actavis, Inc.*,
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FTC v. *Ind. Fed'n of Dentists*,
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In re London Silver Fixing, Ltd., Antitrust Litig.,
14-MD-2573, 2016 WL 5794777
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In re Southeastern Milk Antitrust Litig.,
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In re Sulfuric Acid Antitrust Litig.,
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TABLE OF AUTHORITIES
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Page(s)

Laydon v. *Mizuho Bank, Ltd.*,
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Leegin Creative Leather Prods., Inc. v.
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Nat'l Collegiate Athletic Ass'n. v. *Bd. of*
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468 U.S. 85 (1984) ....*passim*

NYNEX Corp. v. *Discon, Inc.*,
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Spectrum Sports, Inc. v. *McQuillan*,
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State Oil Co. v. *Khan*,
522 U.S. 3 (1997) 5

TABLE OF AUTHORITIES
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Page(s)

Supra USA Inc. v. *Samsung Elecs. Co.*,
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Texaco Inc. v. *Dagher*,
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FEDERAL STATUTES

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15 U.S.C. § 4303 12

Standards Development Organization
Advancement Act of 2004, Pub. L.
108-237, Title I, § 102, 118 Stat. 661
(2004) 12

OTHER AUTHORITIES

1 P. Areeda & H. Hovenkamp, *Antitrust
Law* (3d ed. 2006) 14

Andrew I. Gavil, *Moving Beyond
Caricature and Characterization: The
Modern Rule of Reason in Practice*,
85 S. CAL. L. REV. 733 (2012) 8

Bus. Rev. Letter from T. Barnett, U.S.
Dep't of Justice, Antitrust Div., to
VITA (Oct. 30, 2006) 13

TABLE OF AUTHORITIES
(continued)

Page(s)

C. Rowland & J.M. Lawson, *The Permanent Portfolio* (2012) 17

Compl., *Dennis et al. v. JPMorgan Chase & Co.*, et al., 16-cv-06496 (S.D.N.Y. Aug. 16, 2016) 21

D. Duffie & J. Stein, *Reforming LIBOR and Other Financial-Market Benchmarks*, 29 J. ECON. PERSPS. 191 (2015) 13

Federal Trade Commission and U.S. Department of Justice, *Antitrust Guidelines for Collaborations Among Competitors* (Apr. 7, 2000) 9

Fourth Am. Compl., *Sullivan v. Barclays PLC et al.*, No. 13-cv-2811 (S.D.N.Y. Oct. 14, 2015), ECF No. 174 21

Frank H. Easterbrook, *The Limits of Antitrust*, 63 TEX. L. REV. 1 (1984) 7, 8, 9

Jeff Madura, *Financial Markets and Institutions* (11th ed. 2014) 17

Karen Patton Seymour, *Securities and Financial Regulation in the Second Circuit*, 85 FORDHAM L. REV. 225 (2016) 22

TABLE OF AUTHORITIES
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Page(s)

Pet. for Writ of Certiorari, *Leegin Creative Leather Prods., Inc.* v. *PSKS, Inc.*, 551 U.S. 877 (2007) (No. 06-480), 2006 WL 2849384 20

Pet. for Writ of Certiorari, *Nat'l Collegiate Athletic Ass'n* v. *Bd. of Regents of Univ. of Okla.*, 468 U.S. 85 (1984) (No. 83-271), 1983 WL 919056 20

S. Morgenstern *et al.*, *Antitrust Jurisprudence in the Second Circuit*, 85 FORDHAM L. REV. 111 (2016) 22

Thomas A. Piraino, Jr., *Making Sense of the Rule of Reason: A New Standard for Section 1 of the Sherman Act*, 47 VAND. L. REV. 1753 (1994) 7, 8, 9

Thomas C. Arthur, *A Workable Rule of Reason: A Less Ambitious Antitrust Role for the Federal Courts*, 68 ANTITRUST L.J. 337 (2000) 8, 9

U.S. Department of the Treasury, *Daily Treasury Yield Curve Rates* 18

INTEREST OF THE *AMICI CURIAE*[1]

Amici Curiae are law professors and scholars at U.S. universities and research centers who specialize in antitrust law and policy.[2] Given their interest in and knowledge of this area, *amici* are concerned that the decision by the Second Circuit, a crucial court for financial markets, significantly distorts antitrust law.

SUMMARY OF ARGUMENT

Review is warranted because the Second Circuit formulaically and drastically expanded application of the *Per Se* Rule of antitrust liability, contrary to settled precedents of this Court. The appeals court thereby called into question the necessarily collaborative processes for determining important financial benchmarks, without which the worldwide financial markets cannot function efficiently.

I. Congress designed § 1 of the Sherman Act to outlaw only a narrow category of conduct: agreements that reduce competition. *Atl. Richfield Co.* v. *USA Petroleum Co.*, 495 U.S. 328, 344 (1990).

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[1] *Amici* have timely notified counsel of record for both Petitioners and Respondents of their intention to file this brief. Counsel for both Petitioners and Respondents have filed, with the Clerk of this Court, blanket consent to the filing of *amicus curiae* briefs. As required by Rule 37.6, *amici* state that no counsel for a party authored this brief in whole or in part and that no person or entity other than *amici* or their counsel made a monetary contribution intended to fund the preparation or submission of this brief.

[2] The names and affiliations of *amici* are included in an addendum to this brief. This brief does not purport to represent the institutional views of any entity with which *amici* are affiliated.

To ensure that the antitrust laws are not used to quash agreements lacking this effect, this Court has analyzed challenged agreements under the Rule of Reason by weighing their pro- and anti-competitive effects.

In a few areas, when judicial experience has shown that a practice that clearly reduces competition lacks procompetitive benefits, this Court has permitted lower courts to take a shortcut by declaring a practice to be a *per se* violation of the Sherman Act. But this Court increasingly has warned them to proceed with caution, not using this *Per Se* Rule absent substantial experience with the challenged practice and a deep understanding of the practice's effects on the market, and not letting mere labels control when the *Per Se* Rule applies.

II. Ignoring this Court's repeated admonitions, the Second Circuit has expanded the scope of the *Per Se* Rule to reach the cooperative process by which the U.S. dollar London Interbank Offered Rate (U.S. LIBOR) is determined. The panel's primary justification for doing so was just that plaintiffs in their complaint chose to label the process by which U.S. LIBOR was set as collusive price fixing.

But U.S. LIBOR is a collaboratively set benchmark, and *all* such benchmarks involve agreement among market participants. The question for antitrust purposes, then, should be whether a particular agreement in the collaborative benchmark-setting process is anticompetitive. That requires a case-by-case analysis under the Rule of Reason. Under the *Per Se* Rule, by contrast, the challenged

practice is "conclusively presumed to be unreasonable and therefore illegal without elaborate inquiry as to the precise harm [it] ha[s] caused or the business excuse for [its] use." *N. Pac. Ry. Co.* v. *United States*, 356 U.S. 1, 5 (1958). That is why, since *Broadcast Music, Inc.* v. *Columbia Broadcasting System, Inc.*, 441 U.S. 1 (1979), and particularly *National Collegiate Athletic Association* v. *Board of Regents of the University of Oklahoma*, 468 U.S. 85 (1984), this Court has made clear that the *Per Se* Rule is inappropriate when cooperation among market participants is essential for creating a product.

Here, the *Per Se* Rule is particularly inappropriate because courts have little experience with the competitive implications of collaborative financial benchmarking. As this Court put it in its most recent analysis of the question, "the *per se* rule is appropriate only after courts have had considerable experience with the type of restraint at issue, and only if courts can predict with confidence that it would be invalidated in all or almost all instances under the rule of reason." *Leegin Creative Leather Prods., Inc.* v. *PSKS, Inc.*, 551 U.S. 877, 886–87 (2007) (internal citation omitted). Neither requirement is met here, and the Second Circuit did not claim otherwise in applying the *Per Se* Rule to a collaboration that the Courts of Appeals had not seen before.

III. This Court has granted petitions to restrict the scope of the *Per Se* Rule even when the petitioners did not claim a clear circuit split on that question; all the more should it do so with the petition here. By applying the *Per Se* Rule to the non-competitive U.S. LIBOR-setting process—short-

circuiting an economic analysis and thus the defendants' defense—the Second Circuit invites plaintiffs to bring treble-damages antitrust claims in garden-variety commercial-misrepresentation suits. Yet this Court has warned against "transform[ing] cases involving business behavior that is improper for various reasons" under other laws "into treble-damages antitrust cases." *NYNEX Corp.* v. *Discon, Inc.*, 525 U.S. 128, 136–37 (1998); *see Brooke Grp. Ltd.* v. *Brown & Williamson Tobacco Corp.*, 509 U.S. 209, 225 (1993) (noting that the antitrust laws do not "afford remedies for all torts committed by or against persons engaged in interstate commerce").

The question presented is also important for the world's financial markets. The Second Circuit is the appellate court at the center of the U.S. financial markets, and at a hub of the international financial markets. Thus, most immediately, untold sums are at stake in other U.S. LIBOR cases in the Second Circuit, for which the decision below will be the most direct precedent. Further untold sums are at stake in cases involving other financial benchmarks that are determined, like U.S. LIBOR, through collaborative processes, for which the decision below will be either the most direct precedent or a significant persuasive authority.

Given the wide range of potential impacts of the Second Circuit's decision on antitrust law, commercial litigation, and financial markets, that court's expansion of the *Per Se* Rule warrants this Court's review.

ARGUMENT

I. THE *PER SE* RULE OF ANTITRUST LIABILITY IS TO BE USED SPARINGLY.

Since at least the 1970s, this Court has significantly limited the use of the *Per Se* Rule, emphasizing that it is appropriate only in limited circumstances. The Second Circuit ignored this instruction and extended the *Per Se* Rule to a "product" that cannot exist without the collaboration of market participants, and with which the courts have limited experience.

1. Allegedly anticompetitive agreements must usually be analyzed under the Rule of Reason. *Leegin*, 551 U.S. at 885. Under that test, the factfinder balances any procompetitive benefits of the agreement against any anticompetitive effects, "taking into account a variety of factors, including specific information about the relevant business, its condition before and after the restraint was imposed, and the restraint's history, nature, and effect." *State Oil Co.* v. *Khan*, 522 U.S. 3, 10 (1997). *See also Cont'l T.V., Inc.* v. *GTE Sylvania Inc.*, 433 U.S. 36, 49 (1977) ("[T]he factfinder weighs all of the circumstances of a case."). In essence, the Rule of Reason seeks to determine the "actual effect" of a challenged agreement. *Copperweld Corp.* v. *Indep. Tube Corp.*, 467 U.S. 752, 768 (1984).

Because the Rule of Reason analysis is fact-intensive, it can be inefficient to apply when courts "have had considerable experience with the type of restraint at issue" and "can predict with confidence that it would be invalidated in all or almost all instances" were the full Rule of Reason analysis to be

applied. *Leegin*, 551 U.S. at 886–87. "[O]nly after courts have had" that requisite experience may they short-circuit the full Rule of Reason analysis and declare something to be a *per se* unreasonable restraint of trade. *Id.*; *see In re Southeastern Milk Antitrust Litig.*, 739 F.3d 262, 271 (6th Cir. 2014) ("Applying [the *Per Se* Rule] should be done reluctantly and infrequently . . . and only when the rule of reason would likely justify the same result."). This shortcut is the *Per Se* Rule.

2. Because the availability of the *Per Se* Rule is circumscribed by the limits of judicial experience, this Court for several decades has cautioned lower courts not to apply it to novel business practices when the effects of those practices on competition are unclear. *See Leegin*, 551 U.S. at 886–87; *Cal. Dental Ass'n* v. *FTC*, 526 U.S. 756, 759 (1999) (*Per Se* Rule inappropriate where "any anticompetitive effects . . . are far from intuitively obvious"); *FTC* v. *Ind. Fed'n of Dentists*, 476 U.S. 447, 458–59 (1986) (*Per Se* Rule inappropriate "where the economic impact of certain practices is not immediately obvious"); *Broad. Music*, 441 U.S. at 9–10 (*Per Se* Rule inappropriate where Court "ha[s] never examined a practice like this one before"); *Cont'l T.V.*, 433 U.S. at 50 (effects of practice must be "manifestly anticompetitive" to trigger *Per Se* Rule).

That caution is because, whereas the Rule of Reason is applied on a case-by-case basis and thus can result in different outcomes as market conditions or understandings change, the *Per Se* Rule declares certain conduct presumptively anticompetitive, and thus illegal—which threatens to quash in perpetuity practices that do not actually reduce, and may

increase, competition. *See* Thomas A. Piraino, Jr., *Making Sense of the Rule of Reason: A New Standard for Section 1 of the Sherman Act*, 47 VAND. L. REV. 1753, 1756 (1994) ("By mechanically precluding certain conduct without any consideration of its economic effects," the *Per Se* Rule "deter[s] beneficial as well as pernicious business practices."). When a practice is declared unlawful under the *Per Se* Rule, "years of efficient business practices" may be lost before courts and scholars fully understand the "procompetitive explanations for" those practices, because under that Rule businesses are unable to demonstrate the absence of competitive harm, or even the competitive benefit, from their practices. Frank H. Easterbrook, *The Limits of Antitrust*, 63 TEX. L. REV. 1, 6–7 (1984). *See, e.g.*, *N. Pac. Ry. Co.*, 356 U.S. at 5 (under *Per Se* Rule, challenged practice is "conclusively presumed to be unreasonable and therefore illegal without elaborate inquiry as to the precise harm [it] ha[s] caused or the business excuse for [its] use").

And "[i]f the court errs by condemning a beneficial practice, the benefits may be lost for good," because "[a]ny other firm that uses the condemned practice faces sanctions in the name of stare decisis, no matter the benefits." Easterbrook, *supra*, at 2; *cf., e.g.*, *Arizona* v. *Maricopa Cty. Med. Soc'y*, 457 U.S. 332, 342 (1982) (condemning arrangement despite assumption that it saved consumers millions of dollars). Indeed, it took almost a century before this Court in *Leegin* corrected its overbroad application of the *Per Se* Rule to vertical minimum-resale-price agreements in *Dr. Miles Medical Co.* v. *John D. Park & Sons Co.,* 220 U.S. 373 (1911), even though

economic theory had, long before, proven that such arrangements need not reduce, and may increase, competition. *Leegin*, 551 U.S. at 888–90 (noting the economic theory supporting the procompetitive benefits); *id.* at 900–07 (overruling *Dr. Miles*). That is why scholars have noted that, "[a]s time goes by, fewer and fewer things seem appropriate for per se condemnation," because economists find "competitive benefits in practices that once were thought uniformly pernicious." Easterbrook, *supra*, at 10.

Likewise, as courts "have become more knowledgeable about economic theory," they "have grown disillusioned with the absolutism of the per se rule." Piraino, *supra*, at 1754. This Court has moved away from the *Per Se* Rule for all but the most obviously anticompetitive conduct. *See N. Pac. Ry. Co.*, 356 U.S. at 5 (*Per Se* Rule should apply only to anticompetitive practices that "lack . . . any redeeming virtue"); Piraino, *supra*, at 1757–58 (the Court's recent "history of antitrust analysis . . . has been . . . a steady erosion of the per se approach . . . and an expanded use of the rule of reason."). *See also, e.g.*, Andrew I. Gavil, *Moving Beyond Caricature and Characterization: The Modern Rule of Reason in Practice*, 85 S. CAL. L. REV. 733, 738 (2012) (critics have had "considerable success in persuading courts . . . to move away from . . . per se rules"); Thomas C. Arthur, *A Workable Rule of Reason: A Less Ambitious Antitrust Role for the Federal Courts*, 68 ANTITRUST L.J. 337, 357 (2000) (suggesting that the modern *Per Se* Rule "may apply only to naked cartel restraints"). Where once "tying arrangements, boycotts, territorial allocations, and resale price maintenance were unlawful per se," Easterbrook,

supra, at 10, this Court has largely abandoned *per se* analysis in favor of the Rule of Reason, or a hybrid analysis, *see id.* n.19 (collecting cases in which this Court abandoned strict *per se* analysis in these areas). *See also, e.g.*, Arthur, *supra*, at 351–67 (chronicling the Court's move away from the *Per Se* Rule and towards the Rule of Reason in most areas of antitrust law).

This move "follow[s] ineluctably" from "discoveries of possible benefits" of practices previously condemned, and a recognition that the Court "cannot condemn so quickly anymore." Easterbrook, *supra*, at 10. What a court does "not condemn, [it] must study. The approved method of study is the Rule of Reason." *Id.* Thus, *per se* scrutiny is now reserved for only the most familiar, obviously anticompetitive practices. *See* Piraino, *supra*, at 1757–58.

Following suit, government agencies who enforce antitrust laws have also moved away from the *Per Se* Rule. For example, the Federal Trade Commission and U.S. Department of Justice have advised that, if an agreement among competitors is reasonably ancillary to an "efficiency-enhancing integration," they will "analyze the agreement under the rule of reason, even if it is of a type that might otherwise be considered per se illegal." Federal Trade Commission and U.S. Department of Justice, *Antitrust Guidelines for Collaborations Among Competitors* § 3.2 (Apr. 7, 2000), *available at* https://perma.cc/59CU-8C3P.

II. THE *PER SE* RULE SHOULD NOT BE APPLIED TO COOPERATIVELY-DETERMINED BENCHMARKS LIKE U.S. LIBOR, AS THE SECOND CIRCUIT DID HERE.

Under the law described above, the *Per Se* Rule is ill-suited to address allegations of manipulation of cooperatively-determined financial benchmarks like U.S. LIBOR, yet the Second Circuit below applied it for precisely that purpose.

1. Many financial benchmarks, U.S. LIBOR included, are set through non-competitive processes. There is thus a serious question whether such processes are subject to the Sherman Act at all, let alone the *Per Se* Rule.

The Sherman Act applies only to agreements with a "competition-*reducing* aspect or effect." *Atl. Richfield*, 495 U.S. at 344. *See NCAA*, 468 U.S. at 104 ("impact on competition" is the sole criterion). Accordingly, in non-competitive environments, "cooperative arrangements are . . . not usually unlawful, at least not as price-fixing schemes." *Broad. Music*, 441 U.S. at 23.

Here, it is undisputed that the U.S. LIBOR-setting process "was never intended to be competitive." App. 66a. Rather, U.S. LIBOR is an average of a subset of voluntary responses by individual banks to a hypothetical question about the interest rate at which the bank believes it could borrow money on that particular day. It is necessarily the result of collaboration, not competition. And in the absence of any competition, the process by which U.S. LIBOR is set is ill-suited to antitrust analysis under the Sherman Act, whether

under the Rule of Reason or the *Per Se* Rule. *Atl. Richfield*, 495 U.S. at 344.

2. In any event, the *Per Se* Rule is inappropriate as the basis for any antitrust scrutiny of the collaborative process by which financial benchmarks are set. U.S. LIBOR can only exist through cooperation, and it is undisputed that U.S. LIBOR as a whole has significant procompetitive benefits. The *Per Se* Rule does not apply to agreements or collaborations that are necessary for the resulting product to exist, because a case-by-case analysis is needed to determine whether any particular elements of that cooperation may be anticompetitive. *NCAA*, 468 U.S. at 100–01.

In *NCAA*, this Court found the *Per Se* Rule "inappropriate," despite acknowledging that the defendants were engaging in horizontal price fixing, because those "horizontal restraints on competition [we]re essential if the product [wa]s to be available at all." *Id.* That product, competitive collegiate football games, depends on common rules and understandings. *Id.* at 101–02. By providing those rules and understandings, "the NCAA . . . enables a product to be marketed which might otherwise be unavailable," thus "widen[ing] consumer choice." *Id.* at 102. "[H]ence," the NCAA's horizontal constraint "can be viewed as procompetitive." *Id.; see also Am. Needle, Inc.* v. *Nat'l Football League*, 560 U.S. 183, 203 (2010) ("When restraints on competition are essential if the product is to be available at all, *per se* rules of illegality are inapplicable, and instead the restraint must be judged according to the flexible Rule of Reason.").

Similarly, this Court has made clear that standard-setting bodies have substantial procompetitive benefits and thus should be analyzed under the Rule of Reason, not the *Per Se* Rule—even though the standard-setting process, done among competitors, is "implicitly an agreement" among them "not to manufacture . . . certain types of products." *Allied Tube & Conduit Corp.* v. *Indian Head, Inc.*, 486 U.S. 492, 500–01 (1988). Like the NCAA, such standard-setting bodies and their associated processes can only exist through the collaboration of market participants. Congress has expressly recognized the important role that such organizations and processes play in enhancing competition, efficiency, and safety, and that those organizations should not be deterred by the threat of treble-damage *per se* antitrust liability. *See, e.g.*, 15 U.S.C. §§ 4302, 4303 (insulating standard-setting conduct from the *Per Se* Rule and treble damages). *Cf.* Standards Development Organization Advancement Act of 2004, Pub. L. 108-237, tit. I, § 102, 118 Stat. 661 (2004) (recognizing congressional finding of "the importance of technical standards developed by voluntary consensus standards bodies to our national economy").

Just as college football could not exist without the collaboration of competitor colleges in the NCAA joint venture, and manufacturing standards could not be set without the collaboration of competitor manufacturers, U.S. LIBOR could not exist without the collaboration of banks, who separately compete in the financial markets. (LIBOR does not reflect actual interest rates in consummated financial transactions, because there are too few such transactions each day

to serve as a benchmark. D. Duffie & J. Stein, *Reforming LIBOR and Other Financial-Market Benchmarks*, 29 J. ECON. PERSP. 191, 192 (2015).)

And just as the NCAA's rules enable competition in collegiate football, and product standards can enhance competition, so U.S. LIBOR enables competition in downstream financial markets. U.S. LIBOR and other financial benchmarks facilitate global financial transactions, particularly those with floating interest rates, by giving parties a framework within which they can negotiate. *Cf.* Bus. Rev. Letter from T. Barnett, U.S. Dep't of Justice, Antitrust Div., to VITA, at 7 (Oct. 30, 2006), *available at* https://perma.cc/VR54-DBV3 ("Collaborative standard setting can produce many procompetitive benefits."). By creating a reference point for many financial transactions, U.S. LIBOR and other cooperatively-set financial benchmarks enhance the efficiency, liquidity, and stability of financial markets.

As a concrete example, consider a contract to purchase a commodity in the future, in which a buyer commits to pay the difference between the agreed price and the spot price of that commodity at that future date. Come that future date (and in the absence of a clear market spot price), without an independent reference point for the spot price, there would be substantial friction as the parties disagreed about the proper price, and thus the proper amount due. The resulting inefficiency would increase transaction costs, and could even prevent such deals from being reached in the first place. Thus, a benchmark serves a procompetitive purpose by

increasing efficiency and certainty in financial transactions.

Because U.S. LIBOR has procompetitive benefits but, like other financial benchmarks, requires the cooperation of the defendant banks to exist, antitrust analysis of a challenge to such cooperation must be case-by-case. Because treble damages are available for Sherman Act § 1 suits but are usually not available for private torts, the availability of *per se* antitrust claims, which do not even permit the defendant to show that its conduct did not reduce competition, is likely to deter banks from participating in the voluntary, collaborative U.S. LIBOR-setting process. Without the voluntary participation of banks, LIBOR cannot exist, which would eliminate its procompetitive benefits. *Cf. In re Sulfuric Acid Antitrust Litig.*, 703 F.3d 1004, 1010 (7th Cir. 2012) (noting that per se liability might deter entry into the market, resulting in higher prices and harm to consumers). To use antitrust laws to reduce efficiency and market participation is to corrupt their core purpose. *Cf. Spectrum Sports, Inc.* v. *McQuillan*, 506 U.S. 447, 458–59 (1993) (noting that the Court has "been careful to avoid constructions of [the Sherman Act] which might chill competition, rather than foster it"); 1 P. Areeda & H. Hovenkamp, *Antitrust Law* ¶ 100 (3d ed. 2006) ("[T]he principal objective of antitrust policy is to maximize consumer welfare.").

It is of no moment that the Plaintiffs here allege that the particular (supposed) agreement "corrupted" the collaborative process. As a matter of antitrust law, that allegation merely begs the question: Did the alleged agreement reduce competition or not? *Cf.*

NCAA, 468 U.S. at 104 ("impact on competition" is the sole focus of antitrust law). Under this Court's precedents, the way to know the answer in this context is to study the agreement and determine its market effects.

3. Courts also lack the requisite experience with collaboratively-set financial benchmarks to know whether the collaborations will always or almost always fail the Rule of Reason analysis—a prerequisite before a court can resort to the *Per Se* Rule.

Any "departure from the rule-of-reason standard must be based upon demonstrable economic effect rather than . . . formalistic line drawing." *Cont'l T.V.*, 433 U.S. at 58–59. Thus, if the effects of a challenged practice are not well understood, either because the practice is novel or the market being affected by that practice is so remote as to make causation difficult to ascertain, the *Per Se* Rule is inappropriate. *See Texaco Inc.* v. *Dagher*, 547 U.S. 1, 5 (2006) (noting that courts "have expressed reluctance to adopt *per se* rules . . . where the economic impact of certain practices is not immediately obvious"); *Ind. Fed'n of Dentists*, 476 U.S. at 458–59. If the "anticompetitive effects" of a challenged practice "are far from intuitively obvious," the Rule of Reason, not the *Per Se* Rule, should be applied. *Cal. Dental Ass'n*, 526 U.S. at 759; *see also FTC* v. *Actavis, Inc.,* 133 S. Ct. 2223, 2237 (2013) (similar).

The decision below is novel in the Courts of Appeals in applying the Sherman Act to a cooperatively-set financial benchmark like U.S. LIBOR. The Second Circuit could not have had the

requisite experience to know that the alleged manipulation here will always fail the Rule of Reason. *See NCAA*, 468 U.S. at 100 n.21 ("[J]udicial inexperience with a particular arrangement counsels against extending the" *Per Se* Rule to reach that practice); *Broad. Music*, 441 U.S. at 9–10 (*Per Se* Rule inappropriate where Court "ha[s] never examined a practice like this one before"). Thus, it should not have applied the *Per Se* Rule. As the Seventh Circuit put it recently, in refusing to apply the *Per Se* Rule, "we have never seen or heard of an antitrust case quite like this," and "[i]t is a bad idea to subject a novel way of doing business . . . to per se treatment under antitrust law." *In re Sulfuric Acid Antitrust Litig.*, 703 F.3d at 1011.

More generally, the economic effects of alleged collusion in the benchmark-setting process are not well understood, certainly not by the courts. Indeed, the Second Circuit itself recognized that "there are features of this case that make it like no other." App. 29a. As an example, there is substantial reason to believe that U.S. LIBOR has little to no discernible impact on the value of the underlying financial transactions that refer to it. U.S. LIBOR is a point of reference against which some financial transactions are measured (U.S. LIBOR + 2%, for example). The rate set for those transactions could be any value above or below U.S. LIBOR. Moreover, it must remain competitive with rates on all other similar financial transactions, whether they reference U.S. LIBOR as a benchmark, reference some other benchmark, or do not reference a benchmark at all. The financial transactions that refer to U.S. LIBOR are complex, and their pricing—set in a separate,

fully competitive market—depends on numerous independent factors.

Take bonds, for example. Aside from its interest rate, the price of a bond is determined by myriad independent factors, including the credit rating of the issuer, the bond's term or maturity, the present-value discount rate used to price the bond, the market supply and demand for bonds at any particular moment, monetary policy, general economic conditions, and the rate of inflation. *See generally* Jeff Madura, *Financial Markets and Institutions* 189–204 (11th ed. 2014) (explaining factors affecting bond valuation and risk).

More generally, as noted above, banks and other financial institutions remained free to price their financial instruments without using LIBOR as a reference. Thus, any link between alleged U.S. LIBOR manipulation and the price of a separately negotiated financial instrument in a fully-competitive downstream market is attenuated at best, and therefore not properly subject to the *Per Se* Rule.

Any link between U.S. LIBOR and price is further obscured by the unprecedented financial crisis, which coincided with the period alleged in the complaint, and during which several financial institutions failed or were bailed out. Bond prices rose more than 30% in 2008, but then lost 20% in 2009 as the stock market regained its footing. *See* C. Rowland & J.M. Lawson, *The Permanent Portfolio* figs. 7.1 & 7.2 (2012). This swing was driven by the recession and investors' flight to safety. Indeed, Treasury bonds experienced a substantial inflow of investments in late 2008; investors sought the safety of U.S.-

government-backed investments, as a one-year Treasury bond's yield fell (and thus its price rose) from 3% in January 2008, to 0.37% by December 31, 2008. U.S. Department of the Treasury, *Daily Treasury Yield Curve Rates*, https://perma.cc/6ZJ5-ZNCP (2008 rates).

As the above demonstrates, there is no clear nexus between U.S. LIBOR or the financial benchmarks used in financial transactions, and the ultimate price set by the competitive markets for a particular financial instrument, let alone any clear nexus between how U.S. LIBOR is set and the degree of competition in markets for particular financial instruments. Indeed, the Second Circuit itself recognized as much, noting that "[i]t may be that the influence of the [allegedly] corrupted LIBOR figure on competition was weak and potentially insignificant." App. 38a. Thus, the *Per Se* Rule is inappropriate, and courts instead should (at a minimum) study and weigh the competitive effects. *See Texaco Inc.*, 547 U.S. at 5; *Cal. Dental Ass'n*, 526 U.S. at 759; *Ind. Fed'n of Dentists*, 476 U.S. at 458–59; *Cont'l T.V.*, 433 U.S. at 50.

4. Despite this Court's repeated guidance that the *Per Se* Rule is to be applied narrowly and is only to be expanded after substantial experience with a particular practice, the Second Circuit applied the *Per Se* Rule to the novel, cooperative process by which U.S. LIBOR is set. It did so by recharacterizing that process as "price-fixing." App. 15a. The Second Circuit then assumed that the "price-fixing" was a *per se* unlawful restraint of trade. *Id.* As support, the Second Circuit relied on *Maricopa County*, without recognizing that case

predated significant advancements in this Court's *Per Se* Rule jurisprudence; as well as on *NCAA*, without acknowledging that the Court there found the *Per Se* Rule to be *inappropriate*, notwithstanding "price-fixing," because some degree of collaboration was required, *see NCAA*, 468 U.S. at 100–01, 104. Indeed, the Second Circuit did not even mention *Broadcast Music* in the relevant analysis, *see* App. 15a–16a.

If the *Per Se* Rule could be triggered by a mere allegation that an agreement between competitors constituted "price fixing," then the *per se* exception would become the default. But the words "price-fixing" are not a talisman, particularly when cooperation and coordination are inherent in the challenged process. *See NCAA*, 468 U.S. at 100–01; *Broad. Music*, 441 U.S. at 23 ("cooperative arrangements are . . . not usually unlawful, at least not as price-fixing schemes"). Again, alleging, as Plaintiffs did, that there was some collective manipulation of the U.S. LIBOR rate at some period of time does not turn a necessarily cooperative process in its entirety into a *per se* price-fixing conspiracy. The Second Circuit's decision turns antitrust law on its head.[3]

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[3] This is not to say that plaintiffs necessarily have no recourse. Other causes of actions (on whose merits *amici* take no position) have been brought in this case and others arising out of the alleged manipulation of LIBOR. *See, e.g.*, App. 80a *et seq*. *Amici*'s sole concern here is that courts not distort antitrust law in the course of considering redress for the alleged manipulation.

III. THE SCOPE OF PER-SE LIABILITY IN WORLDWIDE FINANCIAL MARKETS IS A CRITICAL QUESTION THAT THIS COURT SHOULD REVIEW NOW.

The question presented is of critical importance to the world's financial markets, and should be addressed now. This Court has long played an important role in policing the boundaries of the *Per Se* Rule, even when the petitioners did not claim a clear circuit split. *See, e.g.,* Pet. for Writ of Certiorari, *Leegin*, 551 U.S. 877 (2007) (No. 06-480), 2006 WL 2849384, at *5-6 (seeking to overturn *Dr. Miles* as inconsistent with modern economic evidence and antitrust theory, not because of a circuit split); Pet. for Writ of Certiorari, *NCAA*, 468 U.S. 85 (1984) (No. 83-271), 1983 WL 919056, at *20 n.14 (acknowledging that the splits alleged were fact-bound, and thus "it may be said that there is no square conflict"). The petition here is all the more worthy of this Court's review.

1. For one, untold sums are at stake in other cases to which the Second Circuit's decision will apply. *See, e.g.*, *7 W. 57th St. Realty Co., LLC* v. *Citigroup, Inc.*, No. 13-cv-981, 2015 WL 1514539, at *17 (S.D.N.Y. Mar. 31, 2015) (dismissing antitrust claims because USD LIBOR is set in noncompetitive process).

Review is also warranted because the Second Circuit's decision hobbles other financial benchmarks. For example, LIBOR is set each day for five different currencies, not just the U.S. Dollar, and seven different maturities using the cooperative process described above. The Second Circuit's

decision opens up each of those thirty-five LIBOR-setting processes to *per se* antitrust scrutiny, which will drive participants out of those processes. Similarly, other important financial benchmarks are also set, like U.S. LIBOR, through a cooperative process. *See, e.g.*, *In re Commodity Exch., Inc.*, 14-MD-2548, 2016 WL 5794776, at *4–5 (S.D.N.Y. Oct. 3, 2016) (gold benchmark); *In re London Silver Fixing, Ltd., Antitrust Litig.*, 14-MD-2573, 2016 WL 5794777, at *2–4 (S.D.N.Y. Oct. 3, 2016) (silver benchmark); Compl., *Dennis et al. v. JPMorgan Chase & Co.*, et al., 16-cv-06496 (S.D.N.Y. Aug. 16, 2016) (Bank Bill Swap Reference Rate, Australia's equivalent of LIBOR); *Alaska Elec. Pension Fund* v. *Bank of Am. Corp.*, 175 F. Supp. 3d 44, 56–58 (S.D.N.Y. 2016) (ISDAfix, a benchmark incorporated in financial derivatives); Fourth Am. Compl., *Sullivan v. Barclays PLC et al.*, No. 13-cv-2811 (S.D.N.Y. Oct. 14, 2015), ECF No. 174 (Euro Interbank Offered Rate); *Laydon* v. *Mizuho Bank, Ltd.*, No. 12-cv-3419, 2014 WL 1280464, at *8 (S.D.N.Y. Mar. 28, 2014) (Euroyen Tokyo Interbank Offered Rate and Yen–LIBOR).

Because the Second Circuit expanded the *Per Se* Rule to reach cooperative processes, its decision opens the door to *per se* antitrust liability for the entities that set those benchmarks as well. Like the Plaintiffs here—who merely alleged a *per se* violation—plaintiffs attacking agreements involving those benchmarks would be excused from showing any actual harm to competition. If participants in the processes of setting those benchmarks were to leave, those benchmarks would cease to exist, adding

friction to financial transactions and slowing worldwide financial markets.

2. Further percolation is both unnecessary and unlikely to occur. New York City, within the Second Circuit, is the center of the U.S. financial markets. Accordingly, the Second Circuit has become the country's preeminent court in developing antitrust and other financial-market jurisprudence. *See* S. Morgenstern *et al.*, *Antitrust Jurisprudence in the Second Circuit*, 85 FORDHAM L. REV. 111, 111 (2016) (antitrust); Karen Patton Seymour, *Securities and Financial Regulation in the Second Circuit*, 85 FORDHAM L. REV. 225, 225 (2016) (securities and financial regulation). Moreover, the dozens of cases arising out of the alleged U.S. LIBOR manipulation have been consolidated in the Southern District of New York, and thus will be bound by the Second Circuit's ruling. Accordingly, it is unlikely that another Circuit will have the opportunity to address whether the *Per Se* Rule is appropriate in the context of cooperatively-set financial benchmarks, and if it does it will likely look to the Second Circuit. *See, e.g.*, Morgenstern, *supra*, at 111; Seymour, *supra*, at 225.

3. Review is also warranted because the Second Circuit's decision raises federalism concerns. Federal courts have "exclusive jurisdiction" over antitrust claims arising under the Sherman Act. *Marrese* v. *Am. Acad. of Orthopaedic Surgeons*, 470 U.S. 373, 379 (1985). Under the Second Circuit's expansion of the *Per Se* Rule, plaintiffs may more readily use the antitrust laws to force defendants into federal courts for claims based on misrepresentations that could otherwise be relegated to state courts. *See Copperweld*, 467 U.S. at 777 (recognizing potential

for "private state tort suits [to] masquerad[e] as antitrust actions"); *Supra USA Inc.* v. *Samsung Elecs. Co.*, No. 85-cv-9696, 1987 WL 19953, at *3 n.3 (S.D.N.Y. Nov. 10, 1987) (noting federalism concerns raised by allowing plaintiffs to use antitrust law for ordinary business disputes). The antitrust laws' exclusive federal jurisdiction attaches even to antitrust claims that are so lacking in merit that alleging them constitutes sanctionable conduct. *See, e.g.*, *McCoy* v. *Iberdrola Renewables, Inc.*, 760 F.3d 674, 681–82 (7th Cir. 2014) (noting that, although bringing claims under the Sherman Act was "essentially . . . sanctionable conduct," those claims "were sufficient to invoke the district court's subject matter jurisdiction"). Absent congressional intervention, the bounds of such a powerful jurisdictional hook should not be judicially expanded by moving antitrust law away from its focus on competition-reducing conduct. *See Atl. Richfield*, 495 U.S. at 344.

CONCLUSION

For the foregoing reasons and those stated by Petitioners, this Court should grant the requested writ, and the Second Circuit's decision should be reversed.

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