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

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This case raises a fundamental question about the scope of the antitrust laws: whether alleged collusion that does not impair competition nevertheless violates the Sherman Act. By treating such alleged collusion as *per se* unlawful price-fixing, the decision below expands antitrust law beyond its proper sphere and threatens to undermine a system of reference rates that is integral to the global financial system.

In their opposition, respondents simply assume that their claims of collusion constitute "price-fixing" and never engage with the actual question presented. Meanwhile, the government's separate opposition conspicuously does *not* contend that the decision below was correct. Neither explains how the Sherman Act is violated—particularly based on a *per se* presumption—where "the competitive process itself does not suffer harm." *NYNEX Corp.* v. *Discon, Inc.*, 525 U.S. 128, 137 (1998). This Court should take up that important question.

This Court should also consider whether industry-wide antitrust conspiracy claims may proceed based on allegations that are equally consistent with parallel conduct. The answer must be "no" because "parallel conduct that could just as well be independent action" by definition does not support a plausible claim. *Bell Atl. Corp.* v. *Twombly*, 550 U.S. 544, 557 (2007). This question is particularly ripe for review now given the dismissal of *Visa, Inc.* v. *Osborn*, 137 S. Ct. 289 (2016).

Respondents' procedural arguments against review fall flat. Although a reversal here would not end the entire LIBOR MDL, that is no reason to leave standing an erroneous decision that extends the antitrust laws far beyond the realm of competition. Moreover, this Court has resolved important antitrust questions even

when further proceedings remained for remand. *E.g.*, *Leegin Creative Leather Prods., Inc.* v. *PSKS, Inc.*, 551 U.S. 877, 908 (2007). And as for possible dismissal on other grounds, the district court has now dismissed the antitrust claims in some of the MDL cases, but allowed those claims to proceed in many others. The erroneous decision below will control those claims and other reference-rate cases, and chill global market activity, until this Court acts.

I. THE FIRST QUESTION WARRANTS REVIEW

Respondents never join issue on the first question presented. They instead simply assume they have alleged a conventional *per se* antitrust violation by invoking the label of "price-fixing." Opp. 20 (characterizing first question as "whether … plaintiffs who assert that they paid or received a fixed price have pleaded antitrust injury"); *see also id.* 23-30. But "'price-fixing'" in the antitrust sense means "eliminat[ing] one form of competition." *Arizona* v. *Maricopa County Med. Soc.*, 457 U.S. 332, 345 (1982) (quoting *United States* v. *Trenton Potteries Co.*, 273 U.S. 392, 397 (1927)); *see* Pet. 12-14, 17-18.[1] Whether such price-fixing has been alleged here, despite the lack of any impairment of competition, cannot be assumed; that is the very question.

Respondents never explain how their allegations involve the impairment of competition at all. They have conceded that "the process of setting [USD] LIBOR was never intended to be competitive." Pet. App.

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[1] *Cf. Broadcast Music, Inc.* v. *Columbia Broad. Sys., Inc.*, 441 U.S. 1, 9 (1979) ("'[P]rice fixing' is a shorthand way of describing certain categories of business behavior to which the *per se* rule has been held applicable. … Literalness is overly simplistic and often overbroad.").

66a. And they elide a second crucial fact: Competition was also unimpaired in the markets for financial products in which respondents participated, including for products incorporating USD LIBOR. As the Second Circuit acknowledged, "the [b]anks remained horizontal competitors" in the market for financial transactions, and the parties "remained free to negotiate the interest rates attached to particular financial instruments." *Id.* 5a, 19a. Labels and assumptions aside, respondents in substance allege only that USD LIBOR was set improperly—not that any competition was eliminated.

The absence of any impairment of competition in any market distinguishes this case from the *per se* price-fixing cases on which respondents rely. *United States* v. *Socony-Vacuum Oil Co.*, respondents' main case, involved a horizontal conspiracy among oil refiners to fix prices in spot markets, which obviously impaired preexisting competition. 310 U.S. 150, 220 (1940); *see also* Pet. 14-15. The conspiracy also affected competition in the retail market, where prices were based in part on spot prices: Collusion in the spot markets "place[d] a floor under the market," and thus "prevent[ed] the determination of those prices by free competition alone." *Socony*, 310 U.S. at 223.[2]

By contrast, USD LIBOR is a cooperatively determined floating reference rate, not a competitively determined price term. "[F]ree competition alone" continued to determine prices in the market for financial products, as the Second Circuit acknowledged. *See* Pet.

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[2] Respondents also cite *Knevelbaard Dairies* v. *Kraft Foods, Inc.*, 232 F.3d 979 (9th Cir. 2000), but like *Socony*, that case involved price-fixing in a market in which the conspirators had previously competed. *Id.* at 984-986; *see also* Pet. 15-17 (distinguishing respondents' other cases).

App. 19a; *see also id.* 33a ("The disputed transactions were done at rates that were negotiated …."); SIFMA Br. 8 ("[C]ompetition [in this market] occurs when a bank or other firm offers favorable interest rates on actual financial products, not in the setting of LIBOR."). Although the "mechanism" by which price-fixing is accomplished is irrelevant (Opp. 25-26), there still must be price-fixing in the first place—which by definition requires the impairment of competition. That requirement applies no less to the supposed fixing of a "price component" (*id.* 28-29). *See also Catalano, Inc.* v. *Target Sales, Inc.*, 446 U.S. 643, 644-649 (1980) (fixing credit component of price, which had been subject to horizontal competition, was *per se* unlawful).[3]

Respondents' attempts to distinguish *NYNEX* lack merit. Although *NYNEX* was a group boycott case,

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[3] Respondents' suggestion that USD LIBOR is a "price component" highlights why this is not a case of *per se* unlawful price-fixing. The *per se* rule applies only to activities with "'immediately obvious'" anticompetitive effects. *Leegin*, 551 U.S. at 887. But any alleged manipulation of a reference rate like LIBOR would have highly complex aspects and effects. *E.g.*, Antitrust Scholars' Br. 16-17; SIFMA Br. 11-12; *see also* Pet. App. 38a (acknowledging that "[i]t may be that the influence of the corrupted LIBOR figure on competition was weak and potentially insignificant"). For example, unlike physical production inputs governed by the laws of supply and demand, like oil in gasoline or milk in cheese, any manipulation of LIBOR would not affect the supply of LIBOR or of instruments that use LIBOR. Continued competition over the terms of a given instrument—*e.g.*, the "x" in "LIBOR plus x"—could thus fully compensate for any depression of LIBOR. Petitioners thus *do* dispute "that manipulating LIBOR resulted in petitioners charging higher prices (or paying lower returns)." NCUA Opp. 8; *cf. In re LIBOR-Based Fin. Instruments Antitrust Litig.*, 2016 WL 7378980, at *18 (S.D.N.Y. Dec. 20, 2016) (explaining why LIBOR changes may not affect the "price the plaintiffs ultimately paid").

this Court's admonition that antitrust violations require "harm … to the competitive process, *i.e.*, to competition itself," 525 U.S. at 135, reflects a fundamental principle of antitrust law. Pet. 11-13; *see also Apex Hosiery Co.* v. *Leader*, 310 U.S. 469, 496 (1940) (Sherman Act requires "some form of restraint upon commercial competition"). Other courts of appeals have thus applied *NYNEX* in numerous contexts. *E.g.*, *Lucas* v. *Citizens Commc'ns Co.*, 244 F. App'x 774, 776-777 (9th Cir. 2007) (rejecting price-fixing claims); *Craftsmen Limousine, Inc.* v. *Ford Motor Co.*, 491 F.3d 380, 390 (8th Cir. 2007) (affirming summary judgment for defendants in horizontal conspiracy case).

For the same reasons, respondents have failed to plead antitrust injury. Even when a case is governed by a *per se* rule, the plaintiff must establish that some "competition-*reducing* aspect or effect of the defendant's behavior" caused it harm. *Atlantic Richfield Co.* v. *USA Petroleum Co.*, 495 U.S. 328, 344-345 (1990). That is true whether the plaintiff is a competitor or consumer. *Cf.* Opp. 17-18, 30.[4] Respondents cannot avoid that basic principle simply by invoking the "*per se*" label.

The government's brief notably never says that the Second Circuit was correct in holding that conduct with no relationship to any impairment of competition (much

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[4] The supposed harm here must be measured by comparing the net returns plaintiffs received against the returns they would have received in a hypothetical world in which alleged LIBOR suppression never occurred. The Second Circuit's view that respondents "got less for their money," Pet. App. 22a, short-circuits that analysis by assuming that nothing else about the terms and rates of the financial instruments would have changed even if they had offered higher returns—a supposition that was never pleaded and makes no sense. *Supra* n.3.

less an obvious one) nevertheless constitutes a *per se* antitrust violation. To the contrary, the government acknowledges (at 10) that no other decision "appl[ies] the antitrust laws to collusion of the sort alleged here." That point only confirms that the antitrust laws do not and should not apply here—and that the Second Circuit improperly applied a *per se* framework in a context where the competitive effects (if any) of petitioners' alleged conduct were far from "'immediately obvious.'" *Leegin*, 551 U.S. at 887; *see also, e.g.*, *Broadcast Music, Inc.* v. *Columbia Broad. Sys., Inc.*, 441 U.S. 1, 19-20 (1979) (*per se* treatment appropriate when "the practice facially appears to … always or almost always tend to restrict competition").

II. THE SECOND QUESTION WARRANTS REVIEW

Respondents answer the second question presented by rehashing factual allegations discussed in the petition. They discuss (Opp. 7-8) the motives that might have driven banks to collude in setting LIBOR, but they nowhere respond to petitioners' point (Pet. 7-8, 27-29) that those motives are equally consistent with independent conduct. They rely on statements in settlement documents relating to individual banks that have nothing to do with the alleged USD LIBOR suppression or that are again just as readily explained as conscious parallelism. *Compare* Opp. 11 (quoting allegation in CFTC Order that "UBS managers directed its LIBOR submitters to stay in 'the middle of the pack'"), *with* Order, *In re UBS AG*, No. 13-09, at 4 & n.3 (CFTC Dec. 19, 2012) (concluding that "[t]hese directions to be 'in the middle of the pack'" served "[t]o [p]rotect [r]eputation" and are not "evidence that UBS issued or acted upon the directions with the intent to manipulate the official published LIBOR"). None of this plausibly pleads an

industry-wide, multi-year conspiracy among sixteen LIBOR panel banks. Rather, it is all equally consistent with independent, parallel LIBOR submissions.

The decision below departs from *Twombly*, where this Court held that antitrust plaintiffs must plead facts that are more than "merely consistent with" a conspiracy in order to state a plausible claim. 550 U.S. at 557. "[P]arallel conduct that could just as well be independent action" is insufficient to meet the plausibility standard. *Id.* at 567. As the petition explains (at 26-27)—and respondents nowhere address—*Twombly*'s plausibility standard reflects longstanding concerns about the danger of false-positives in expensive, high-stakes, industry-wide antitrust cases. Yet the Second Circuit redefined plausibility contrary to *Twombly*, holding that allegations that "are susceptible to an equally likely interpretation" of parallel conduct now meet the plausibility bar. Pet. App. 38a.

Respondents' attempt to minimize the circuit split on this question is unavailing. The main opposition mentions (at 33) only one of the three circuits that depart from the Second Circuit's approach and does not even refer to the relevant conspiracy claim in that case. The government's brief (at 15) likewise misconstrues the split. *Twombly* may not require dismissal "when a complaint raises a *plausible* inference of an agreement but also an *equally plausible* inference of independent parallel conduct." (Emphasis added). But that is not the issue here. Rather, as *Twombly* held, allegations that "could just as well be independent action"—that contain nothing inconsistent with mere parallelism—are not plausible by definition. 550 U.S. at 566-567; *compare SD3, LLC* v. *Black & Decker (U.S.) Inc.*, 801 F.3d 412, 437 (4th Cir. 2015) (rejecting conspiracy theory where allegations were "equally consistent with le-

gal behavior"), *with id.* at 433-434 (separately pleaded conspiracy was plausible where there were independent allegations of an agreement).

This Court has already deemed these issues worthy of consideration. In June, it granted certiorari in *Osborn* to resolve the question whether participation in an industry association—*i.e.*, conduct wholly consistent with permitted activity—could support a claim of antitrust conspiracy.[5] Although the Court dismissed that case for reasons unrelated to the merits, the legal question remains important, and this case—which raises related issues, as petitioners explained (at 31-32) and respondents barely contest—provides an opportunity to address it. This Court can and should grant review here to address the pleading of antitrust conspiracies as it was prepared to do in *Osborn*.

III. THE ISSUES ARE UNDISPUTEDLY IMPORTANT, AND THIS CASE IS THE RIGHT VEHICLE FOR RESOLVING THEM

Respondents do not even attempt to dispute the importance of the questions presented to world financial markets. And their procedural arguments against review lack merit.

First, respondents stress (at 34-36) that other aspects of the MDL will continue even if this Court reverses the decision below and orders the federal anti-

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[5] By comparison, the allegations here draw substantially from settlements involving a small group of LIBOR banks, *e.g.*, Opp. 10-12, and are wholly consistent with parallel (if improper) activity, *see* Pet. 7-9, 28-29; nevertheless respondents assert a conspiracy claim against all of the other LIBOR banks as well, as to which the allegations mainly involve mere membership and participation in the LIBOR panel.

trust claims dismissed. There are in fact many non-antitrust claims in the sprawling, 60-case multidistrict litigation below. But respondents cite no rule or policy precluding review of every decision in an MDL until the last MDL case has reached final judgment. Such a rule would inappropriately insulate appellate rulings on important issues of federal law. Indeed, this Court recently rejected such a "whole MDL" rule *at respondents' behest* with respect to review of district court decisions. *Gelboim* v. *Bank of Am. Corp.*, 135 S. Ct. 897, 905 n.5, 906 (2015).

Contrary to respondents' view, a gravely mistaken appellate ruling on fundamental questions of antitrust law should not escape review simply because the plaintiffs are also asserting other claims. Petitioners' argument is that antitrust is an especially *inappropriate* theory of liability here. It would be bizarre to force the continued threat of treble damages and joint-and-several liability—and leave in place a commerce-chilling expansion of antitrust law—because some respondents also asserted other, non-antitrust theories.

As *Twombly* taught, antitrust conspiracy claims targeting an entire industry can exert an *in terrorem* effect far beyond their actual merit. *See also Shapiro* v. *General Motors Corp.*, 472 F. Supp. 636, 660 (D. Md. 1979) ("[O]ne can readily understand … the *in terrorem* effect of an antitrust complaint.'" (citing *Blue Chip Stamps* v. *Manor Drug Stores*, 421 U.S. 723, 740 (1975)); SIFMA Br. 15-18 (discussing chilling effect of Second Circuit's decision on standard-setting associations). Respondents' suggestion that this Court should not grant certiorari because some of the MDL cases might settle only underscores that point; their candid hope of gaining settlement leverage by leaving intact the decision below is a reason for the Court to grant re-

view, not deny it. That is particularly true because the stakes here, where treble damages and "'trillions of dollars' worth of financial transactions'" are at issue, Pet. App. 31a, could scarcely be higher.[6]

Second, respondents (particularly the government, at 7-8) also note that the district court may yet dismiss the antitrust claims here on other grounds. In fact, the district court recently issued an opinion dismissing the antitrust claims in some of the cases here (including the lead case, *Gelboim*) on alternative grounds, but allowing such claims to proceed in others (such as *Metzler* and *City of Baltimore*) that are also the subject of this petition. *In re LIBOR-Based Fin. Instruments Antitrust Litig.*, 2016 WL 7378980, at *15-23 & App'x (S.D.N.Y. Dec. 20, 2016).[7] The antitrust claims thus have not gone away; it is clearer than ever that only this Court's review will prevent them from moving forward in many (if not all) of the MDL cases.

That some of the antitrust claims here have been dismissed on an alternative ground is no reason to leave standing an erroneous decision of surpassing economic and legal significance. This case is singularly important because of its potential impact on both the MDL anti-

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[6] This Court regularly decides important questions and then remands for further litigation. *E.g.*, *Leegin*, 551 U.S. at 908 (remanding after holding vertical minimum price restraints not unlawful *per se*); *F. Hoffmann-La Roche Ltd.* v. *Empagran S.A.*, 542 U.S. 155, 175 (2004) (remanding after determining scope of Foreign Trade Antitrust Improvements Act); *State Oil Co.* v. *Khan*, 522 U.S. 3, 22 (1997) (remanding after holding vertical maximum price restraints not *per se* unlawful); *Broadcast Music*, 441 U.S. at 7 (remanding after holding blanket license not unlawful *per se*).

[7] The court also fully dismissed certain defendants (not petitioners here) for lack of personal jurisdiction. *In re LIBOR*, 2016 WL 7378980, at *2-14.

trust claims *and* many other suits targeting collaboratively set benchmark or other reference rates, virtually all of which arise in the Second Circuit. Pet. 33-34; *accord* Opp. 23 n.2; Antitrust Scholars Br. 20-23 (collecting benchmark cases and explaining that "the Second Circuit's decision hobbles other financial benchmarks"). Absent review now, the decision below will be the controlling authority on whether the setting of important reference rates like LIBOR is subject to suit under the antitrust laws even where there is no clear relationship between alleged misconduct and any impairment of competition—and the effects of that erroneous decision will be felt throughout the financial industry across a host of cases. The threat of antitrust claims untethered to competitive harms is not ameliorated merely because a district court has held that some limited set of plaintiffs are not proper enforcers of such claims. The Second Circuit's unprecedented expansion of the antitrust laws warrants review.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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