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Supreme Court, U.S.
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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

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

This case involves an alleged conspiracy to manipulate U.S. Dollar ("USD") LIBOR, a reference rate used in financial transactions and based on a composite of individual banks' estimates of the interest rates at which they could borrow U.S. Dollars under various hypothetical conditions. It is undisputed that the process of setting USD LIBOR has never been, and was never meant to be, competitive. It is also undisputed that the banks that participated in the process continued to compete in the actual market for financial instruments and transactions.

Respondents have asserted claims under the Sherman Act based on the banks' alleged collusion in the non-competitive USD LIBOR-setting process. The questions presented are:

1. Whether a plaintiff may plead a violation of the antitrust laws based on alleged collusion in a non-competitive context and alleged injuries that do not stem from the impairment or restraint of any competitive process.

2. Whether a plaintiff may plead an antitrust conspiracy based on alleged conduct that is equally indicative of parallel, non-conspiratorial activity.

PARTIES TO THE PROCEEDING

Petitioners are Bank of America Corporation, Bank of America, N.A., Merrill Lynch, Pierce, Fenner & Smith, Inc. (f/k/a Banc of America Securities LLC), Citibank, N.A., Citigroup Inc., Citigroup Global Markets Inc., Citigroup Global Markets Limited, JPMorgan Chase & Co., JPMorgan Chase Bank, N.A., and J.P. Morgan Securities LLC (f/k/a J.P. Morgan Securities Inc.).

Respondents are Ellen Gelboim, on behalf of herself and all others similarly situated, Linda Zacher, Schwab Short-Term Bond Market Fund, Schwab Total Bond Market Fund, Schwab U.S. Dollar Liquid Assets Fund, Schwab Money Market Fund, Schwab Value Advantage Money Fund, Schwab Retirement Advantage Money Fund, Schwab Investor Money Fund, Schwab Cash Reserves, Schwab Advisor Cash Reserves, Charles Schwab Bank, N.A., Charles Schwab & Co., Inc., Charles Schwab Corporation, Schwab YieldPlus Fund, Schwab YieldPlus Fund Liquidation Trust, 33-35 Green Pond Road Associates, LLC, on behalf of itself and all others similarly situated, FTC Futures Fund PCC Ltd, on behalf of themselves and all others similarly situated, FTC Futures Fund SICAV, on behalf of themselves and all others similarly situated, Metzler Investment GmbH, on behalf of itself and all others similarly situated, 303030 Trading LLC, Atlantic Trading USA, LLC, Gary Francis, Nathaniel Haynes, Courtyard at Amwell II, LLC, Greenwich Commons II, LLC, Jill Court Associates II, LLC, Maidencreek Ventures II LP, Raritan Commons, LLC, Lawrence W. Gardner, on behalf of themselves and all others similarly situated, Mayor and City Council of Baltimore, City of New Britain Firefighters' and Police Benefit Fund,

on behalf of itself and all others similarly situated, Texas Competitive Electric Holdings Company LLC, Guaranty Bank & Trust Company, Individually and on behalf of all others similarly situated, National Credit Union Administration Board, as Liquidating Agent of U.S. Central Federal Credit Union, Western Corporate Federal Credit Union, Members United Corporate Federal Credit Union, Southwest Corporate Federal Credit Union, and Constitution Corporate Federal Credit Union, City of Philadelphia, Pennsylvania Intergovernmental Cooperation Authority, Darby Financial Products, Capital Ventures International, Salix Capital US Inc., Prudential Investment Portfolios 2, FKA Dryden Core Investment Fund, on behalf of Prudential Core Short-Term Bond Fund, Prudential Core Taxable Money Market Fund, City of Riverside, Riverside Public Financing Authority, East Bay Municipal Utility District, County of San Mateo, San Mateo County Joint Powers Financing Authority, City of Richmond, Richmond Joint Powers Financing Authority, Successor Agency to the Richmond Community Redevelopment Agency, County of San Diego, County of Sonoma, David E. Sundstrom, in his official capacity as Treasurer of the county of Sonoma for and on behalf of the Sonoma County Treasury Pool Investment, Regents of the University of California, San Diego Association of Governments, County of Sacramento, The County of Mendocino, City of Houston, Bay Area Toll Authority, Joseph Amabile, Louie Amabile, individually & on behalf of Lue Trading, Inc., Norman Byster, Michael Cahill, Richard Deogracias, individually on behalf of RCD Trading, Inc., Marc Federighi, individually on behalf of MCO Trading, Scott Federighi, individually on behalf of Katsco, Inc., Robert Furlong, individually on behalf of XCOP, Inc., David Cough, Brian Haggerty,

individually on behalf of BJH Futures, Inc., David Klusendorf, Ronald Krug, Christopher Lang, John Monckton, Philip Olson, Brett Pankau, David Vecchione, individually on behalf of Vecchione & Associates, Randall Williams, John Henderson, 303 Proprietary Trading LLC, Margery Teller, Nicholas Pesa, Eduardo Restani, and Vito Spillone.

Other non-petitioning parties to the proceeding in the court below are The Bank of Tokyo-Mitsubishi UFJ, Ltd., Barclays Bank PLC, Barclays plc, Barclays Capital Inc., Citigroup Funding, Inc., Citi Swapco Inc., Citigroup Financial Products, Inc., Coöperatieve Rabobank U.A. (f/k/a Coöperatieve Centrale RaiffeisenBoerenleenbank B.A.), Credit Suisse Group AG, Credit Suisse International, Credit Suisse AG, Credit Suisse Securities (USA) LLC, Credit Suisse (USA), Inc., Deutsche Bank AG, Deutsche Bank Securities Inc., HSBC Securities (USA) Inc., HSBC USA, Inc., HSBC Finance Corporation, HSBC Holdings plc, HSBC Bank plc, HSBC Bank USA, N.A., J.P. Morgan Dublin plc (f/k/a J.P. Morgan Bank Dublin plc) (f/k/a/ Bear Stearns Bank plc), Lloyds Banking Group plc, Lloyds Bank plc (f/k/a Lloyds TSB Bank plc), HBOS plc, The Norinchukin Bank, Portigon AG (f/k/a WestLB AG), Westdeutsche ImmobilienBank AG, Royal Bank of Canada, The Royal Bank of Scotland Group plc, The Royal Bank of Scotland plc, RBS Securities Inc. (f/k/a Greenwich Capital Markets Inc.), Société Générale, UBS AG, UBS Securities LLC, UBS Limited, British Bankers' Association, BBA Enterprises Ltd., and BBA LIBOR Ltd.

CORPORATE DISCLOSURE STATEMENT

Bank of America Entities

Petitioner Bank of America Corporation[1] is a publicly held company, does not have any parent corporation, and no publicly held company has an ownership interest of 10% or more in Bank of America Corporation.

Petitioner Bank of America, N.A.[2] is a National Association and is 100% owned by BANA Holding Corporation. BANA Holding Corporation is 100% owned by BAC North America Holding Company. BAC North America Holding Company is 100% owned by NB Holdings Corporation. NB Holdings Corporation is 100% owned by Bank of America Corporation.

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[1] As to the following cases: *Gelboim* v. *Credit Suisse Grp. AG*, No. 13-3565 (2d Cir.); *Mayor and City Council of Baltimore* v. *Credit Suisse Grp. AG*, Nos. 15-494, 15-498 (2d Cir.); *Metzler Inv. GmbH* v. *Credit Suisse Grp. AG*, No. 15-454 (2d Cir.); *Amabile* v. *Bank of Am. Corp.*, Nos. 15-825, 15-830 (2d Cir.); *Salix Capital US Inc.* v. *Banc of Am. Sec. LLC*, Nos. 15-611, 15-620 (2d Cir.); *33-35 Green Pond Assocs., LLC* v. *Bank of Am. Corp.*, No. 15-441 (2d Cir.); *Courtyard at Amwell II, LLC* v. *Bank of Am. Corp.*, No. 15-477 (2d Cir.); *Guaranty Bank & Trust Co.* v. *Credit Suisse Grp. AG*, No. 15-524 (2d Cir.).

[2] As to the following cases: *Gelboim* v. *Credit Suisse Grp. AG*, No. 13-3565 (2d Cir.); *Mayor and City Council of Baltimore* v. *Credit Suisse Grp. AG*, Nos. 15-494, 15-498 (2d Cir.); *Metzler Inv. GmbH* v. *Credit Suisse Grp. AG*, No. 15-454 (2d Cir.); *Salix Capital US Inc.* v. *Banc of Am. Sec. LLC*, Nos. 15-611, 15-620 (2d Cir.); *Courtyard at Amwell II, LLC* v. *Bank of Am. Corp.*, No. 15-477 (2d Cir.); *Guaranty Bank & Trust Co.* v. *Credit Suisse Grp. AG*, No. 15-524 (2d Cir.).

Petitioner Merrill Lynch, Pierce, Fenner & Smith Incorporated ("MLPFS")[3] is 100% owned by NB Holdings Corporation. NB Holdings Corporation is 100% owned by Bank of America Corporation. Effective November 1, 2010, Banc of America Securities LLC merged with and into MLPFS.

Citibank Entities

Petitioner Citigroup Inc.[4] is a publicly held corporation, has no parent corporation, and no publicly held corporation owns 10% or more of its stock.

Petitioner Citibank, N.A.[5] is wholly owned by Citicorp, which in turn is wholly owned by Citigroup Inc.

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[3] As to the following case: *Salix Capital US Inc.* v. *Banc of Am. Sec. LLC*, Nos. 15-611, 15-620 (2d Cir.).

[4] As to the following cases: *Gelboim* v. *Credit Suisse Grp. AG*, No. 13-3565 (2d Cir.); *Mayor and City Council of Baltimore* v. *Credit Suisse Grp. AG*, Nos. 15-494, 15-498 (2d Cir.); *Metzler Inv. GmbH* v. *Credit Suisse Grp. AG*, No. 15-454 (2d Cir.); *Guaranty Bank & Trust Co.* v. *Credit Suisse Grp. AG*, No. 15-524 (2d Cir.); *City of Philadelphia* v. *Barclays Bank plc.*, 15-547 (2d Cir.); *Salix Capital US Inc.* v. *Banc of Am. Sec. LLC*, Nos. 15-611, 15-620 (2d Cir.); *Prudential Inv. Portfolios 2.* v. *Bank of Am. Corp.*, No. 15-627 (2d Cir.).

[5] As to the following cases: *Gelboim* v. *Credit Suisse Grp. AG*, No. 13-3565 (2d Cir.); *33-35 Green Pond Assocs., LLC* v. *Bank of Am. Corp.*, No. 15-441 (2d Cir.); *Metzler Inv. GmbH* v. *Credit Suisse Grp. AG*, No. 15-454 (2d Cir.); *Guaranty Bank & Trust Co.* v. *Credit Suisse Grp. AG*, No. 15-524 (2d Cir.); *Salix Capital US Inc.* v. *Banc of Am. Sec. LLC*, Nos. 15-611, 15-620 (2d Cir.); *Bay Area Toll Authority* v. *Bank of Am. Corp.*, 15-778 (2d Cir.); *Amabile* v. *Bank of Am. Corp.*, Nos. 15-825, 15-830 (2d Cir.).

Petitioner Citigroup Global Markets Inc.[6] is wholly owned by Citigroup Inc.

Petitioner Citigroup Global Markets Limited[7] is a subsidiary of Citigroup Global Markets Europe Ltd., which in turn is a subsidiary of Citigroup Global Markets Holdings Inc., which in turn is wholly owned by Citigroup Inc.

JPMorgan Entities

Petitioner JPMorgan Chase & Co.[8] is a publicly held corporation. JPMorgan Chase & Co. does not have a parent corporation and no publicly held corporation owns 10% or more of JPMorgan Chase & Co.'s stock.

Petitioner JPMorgan Chase Bank, N.A.[9] is a wholly owned subsidiary of JPMorgan Chase & Co., a publicly

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[6] As to the following cases: *Metzler Inv. GmbH* v. *Credit Suisse Grp. AG*, No. 15-454 (2d Cir.); *Salix Capital US Inc.* v. *Banc of Am. Sec. LLC*, Nos. 15-611, 15-620 (2d Cir.).

[7] As to the following case: *Salix Capital US Inc.* v. *Banc of Am. Sec. LLC*, Nos. 15-611, 15-620 (2d Cir.).

[8] As to the following cases: *Gelboim* v. *Credit Suisse Grp. AG*, No. 13-3565 (2d Cir.); *Mayor and City Council of Baltimore* v. *Credit Suisse Grp. AG*, Nos. 15-494, 15-498 (2d Cir.); *Metzler Inv. GmbH* v. *Credit Suisse Grp. AG*, No. 15-454 (2d Cir.); *Amabile* v. *Bank of Am. Corp.*, Nos. 15-825, 15-830 (2d Cir.); *Darby Fin. Prods.* v. *Barclays Bank plc*, No. 15-551 (2d Cir.); *Salix Capital US Inc.* v. *Banc of Am. Sec. LLC*, Nos. 15-611, 15-620 (2d Cir.); 33-35 *Green Pond Assocs., LLC* v. *Bank of Am. Corp.*, No. 15-441 (2d Cir.); *Courtyard at Amwell II, LLC* v. *Bank of Am. Corp.*, No. 15-477 (2d Cir.); *Guaranty Bank & Trust Co.* v. *Credit Suisse Grp. AG*, No. 15-524 (2d Cir.).

[9] As to the following cases: *Gelboim* v. *Credit Suisse Grp. AG*, No. 13-3565 (2d Cir.); *Mayor and City Council of Baltimore* v. *Credit Suisse Grp. AG*, Nos. 15-494, 15-498 (2d Cir.); *Metzler Inv.*

held corporation. No other publicly held corporation owns 10% or more of JPMorgan Chase Bank, N.A.'s stock.

Petitioner J.P. Morgan Securities LLC[10] is a wholly owned subsidiary of JPMorgan Broker-Dealer Holdings, Inc., which, in turn, is a wholly owned subsidiary of JPMorgan Chase & Co. No other publicly held corporation owns 10% or more of J.P. Morgan Securities LLC's stock.

GmbH v. *Credit Suisse Grp. AG*, No. 15-454 (2d Cir.); *Darby Fin. Prods.* v. *Barclays Bank plc*, No. 15-551 (2d Cir.); *Salix Capital US Inc.* v. *Banc of Am. Sec. LLC*, Nos. 15-611, 15-620 (2d Cir.); *Courtyard at Amwell II, LLC* v. *Bank of Am. Corp.*, No. 15-477 (2d Cir.); *Guaranty Bank & Trust Co.* v. *Credit Suisse Grp. AG*, No. 15-524 (2d Cir.).

[10] As to the following cases: *Prudential Inv. Portfolios 2.* v. *Bank of Am. Corp.*, No. 15-627 (2d Cir.); *Salix Capital US Inc.* v. *Banc of Am. Sec. LLC*, Nos. 15-611, 15-620 (2d Cir.).

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
PARTIES TO THE PROCEEDING	ii
CORPORATE DISCLOSURE STATEMENT	v
TABLE OF AUTHORITIES	xi
INTRODUCTION	1
OPINIONS BELOW	4
JURISDICTION	4
STATUTES INVOLVED	4
STATEMENT	5
A. The Non-Competitive Process of Setting USD LIBOR	5
B. Respondents' Allegations Of A Conspiracy To Manipulate USD LIBOR	7
C. Proceedings Below	9
REASONS FOR GRANTING THE PETITION	12
I. THE COURT OF APPEALS CONTRAVENED THIS COURT'S DECISIONS BY ALLOWING ANTITRUST CLAIMS THAT ARE NOT BASED ON RESTRAINTS ON ANY COMPETITIVE PROCESS	12
A. The Decision Below Contravenes This Court's Decisions Holding That Only Impairments Of Competition Violate The Antitrust Laws	13

TABLE OF CONTENTS—Continued

Page

B. The Decision Below Also Contravenes The Rule That An Antitrust Plaintiff Must Plead Injury Flowing From Reduced Competition 22

II. THE COURT OF APPEALS' NEW ANTITRUST CONSPIRACY PLEADING STANDARD CONFLICTS WITH *TWOMBLY* AND CREATES A CIRCUIT SPLIT 25

III. THE QUESTIONS PRESENTED ARE EXCEEDINGLY IMPORTANT TO ANTITRUST LAW AND THE GLOBAL ECONOMY 32

CONCLUSION 35

APPENDIX A: Opinion of the United States Court of Appeals for the Second Circuit, May 23, 2016 .... 1a

APPENDIX B: Memorandum Opinion and Order of the United States District Court for the Southern District of New York, Mar. 29, 2013 .... 41a

TABLE OF AUTHORITIES

CASES

Page(s)

7 West 57th Street Realty Co. v. *Citigroup, Inc.*, 2015 WL 1514539 (S.D.N.Y. Mar. 31, 2015) 34

Alaska Electrical Pension Fund v. *Bank of Am. Corp.*, 2016 WL 1241533 (S.D.N.Y. Mar. 28, 2016) 34

Allied Tube & Conduit Corp. v. *Indian Head, Inc.*, 486 U.S. 492 (1988) 16

Anderson News, L.L.C. v. *American Media, Inc.*, 680 F.3d 162 (2d Cir. 2012) 28

Apex Hosiery Co. v. *Leader*, 310 U.S. 469 (1940) 12

Arizona v. *Maricopa County Medical Society*, 457 U.S. 332 (1982) 16, 17

Associated General Contractors of California, Inc. v. *California State Council of Carpenters*, 459 U.S. 519 (1983) 14, 22

Atlantic Richfield Co. v. *USA Petroleum Co.*, 495 U.S. 328 (1990) 2, 9, 13, 22, 23

Bassett v. *NCAA*, 528 F.3d 426 (6th Cir. 2008) 24

Bell Atlantic Corp. v. *Twombly*, 550 U.S. 544 (2007) .... *passim*

Blue Shield of Virginia v. *McCready*, 457 U.S. 465 (1982) 15

Board of Trade City of Chicago v. *United States*, 246 U.S. 231 (1918) 13

TABLE OF AUTHORITIES—Continued

Page(s)

Broadcast Music, Inc. v. *Columbia Broadcasting System, Inc.*, 441 U.S. 1 (1979) 17

Brooke Group Ltd. v. *Brown & Williamson Tobacco Corp.*, 509 U.S. 209 (1993) 14, 21, 24, 25, 32

Brunswick Corp. v. *Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477 (1977) 10, 11, 22, 23, 25

Cargill, Inc. v. *Monfort of Colorado, Inc.*, 479 U.S. 104 (1986) 23, 24

Catalano, Inc. v. *Target Sales, Inc.*, 446 U.S. 643 (1980) 11, 15

Forsyth v. *Humana, Inc.*, 114 F.3d 1467 (9th Cir. 1997) 21

Hunt v. *Crumboch*, 325 U.S. 821 (1945) 21

In re Musical Instruments & Equipment Antitrust Litigation, 798 F.3d 1186 (9th Cir. 2015) 31

In re Travel Agent Commission Antitrust Litigation, 583 F.3d 896 (6th Cir. 2009) 31

In re Zarnel, 619 F.3d 156 (2d Cir. 2010) 34

Kendall v. *Visa U.S.A., Inc.*, 518 F.3d 1042 (9th Cir. 2008) 31

Laydon v. *Mizuho Bank, Ltd.*, 2014 WL 1280464 (S.D.N.Y. Mar. 28, 2014) 34

Leegin Creative Leather Products, Inc. v. *PSKS, Inc.*, 551 U.S. 877 (2007) 17

TABLE OF AUTHORITIES—Continued

Page(s)

Maple Flooring Manufacturers' Ass'n v. *United States*, 268 U.S. 563 (1925) 16

Matsushita Electric Industrial Co. v. *Zenith Radio Corp.*, 475 U.S. 574 (1986) 26

Mayfield v. *British Bankers' Ass'n*, 2014 WL 10449597 (S.D.N.Y. July 22, 2014) 34

McDonald v. *Johnson & Johnson*, 722 F.2d 1370 (8th Cir. 1983) 24

Monsanto Co. v. *Spray-Rite Service Corp.*, 465 U.S. 752 (1984) 26, 27

Novell, Inc. v. *Microsoft Corp.*, 731 F.3d 1064 (10th Cir. 2013) 24

NYNEX Corp. v. *Discon, Inc.*, 525 U.S. 128 (1998) .... *passim*

Osborn v. *Visa Inc.*, 797 F.3d 1057 (D.C Cir. 2015) 31

Plymouth Dealers' Association of Northern California v. *United States*, 279 F.2d 128 (9th Cir. 1960) 15

Rambus Inc. v. *FTC.*, 522 F.3d 456 (D.C. Cir. 2008) 20

Schachar v. *American Academy of Ophthalmology, Inc.*, 870 F.2d 397 (7th Cir. 1989) 21

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TABLE OF AUTHORITIES—Continued

Page(s)

SD3, LLC v. *Black & Decker*, 801 F.3d 412 (4th Cir. 2015) 17, 30

Texaco Inc. v. *Dagher*, 547 U.S. 1 (2006) 17, 20

Turner v. *Johnson & Johnson*, 809 F.2d 90 (1st Cir. 1986) 24

United States v. *Colgate & Co.*, 250 U.S. 300 (1919) 14

United States v. *Joint-Traffic Ass'n*, 171 U.S. 505 (1898) 16

United States v. *Socony-Vacuum Oil Co.*, 310 U.S. 150 (1940) 11, 15, 18

DOCKETED CASES

United States v. *Royal Bank of Scotland, PLC*, No. 13 cr. 74 (D. Conn.) 8

Visa, Inc. v. *Osborn*, No. 15-961 (U.S.) 3

STATUTES

15 U.S.C.
§ 1 .... 4, 7
§ 15 5

28 U.S.C. § 1254 4

OTHER AUTHORITIES

Areeda, Phillip E. & Herbert Hovenkamp, *Antitrust Law* (rev. ed. 1996) 32

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

PETITION FOR A WRIT OF CERTIORARI

Petitioners respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit in this case.

INTRODUCTION

Respondents allege that a group of banks violated Section 1 of the Sherman Act by agreeing to manipulate U.S. Dollar ("USD") LIBOR, a reference rate used widely in financial transactions that is set through a collaborative process. Respondents contend that they were injured by that alleged manipulation when they bought and sold financial instruments that refer or relate somehow to USD LIBOR. Reversing the district court's dismissal of the complaints, the Second Circuit

held that respondents' allegations of collusion in the USD LIBOR-setting process were sufficient to plead a price-fixing claim under Section 1.

The court of appeals' decision is inconsistent with this Court's repeated admonition that the antitrust laws are not designed to address business misconduct that does not impair competition. The Sherman Act does not "transform cases involving business behavior that is [allegedly] improper ... into treble-damages antitrust cases" where "the competitive process itself does not suffer harm." *NYNEX Corp.* v. *Discon, Inc.*, 525 U.S. 128, 137 (1998). Nor do antitrust plaintiffs have standing to seek relief unless their injuries "stem[] from a competition-*reducing* aspect or effect of the defendant's behavior." *Atlantic Richfield Co.* v. *USA Petroleum Co.*, 495 U.S. 328, 344 (1990) ("*ARCO*").

Those settled principles should lead to dismissal of these cases (as the district court recognized). USD LIBOR has never been the product of competition between banks or any other participants in the market for financial products. It is set through a daily submission process that concededly "was never intended to be competitive." App. 66a. Any alleged manipulation of the non-competitive USD LIBOR-setting process cannot have impaired or displaced competition, because there was never any competition over LIBOR in the first place—and because competition in the actual market for financial products continued unabated. Although respondents may be able to pursue other avenues of relief, they do not allege an *antitrust* claim.

The court of appeals' contrary conclusion was premised on its determination that respondents had alleged *per se* unlawful price-fixing. But respondents' use of that label cannot substitute for alleging some re-

straint on preexisting competition. Every price-fixing case the court of appeals cited, unlike this case, involved allegations of collusion or misconduct that restricted some competitive process. By allowing to proceed claims that are based on conduct that did not impede any competitive process, and on an injury that cannot have flowed from any competitive harm, the decision below takes antitrust law into uncharted—indeed, forbidden—territory.

Review is warranted for another reason, too. To state an antitrust conspiracy claim, a plaintiff must plausibly plead an *agreement* in restraint of trade. *Bell Atl. Corp.* v. *Twombly*, 550 U.S. 544, 566 (2007). Drawing on established antitrust principles, this Court held in *Twombly* that allegations that are "merely consistent with" such an agreement, but are also equally consistent with independent conduct, are insufficient. *Id.* at 557.

Here, as in *Twombly*, respondents alleged a sweeping antitrust conspiracy based on circumstantial evidence that does nothing to suggest that the defendants acted in concert rather than in parallel. The court of appeals' holding—that respondents may proceed to discovery, even if their allegations "are susceptible to an equally likely interpretation" of parallel conduct—cannot be reconciled with either *Twombly* or the decisions of other circuits. The importance of *Twombly*'s bar on pleadings that are "merely consistent with" collusion is confirmed by the Court's grant of review in *Visa, Inc.* v. *Osborn*, No. 15-961, which is likely to address related issues.

Both questions presented are exceedingly important to antitrust law and the global economy. The legal issues go to the fundamental limits of antitrust

law. As a practical matter, the Second Circuit's decision may cast doubt on the process of setting USD LIBOR, which has been called "the world's most important number" because of its widespread use in the global financial system. Moreover, treble-damages judgments here (and in similar pending cases likely to be controlled by the decision below) could be astronomical—the court of appeals suggested that such a judgment could "bankrupt 16 of the world's most important financial institutions and vastly extend the potential scope of antitrust liability in myriad markets." Review is therefore warranted.

OPINIONS BELOW

The court of appeals' opinion (App. 1a-39a) is reported at 823 F.3d 759. The district court's decision (App. 41a-169a) is reported at 935 F. Supp. 2d 666.

JURISDICTION

The court of appeals entered judgment on May 23, 2016. App. 1a. On August 8, 2016, Justice Ginsburg extended the time for filing a petition for certiorari to September 20, 2016. On September 13, 2016, Justice Ginsburg further extended the deadline to October 20, 2016. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTES INVOLVED

Section 1 of the Sherman Act, 15 U.S.C. § 1, provides:

> Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal.

Section 4 of the Clayton Act, 15 U.S.C. § 15(a), provides:

> [A]ny person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor ... and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee.

STATEMENT

A. The Non-Competitive Process of Setting USD LIBOR

Petitioners[1] are financial institutions, including current and former members of the British Bankers' Association ("BBA"), a London-based trade association that administered the London Interbank Offered Rate, or LIBOR, for various currencies. This case relates to U.S. Dollar ("USD") LIBOR. *See* App. 3a-5a.

USD LIBOR is a set of benchmark rates referenced in financial transactions. During the relevant period, USD LIBOR was calculated each business day in various maturities or "tenors" (such as 1-month, 3-month, and 6-month) based on individual submissions from 16 designated USD LIBOR panel banks. Each panel bank agreed to follow the procedures set by the BBA for making USD LIBOR submissions. *See* App. 4a-5a, 45a-47a.

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[1] Certain petitioners have moved in certain cases in the district court (as to which they are not petitioning) for dismissal of all claims against them for lack of personal jurisdiction. For the avoidance of doubt, petitioners continue to assert their personal jurisdiction defenses notwithstanding the filing of this petition.

The submission process operated as follows: Each day, at 11:00 a.m. London time, each panel bank reported its estimates of the rates at which it believed it could borrow U.S. Dollars in a "reasonable market size" (*i.e.*, a typical transaction) in various tenors from other banks in the London market. *See* App. 4a-5a. The responses to that hypothetical question were compiled and published by Thomson Reuters. The published rate for a given day was the average of the middle eight submissions. *See id.*

As respondents conceded before the district court, "the process of setting LIBOR was never intended to be competitive." App. 66a. Panel banks did not compete over USD LIBOR, and USD LIBOR submissions were not considered bids or quotes on any market. USD LIBOR itself was not and is not traded. *See* App. 65a-66a, 72a; *see also* App. 129a-131a (discussing difference between USD LIBOR and Eurodollar futures contract).

Rather, USD LIBOR serves as a common reference that facilitates a global market in financial instruments. For example, a loan product might bear an interest rate of "LIBOR plus x." The availability of a single reference rate, set at a certain fixed time and place each day, makes it easier to complete financial transactions, particularly transactions with a floating term. LIBOR is "the primary benchmark for short term interest rates globally." App. 47a.

Regardless of how USD LIBOR was set, the actual price terms for financial instruments remained fully subject to market competition. As the court of appeals acknowledged, "[a]lthough LIBOR [was] set jointly, the Banks remained horizontal competitors in the sale of financial instruments," including instruments refer-

encing USD LIBOR, and parties "remained free to negotiate the interest rates attached to [such] financial instruments." App. 5a, 19a.

B. Respondents' Allegations Of A Conspiracy To Manipulate USD LIBOR

Respondents claim to be purchasers of financial instruments that refer to or are somehow affected by USD LIBOR. *See* App. 3a. They allege that, between August 2007 and December 2010, the panel banks conspired to manipulate USD LIBOR in violation of Section 1 of the Sherman Act, 15 U.S.C. § 1.

In particular, respondents allege that, despite panel rules requiring independent submissions by each panel bank, the banks colluded with one another to make lower submissions than they would have made independently, thereby depressing USD LIBOR. *See* App. 6a. Respondents do not allege the occurrence of any meeting or any express agreement among the banks. Rather, they attempt to support their conspiracy theory with three kinds of circumstantial evidence.

First, respondents assert that the banks had financial and reputational motives to report artificially low borrowing rates. App. 37a. As for the supposed financial motive, respondents argue that lower USD LIBOR benefitted panel banks financially by decreasing their interest rates on transactions where the banks were borrowers—even though the same banks were also *lenders* on other transactions, and thus would have been financially harmed by lower rates, *see* App. 39a. As to reputation, the banks allegedly wished to project financial strength by claiming that they could borrow at low rates. But that alleged motive does little to suggest collusion as opposed to unilateral conduct, because

each bank "'had the same motive (namely, to protect its own reputation for creditworthiness) to engage independently in the same misconduct.'" App. 34a-35a.

Second, respondents cite statistical studies purporting to show that, during the relevant period, USD LIBOR was artificially low. App. 7a. But most of those studies took no position on whether that phenomenon was due to independent conduct or collusion. And the sole study that did so purported to show *increased* variation in the banks' USD LIBOR submissions—*i.e.*, less clustering of submissions around some ostensible common target—during the period when the banks were allegedly conspiring, which indicates that the banks were acting independently rather than cooperating. *See* CAJA411-414.

Third, the "vast majority" of respondents' allegations of conspiracy are based on government settlements. App. 6a-7a. None of those settlements, however, describes any agreement among panel banks to depress USD LIBOR. Some of the cited settlements did not even involve USD LIBOR (which is the only benchmark at issue in this case), but rather involved different rates that were set by different panels of banks using different processes.[2] Those settlements that do discuss USD LIBOR describe two categories of reported conduct: First, sporadic attempts by certain traders at certain banks to move certain specific USD LIBOR submissions up or down on particular dates in order to benefit their trading positions, and second, artificially low submissions by some banks that were

[2] For example, the RBS settlement noted by the court of appeals, App. 7a n.5, describes misconduct related to Yen and Swiss Franc LIBOR, not USD LIBOR. *See* Stmt. of Facts, No. 13 Cr. 74, Dkt. No. 5-1 (D. Conn. Apr. 12, 2013).

made unilaterally due to reputational concerns in the midst of the financial crisis.[3] Neither of these supports the "global conspiracy" alleged by respondents, *e.g.*, OTC SAC ¶2, Dist Ct. Dkt. No. 406.

C. Proceedings Below

1. Respondents brought dozens of actions, including numerous class actions, asserting various theories of liability against petitioners based on the alleged conspiracy to lower USD LIBOR. The complaints allege that the manipulation of USD LIBOR affected an array of financial transactions, including over-the-counter interest rate swaps, debt securities, and Eurodollar futures contracts. In many instances, respondents did not contract with any of the panel banks, and in some they did not even purchase an instrument that directly incorporated USD LIBOR. App. 48a-59a. The common thread is that respondents all assert claims under Section 1 of the Sherman Act, based on the theory that the alleged manipulation of USD LIBOR caused them to lose money. App. 45a n.2. Respondents' actions were consolidated in the Southern District of New York.

The district court dismissed respondents' antitrust claims, ruling that they had failed to allege antitrust injury—*i.e.*, an injury that "'stems from a competition-*reducing* aspect or effect of the defendant's behavior.'" App. 63a (quoting *ARCO*, 495 U.S. at 344). The district court observed that USD LIBOR-setting "was a cooperative endeavor wherein otherwise-competing banks

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[3] The Barclays settlements are illustrative. *See* CAJA435-442, 461-465, 510-519 (sporadic requests by certain traders for high or low USD LIBOR submissions to benefit their trading positions); CAJA445-452, 473-479, 523-531 (low USD LIBOR submissions due to reputational concerns during the financial crisis).

agreed to submit estimates of their borrowing costs ... to facilitate the BBA's calculation of an interest rate index." App. 66a. Thus, respondents' alleged injuries did not flow from any impairment of the competitive process:

> [E]ven if ... defendants subverted this cooperative process by conspiring to submit artificial estimates ..., it would not follow that plaintiffs have suffered antitrust injury. Plaintiffs' injury would have resulted from defendants' misrepresentation, not from harm to competition.

Id.

The district court explained further that respondents had not alleged any restraint in the market for financial instruments or interbank loans, and that any effect on those markets in any event did not flow from "a failure of defendants to compete where they otherwise would have." App. 68a. Rather, respondents' supposed injuries all flowed from "alleged collusion ... in an arena in which defendants never did and never were intended to compete." *Id.* Likening respondents' alleged injury to those held insufficient in *ARCO* and *Brunswick Corp.* v. *Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477 (1977), the court explained that "collusion among defendants would not have allowed them to do anything that they could not have done" under normal competitive conditions. App. 71a-72a.

2. The court of appeals reversed, holding that respondents had stated a claim for a violation of Section 1 of the Sherman Act. App. 15a-28a.

The court first held that respondents had pleaded a *per se* violation of the antitrust laws. The court read the complaints to allege that USD LIBOR is "'an insep-

arable part of the price'" of financial transactions, and so "the claim is one of price-fixing." App. 15a. Relying mainly on *Catalano, Inc.* v. *Target Sales, Inc.*, 446 U.S. 643 (1980) (per curiam) and *United States* v. *Socony-Vacuum Oil Co.*, 310 U.S. 150 (1940), the court reasoned that USD 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." App. 15a.

The court reached that conclusion even though, as it acknowledged elsewhere in its decision, the banks continued to compete with one another in the actual market for financial products and transactions that might incorporate USD LIBOR, App. 5a, 19a, and even though any relationship between USD LIBOR and the "price" of the complex financial instruments respondents traded was highly attenuated at best. And the court never addressed the crucial point that distinguishes this case from *Catalano* and *Socony*: In those cases, the defendants suppressed preexisting competition over a particular price component, whereas here, the supposed price component was never subject to any competitive process.

The court next concluded that respondents had pleaded antitrust injury. Generally, the court observed, "when consumers, because of a conspiracy, must pay prices that no longer reflect ordinary market conditions, they suffer 'injury of the type the antitrust laws were intended to prevent.'" App. 18a (quoting *Brunswick*, 429 U.S. at 489). Reiterating its conclusion that respondents had alleged *per se* unlawful price-fixing, the court held that respondents' injury flowed from the alleged conspiracy because respondents "got less for their money" as a result of USD LIBOR's suppression. App. 22a. The court rejected as irrelevant

that "the LIBOR-setting process was a 'cooperative endeavor,'" App. 23a; in its view, respondents' antitrust injury "flow[ed] from the corruption of the rate-setting process." *Id.* Again, the court did not explain how "corruption" of a non-competitive process could constitute a restraint on competition in any market.

Finally, the court rejected petitioners' argument that respondents had failed to plead an *agreement* among the banks to depress LIBOR, as opposed to (at most) independent parallel conduct with that effect. App. 34a-38a. The court acknowledged petitioners' argument that "the 'pack' behavior described in the complaints is equally consistent with parallelism." App. 38a. "Maybe," the court stated, "but 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" of lawful parallelism. *Id.*

REASONS FOR GRANTING THE PETITION

I. The Court Of Appeals Contravened This Court's Decisions By Allowing Antitrust Claims That Are Not Based On Restraints On Any Competitive Process

The court of appeals allowed respondents' antitrust claim to go forward even though the LIBOR-setting process was never a competitive one. That decision conflicts with fundamental teachings of this Court's antitrust decisions: The purpose of the Sherman Act is to protect competition, not to serve as a code of good business behavior, and the antitrust laws are not violated unless competition is restrained. Where "the competitive process itself does not suffer harm," there is no violation of the Sherman Act. *NYNEX Corp.* v. *Discon, Inc.*, 525 U.S. 128, 137 (1998); *see also Apex*

Hosiery Co. v. *Leader*, 310 U.S. 469, 495 (1940) ("[T]his Court has never applied the Sherman Act in any case ... unless ... there was some form of restraint upon commercial competition ...."); *Board of Trade City of Chi.* v. *United States*, 246 U.S. 231, 238 (1918) ("The true test of legality is whether the restraint imposed ... is such as may suppress or even destroy competition."). Moreover, consistent with that basic principle, private plaintiffs may not bring suit under the antitrust laws unless their alleged injuries flow from a "competition-*reducing* aspect or effect" of the asserted misconduct. *Atlantic Richfield Co.* v. *USA Petroleum Co.*, 495 U.S. 328, 344 (1990) ("*ARCO*").

The court of appeals never analyzed whether the conduct alleged here involved any restraint on competition. Instead, it simply assumed as much, relying on respondents' labelling of their claim as "price fixing" as well as *per se* illegal price-fixing cases that involved collusion where there had once been competition. But respondents' label cannot obscure what respondents themselves have conceded: The process of setting USD LIBOR never involved competition; banks have never offered their own competing LIBORs or competed over the level of LIBOR. The Sherman Act does not apply to conduct that impairs no competitive process. By disregarding that principle, the panel departed from this Court's decisions and extended antitrust law beyond its proper domain.

A. The Decision Below Contravenes This Court's Decisions Holding That Only Impairments Of Competition Violate The Antitrust Laws

1. The Sherman Act prohibits only "restraints of trade" that impair or suppress some competitive pro-

cess. *See, e.g.*, *NYNEX*, 525 U.S. at 136-137. The principle that the antitrust laws reach only conduct that impairs competition, not other business misconduct, pervades this Court's Sherman Act decisions. *See, e.g.*, *Brooke Grp. Ltd.* v. *Brown & Williamson Tobacco Corp.*, 509 U.S. 209, 251 (1993) (purpose of Sherman and Clayton Acts is "protecting competition"); *United States* v. *Colgate Co.*, 250 U.S. 300, 307 (1919) ("The purpose of the Sherman Act is to prohibit monopolies, contracts and combinations which ... interfere with the free exercise of their rights by those engaged, or who wish to engage, in trade and commerce—in a word to preserve the right of freedom to trade."); *see also, e.g.*, *Associated Gen. Contractors, Inc.* v. *California State Council of Carpenters*, 459 U.S. 519, 535-538 (1983) ("*AGC*") (Act's "central interest i[s] protecting the economic freedom of participants in the relevant market").

2. The court of appeals never examined whether alleged collusion in the USD LIBOR-setting process restrained any preexisting competition, even though the district court's analysis was based on its recognition that this process was never competitive. App. 65a-74a. Rather, for the court of appeals, the analysis began and ended with respondents' description of the alleged misconduct as *per se* unlawful horizontal price-fixing: "Since appellants allege that the LIBOR 'must be characterized as an inseparable part of the price,' and since we must accept that allegation as true for present purposes, the claim is one of price-fixing." App. 15a.

But the decisions cited by the court of appeals show why this case is fundamentally different from *per se* unlawful price-fixing: Each one involved competitors who began colluding where they had once competed. For instance, the court relied heavily on this Court's *Socony* decision, which involved horizontal collusion to fix a

base component of wholesale gasoline prices. *United States* v. *Socony-Vacuum Oil Co.*, 310 U.S. 150, 216 (1940). In *Socony*, horizontal competitors in the wholesale market initially competed to purchase their gasoline in so-called "spot" markets, and average spot-market prices were used as an industry benchmark. These competitors colluded in the spot markets, driving spot market supply down and spot prices up. *Id.* at 167-168. "[R]educ[ing] the play of the forces of supply and demand" in the spot markets was thus the crux of the scheme. *Id.* at 220.

Similarly, *Catalano*, another price-component case on which the court heavily relied, undisputedly involved the suppression of competition. Before the agreement at issue, "wholesalers had competed with each other with respect to trade credit," but "[a]fter entering into the agreement, [they] uniformly refused to extend any credit at all." *Catalano, Inc.* v. *Target Sales, Inc.*, 446 U.S. 643, 644-645 (1980) (per curiam). Fixing this credit component of price, previously set by competition, was obviously *per se* unlawful; the only issue was whether respondents could argue that their conduct was "harmless" notwithstanding the "virtually self-evident" *per se* violation. *Id.* at 648-649. The decision in *Blue Shield of Virginia* v. *McCready*, 457 U.S. 465 (1982) (cited at App. 21a-22a), also involved the obvious suppression of competition—a collective boycott of psychologists by health insurers. *Id.* at 468-469, 483. And *Plymouth Dealers' Association of Northern California* v. *United States*, 279 F.2d 128 (9th Cir. 1960) (cited at App. 16a), involved a uniform price list agreed to by car dealers that operated as a "boundary" on prices in the retail car market. *Id.* at 134.

Those decisions required the impairment of some competitive process even though they involved alleged

per se unlawful conduct. When a plaintiff properly alleges a *per se* unlawful restraint of trade, such as price-fixing between competitors, courts are allowed to assume that such restraints have anticompetitive *effects*, because judicial experience has proven as much. *See Arizona* v. *Maricopa Cty. Med. Soc'y*, 457 U.S. 332, 345 (1982) ("The aim and result of every price-fixing agreement ... is the elimination of one form of competition."); *United States* v. *Joint-Traffic Ass'n*, 171 U.S. 505, 565 (1898) ("The natural, direct, and necessary effect of ... the [price-fixing] agreement is to prevent any competition whatever between the parties to it."). But that principle does not authorize courts to presume the existence of a *per se* unlawful restraint of trade itself, which is what the court of appeals did here. *See, e.g.*, *NYNEX*, 525 U.S. 136-137; *see also infra* Part I.A.3.

The court of appeals also invoked cases (at App. 24a) holding that the manipulation of cooperative processes to suppress competition can violate the Sherman Act. But in those cases, too, the alleged conspirators used a cooperative process as a means to suppress competition in which they would have otherwise engaged. *See, e.g.*, *Allied Tube & Conduit Corp.* v. *Indian Head, Inc.*, 486 U.S. 492, 507 (1988) (members of trade association entered an "implicit agreement not to trade in [a particular] type of electrical conduit"); *cf. Maple Flooring Mfrs.' Ass'n* v. *United States*, 268 U.S. 563, 586 (1925) (association members who discussed industry "without however reaching or attempting to reach any agreement ... restraining competition, d[id] not thereby engage in unlawful restraint of commerce"). Here, in sharp contrast, the panel banks never competed regarding USD LIBOR, and they continued to engage in vigorous competition in the market for financial

transactions. No competition was restrained by their actions.[4]

Labeling USD LIBOR a "price" or a "component of price" does not obviate the inquiry into whether its alleged manipulation impaired existing competition. The court mistakenly thought itself bound to accept plaintiffs' characterization as true, App. 15a, but a "price" *in the antitrust sense* is properly labeled as such only when "fixing" it "eliminat[es] one form of competition," *Arizona*, 457 U.S. at 345; *see also Texaco Inc.* v. *Dagher*, 547 U.S. 1, 6 (2006) (distinguishing between "price fixing in a literal sense" and "in the antitrust sense"). Respondents contend only that USD LIBOR was set improperly—not that any competition was ever eliminated. Moreover, treating the alleged manipulation of USD LIBOR as *per se* unlawful fixing of a "price" would be proper only if the anticompetitive economic impact of supposed LIBOR manipulation was "immediately obvious" (as it is in real cases of horizontal price-fixing). *Leegin Creative Leather Prods., Inc.* v. *PSKS, Inc.*, 551 U.S. 877, 887 (2007). But here respondents have proceeded exclusively on their *per se*

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[4] *Allied Tube* further notes that alleged abuse of cooperative processes should not be analyzed under the *per se* rule, 486 U.S. at 501, which further undermines the court of appeals' mechanical invocation of that rule in this case. *See Broadcast Music, Inc.* v. *Columbia Broad. Sys., Inc.*, 441 U.S. 1, 23 (1979) ("[C]ooperative arrangements are ... not usually unlawful, at least not as price-fixing schemes."); *SD3, LLC* v. *Black & Decker*, 801 F.3d 412, 436 (4th Cir. 2015) (rejecting antitrust claims relating to standard-setting activity and noting that the "few cases" finding antitrust liability in that context all involved some "market-closing effect"), *cert. denied*, 136 S. Ct. 2485 (2016); *cf. Texaco Inc.* v. *Dagher*, 547 U.S. 1, 7-8 (2006) ("[I]t would be inconsistent with this Court's antitrust precedents to condemn the internal pricing decisions of a legitimate joint venture as *per se* unlawful.").

theory even though the supposed link between LIBOR and the actual "price" of traded financial products is, at most, highly attenuated.[5]

By mistakenly labeling the USD LIBOR rate an obvious component of "price" and then jumping to treat this as a *per se* case, the court of appeals elided the relevant inquiry—whether respondents ever alleged a restraint on any competitive process—and overlooked respondents' failure to do so. The court's conflation of this case with inapposite *per se* price-fixing cases like *Socony* led it astray.

3. Had the Second Circuit followed this Court's precedents, it would have dismissed respondents' claims for want of any allegation that the banks restrained preexisting competition. *See, e.g.*, *NYNEX*, 525 U.S. at 135-137.

It is undisputed that "the process of setting [USD] LIBOR was never intended to be competitive." App. 66a. USD LIBOR was set through a hypothetical exercise that was distinct from the market-based "play of the forces of supply and demand" that are antitrust law's purview. *Socony*, 310 U.S. at 220. Moreover, as

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[5] In other words, even if LIBOR manipulation could be considered a restraint of trade, it would be one whose economic effects are counterintuitive, complex, and novel to the courts. Consider, for example, a simple floating rate bond that will pay an interest rate of LIBOR plus a competitively determined margin of x%. The "price" of the bond, which fluctuates on the market, reflects a host of factors unrelated to LIBOR, including the discount rate used to determine the present value of the expected cash flow, supply and demand, age-to-maturity, and credit ratings. Whether or not allegedly lower LIBOR would have had any effect on market price or total bond returns in a competitive market is far from obvious. And any link is even less obvious for the much more complex types of financial transactions at issue in this case.

the court of appeals acknowledged, in the actual market for financial products, including products referencing LIBOR, "the [b]anks remained horizontal competitors," and the parties "remained free to negotiate the interest rates attached to particular financial instruments." App. 5a, 19a. Because USD LIBOR was never set through a competitive process to begin with, any alleged deviation from the normal submissions process—whether or not actionable under some other legal theory—did not restrain or impair competition. Whatever harm respondents may have suffered, they alleged no violation of the antitrust laws.

That was this Court's conclusion in *NYNEX*, a case that also involved assertions of *per se* unlawful conduct and deception, and supposed consumer price effects. There, a phone company allegedly set up a kickback scheme: The company switched to a higher-cost vendor, passed on the increased costs to consumers, and then issued a rebate to the new vendor that was funneled back to the company. 525 U.S. at 131-132. This Court explained that the allegations in *NYNEX*—a competing vendor lost business due to an asserted *per se* unlawful boycott, the scheme increased rates for consumers, and the company deceived regulators who approved the rates—were insufficient to establish an antitrust violation without some "harm ... to the competitive process, *i.e.*, to competition itself." 525 U.S. at 133-137. Whatever injuries may have resulted for consumers or regulators or competitors in *NYNEX*, they did not "naturally flow[]" from the market being rendered "less competitive." *Id.* at 136. Here, as in *NYNEX*, the absence of any reduction in preexisting competition is dispositive.

The fact that "*per se* violations ... are presumed illegal," App. 25a, did not deter this Court in *NYNEX*

from rejecting conclusory assertions of *per se* unlawful misconduct. Rather, recognizing that the alleged kickbacks and deception did not create "a less competitive market," this Court refused to allow assertions of *per se* unlawfulness to "transform cases involving business behavior that is [allegedly] improper ... into treble-damages antitrust cases" where "the competitive process itself does not suffer harm." 525 U.S. 136-137; *cf. Dagher*, 547 U.S. at 6 (no *per se* rule where joint pricing policy was "not a pricing agreement between competing entities with respect to their competing products").

The Second Circuit's decision also conflicts with decisions of other courts of appeals that have rejected antitrust liability premised on conduct that does not restrain competition. For example, *Rambus Inc.* v. *FTC*, 522 F.3d 456 (D.C. Cir. 2008), involved a company's alleged use of deception to evade a price cap and increase consumer prices. The FTC alleged that Rambus made submissions to a standard-setting body without disclosing that it had patents in some of the standards under consideration. *Id.* at 459-462. The FTC found an antitrust violation, but the D.C. Circuit reversed, explaining that Rambus's alleged deception did not violate the antitrust laws because it did not "inflict[] any harm on competition." *Id.* at 467. The court acknowledged that Rambus's scheme had "enabl[ed] a monopolist to charge higher prices than it otherwise could have charged," but concluded that Rambus's "end-run around price constraints, even when deceptive or fraudulent," did not involve any reduction in the level of competition in the market. *Id.* at 459, 466 (discussing *NYNEX*).

In *Rambus* as in *NYNEX*, the fact that some people "got less for their money," App. 22a, as a result of the conduct at issue was irrelevant to whether the anti-

trust laws had been violated. The dispositive issue was that no restraint was imposed on the competitive process. The decision here cannot be reconciled with the D.C. Circuit's decision in *Rambus*, or with similar decisions from other courts of appeals.[6]

4. The court of appeals' articulation of the competitive harm in this case reveals how far it strayed beyond the limits of antitrust law.

In the court's view, the essence of the competitive harm here was an alleged "warping" or "corruption of the rate-setting process." App. 23a, 25a. The court appeared to conclude that nothing beyond this "corruption" needed to be pleaded; "the crucial allegation is that the Banks circumvented the LIBOR setting rules, and th[e] joint [LIBOR-setting] process thus turned into collusion." App. 24a.

But not all collusion or "corruption" is a violation of the antitrust laws; only collusion that impairs competition is. *See, e.g.*, *NYNEX*, 525 U.S. at 135-136; *Brooke Grp.*, 509 U.S. at 225 (antitrust laws "do not create a federal law of unfair competition or 'purport to afford remedies for all torts committed by or against persons engaged in interstate commerce.'" (quoting *Hunt* v.

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[6] *See also, e.g.*, *Forsyth* v. *Humana, Inc.*, 114 F.3d 1467, 1477-1478 (9th Cir. 1997) (dismissing claim where insurers' alleged kickback scheme raised rates, but plaintiff did "not explain how the scheme reduced competition in the relevant market"), *aff'd on other grounds*, 525 U.S. 299 (1999); *Schuylkill Energy Res., Inc.* v. *Pennsylvania Power & Light Co.*, 113 F.3d 405, 414 (3d Cir. 1997) (where rates were set by public commission and "not the market," complaints about "artificially high" rates were "not within the purview of the antitrust laws"); *Schachar* v. *American Acad. of Ophthalmology, Inc.*, 870 F.2d 397, 400 (7th Cir. 1989) (dismissing alleged conspiracy because even if defendant's "statements should be false or misleading ..., the remedy is not antitrust litigation").

Crumboch, 325 U.S. 821, 826 (1945)). And the court of appeals never explained how the alleged misconduct here, which occurred in a process that was never competitive (or meant to be competitive) in the first place, could have limited competition. As the result here shows, the court's "corruption" formulation permits antitrust claims where there is no impairment of competition at all.

B. The Decision Below Also Contravenes The Rule That An Antitrust Plaintiff Must Plead Injury Flowing From Reduced Competition

Even if an antitrust plaintiff pleads an actual restraint of trade (which respondents did not), that is not enough. The plaintiff's injury must also stem from the "competition-*reducing* aspect or effect of the defendant's behavior." *ARCO*, 495 U.S. at 344. Without alleging such an antitrust injury—that is, an injury flowing from reduced competition—a plaintiff has no standing to seek damages under the antitrust laws. *See id.* at 334, 342; *Brunswick Corp.* v. *Pueblo Bowl-o-Mat, Inc.*, 429 U.S. 477, 489 (1977). "[E]ven in cases involving *per se* violations," plaintiffs are "still required to show that the conspiracy caused them an injury for which the antitrust laws provide relief." *ARCO*, 495 U.S. at 344-345 (quotation marks and italics omitted); *see also, e.g.*, *AGC*, 459 U.S. at 529.

Unlike the court of appeals, the district court correctly followed this Court's precedents. The district court recognized that respondents had alleged no impairment of competition based on LIBOR-related corruption or misrepresentations because USD LIBOR-setting was never a competitive process to begin with. App. 66a-68a. Accordingly, it held that respondents had asserted no loss or injury flowing from some "com-

petition-*reducing*" aspect of the banks' alleged conduct, *ARCO*, 495 U.S. at 344. App. 66a-74a.

The court of appeals' ruling on antitrust injury, by contrast, relieved respondents of their obligation to plead a loss stemming from reduced competition. That error followed directly from—and must therefore fall with—the court's mistaken conclusion that respondents had properly pleaded a violation of Section 1 merely by calling their claim a price-fixing claim. *See* App. 28a ("[A]ppellants are consumers claiming injury from a horizontal price-fixing conspiracy. They have accordingly plausibly alleged antitrust injury."). Indeed, the court's reliance on its *per se* price-fixing framework in assessing antitrust standing was particularly improper because the *per se* rule does not relieve plaintiffs of their independent obligation to show that their alleged injury flows from some anticompetitive aspect of the allegedly unlawful restraint. *ARCO*, 495 U.S. at 344-345.

The court of appeals reasoned that respondents had pleaded antitrust injury because consumers allegedly "got less for their money" and had to "pay prices that no longer reflect[ed] ordinary market conditions," leaving them in a "worse position" financially than they would have been if USD LIBOR had been higher. App. 18a, 22a, 23a. But this Court has rejected the notion that a plaintiff can establish antitrust injury merely by claiming that it would have been wealthier but for a defendant's alleged misconduct. *See Brunswick*, 429 U.S. at 488 ("[W]hile respondents' loss occurred 'by reason of' the unlawful acquisitions, it did not occur 'by reason of' that which made the acquisitions unlawful."); *see also, e.g., Cargill, Inc.* v. *Monfort of Colo., Inc.*, 479 U.S. 104, 115 (1986) ("The loss of profits to the competitors in *Brunswick* was not of concern under the antitrust

laws, since it resulted only from continued competition.").[7] That respondents allegedly "got less for their money" in various financial transactions says nothing about whether that injury occurred (if at all) as a result of the reduction of competition in some separate market. *See NYNEX*, 525 U.S. at 133-137 (higher consumer prices not relevant to whether competition had been reduced); *see also, e.g., Brooke Grp.*, 509 U.S. at 224 ("That below-cost pricing may impose painful losses on its target is of no moment to the antitrust laws if competition is not injured.").

Outside the Second Circuit, courts of appeals have uniformly recognized that a plaintiff cannot establish antitrust injury where, as here, supposed financial losses stem from alleged misrepresentations, frauds, or rules infractions, rather than the suppression of competition. *See, e.g., Novell, Inc.* v. *Microsoft Corp.*, 731 F.3d 1064, 1080 (10th Cir. 2013) ("[T]he conduct Novell complains about (deception) is divorced from the conduct that allegedly caused harm to it and to consumers (the refusal to deal)."); *Bassett* v. *NCAA*, 528 F.3d 426, 434 (6th Cir. 2008) ("[A]ppellant's injury, ... was the result of [NCAA] rules violations."); *McDonald* v. *Johnson & Johnson*, 722 F.2d 1370, 1377 (8th Cir. 1983) ("The injuries to the plaintiffs flowed from the alleged fraud and breach of contract, not from suppressed competition."); *Turner* v. *Johnson & Johnson*, 809 F.2d 90, 102 (1st Cir.

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[7] The court of appeals dismissed *Brunswick* and *ARCO* as standing "[a]t most ... for the proposition that competitors who complain of low fixed prices do not suffer antitrust injury." App. 27a. But the antitrust-injury requirement is broader, and is not satisfied when a plaintiff's claimed losses result from "continued competition," rather than some impairment of competition. *See, e.g., Cargill*, 479 U.S. at 115.

1986) ("The alleged injury ... flowed from the alleged fraud and not from suppressed competition.").

Under this Court's cases, the result here should have been the same. Respondents' supposed injury does not "stem[] from a competition-*reducing* aspect," *ARCO*, 495 U.S. at 344, of alleged corruption in the USD LIBOR submission process because that process was admittedly never competitive, and cannot be assumed as such for antitrust-injury purposes. And it does not "stem[] from a competition-*reducing* ... effect," *id.*, of such supposed corruption because competition in the financial products market was never impaired, *see* App. 5a, 19a.

Just as the substantive reach of the Sherman Act is limited to restraints on the competitive process, *see, e.g.*, *NYNEX*, 525 U.S. at 136; *Brooke Grp.*, 509 U.S. at 225, so too is the scope of injuries that may be remedied by Sherman Act claims, *see, e.g.*, *Brunswick*, 429 U.S. at 488. Where a defendant's alleged conduct does nothing to restrain competition—and a plaintiff's losses thus cannot flow from any such restraint—the antitrust laws are not implicated. The Second Circuit's contrary decision warrants review.

II. THE COURT OF APPEALS' NEW ANTITRUST CONSPIRACY PLEADING STANDARD CONFLICTS WITH *TWOMBLY* AND CREATES A CIRCUIT SPLIT

The court of appeals' decision also warrants review because it departed from the standard set by this Court in *Bell Atlantic Corp.* v. *Twombly* for pleading antitrust conspiracies. Under *Twombly*, allegations that are "merely consistent with" an antitrust conspiracy—allegations of "parallel conduct that could just as well be independent action"—are insufficient. 550 U.S. 544, 557 (2007). Yet the Second Circuit applied a fundamen-

tally inconsistent rule, and created a circuit split, by holding that respondents could proceed to discovery by pleading facts "susceptible to an equally likely interpretation" of lawful parallelism. App. 38a. This Court should resolve the split created by the Second Circuit's decision. At the very least, it should hold this petition pending a decision in *Visa* v. *Osborn*, which is likely to delve into related issues.

A. *Twombly* involved an alleged nationwide conspiracy by incumbent regional telephone companies (the "ILECs") to divide territory and suppress new competition. 550 U.S. at 549-550. As in this case, the allegations drew entirely on circumstantial evidence. *Id.* at 551. The district court dismissed the complaint as supporting only consciously parallel behavior, and the Second Circuit reinstated the claim. Reversing, this Court held that it is insufficient, in the antitrust context, to plead parallel conduct that is equally consistent with both an antitrust conspiracy and other possible explanations.

Twombly represented a straightforward application of this Court's antitrust precedents. This Court had already rejected the use, at summary judgment and trial, of standards of proof that were "consistent with conspiracy, but *just as much in line* with a wide swath of rational and competitive business strategy." 550 U.S. at 554 (emphasis added) (citing *Monsanto Co.* v. *Spray-Rite Serv. Corp.*, 465 U.S. 752 (1984), and *Matsushita Elec. Indus. Co.* v. *Zenith Radio Corp.*, 475 U.S. 574 (1986)). *Twombly* applied to the pleading stage the lessons of experience about the "false inferences" of conspiracy that could be drawn from allegations of "parallel conduct that *could just as well be independent action.*" 550 U.S. at 554, 557 (emphasis added); *see Matsushita*, 475 U.S. at 593 ("In *Monsanto*, we

emphasized that courts should not permit factfinders to infer conspiracies when such inferences are implausible."); *Monsanto*, 465 U.S. at 763 ("Permitting an agreement to be inferred [from facts consistent with parallelism] could deter or penalize perfectly legitimate conduct.").

Twombly also emphasized serious practical concerns about the cost of industry-wide antitrust conspiracy cases like this one. "[A]ntitrust discovery can be expensive" and is subject to only "modest" judicial checks; such "potentially enormous" "discovery expense[s] will push cost-conscious defendants to settle even anemic cases." 550 U.S. at 558-559.

Twombly thus held that an antitrust plaintiff must plead facts that are more than "merely consistent with" an agreement to restrain trade. 550 U.S. at 557. Allegations that are in "neutral territory"—*i.e.*, that plead conscious parallel conduct "without that further circumstance pointing toward a meeting of the minds"—are insufficient. *Id.* Indeed, the Court specifically noted that a plausible claim would not be pleaded where "'defendants' allegedly conspiratorial actions could equally have been prompted by lawful, independent goals which do not constitute a conspiracy.'" *Id.* at 566-567; *see id.* at 557 ("parallel conduct that could just as well be independent action" insufficient).

B. Petitioners argued below that the allegations supporting collusion were at most equally consistent with parallel, independent submissions of lower LIBOR figures, made to appear healthier during a time of economic crisis. "Maybe," the court of appeals responded, "but at the motion-to-dismiss stage, appellants 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" of mere parallelism. App. 38a (emphasis added). That statement of the law merely adds the word "plausibly" to a proposition that this Court expressly rejected. *See Twombly*, 550 U.S. at 566-567 ("parallel conduct that *could just as well* be independent action" does not support a plausible claim).[8]

Moreover, although the court of appeals also stated that the "complaints contain numerous allegations that clear the bar of plausibility," App. 36a, the allegations that the court relied on are strikingly similar to those this Court rejected as insufficient in *Twombly*. Here, as in *Twombly*, respondents alleged that the panel banks had "a common motive to conspire," namely "increased profits and the projection of financial soundness," App. 37a, that could equally have inspired them to take the same exact actions in parallel. *Cf. Twombly*, 550 U.S. at 566 ("'[E]ach ILEC has reason to want to avoid dealing with [new competitors]' and 'each ILEC would attempt to keep [them] out, regardless of the actions of the other ILECs.'"). Here, as in *Twombly*, respondents also alleged parallelism, including with statistical evidence that showed parallel, lower-than-expected LIBOR submissions but did not establish an agreement. *Compare* App. 7a, 37a-38a & n.20 *with Twombly*, 550 U.S. at 564-565. And here, as in *Twombly*, respondents also relied on ambiguous statements by company officials that do not show the existence of an interfirm agreement (and certainly not an

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[8] The court of appeals cited as support for this rule its prior decision in *Anderson News, L.L.C.* v. *American Media, Inc.*, 680 F.3d 162, 184 (2d Cir. 2012). *See* App. 38a. But *Anderson News*, unlike this case, involved significant allegations of an actual agreement to engage in a conspiracy, based on conversations between company executives. 680 F.3d at 186-189.

agreement among *all* panel banks). *Compare* App. 36a-37a n.19 (noting bank official's statement that particular proposed submission "would have been 20 basis points above the next highest submission," without any allegations suggesting that this was anything more than an educated guess)[9] *with Twombly*, 550 U.S. at 551 (noting ILEC CEO's similarly ambiguous statement that entering competitor's territory "'might be a good way to turn a quick dollar but that doesn't make it right'").

Even taken in combination, none of this suggests more than independent, parallel conduct. *Twomby*, 550 U.S. at 557. Yet faced with allegations very similar to those in *Twombly*, in an antitrust conspiracy case of similar, industry-wide scope, raising the same key concerns about massive discovery expense and the risk of false inferences from circumstantial evidence, the court of appeals allowed respondents to proceed based on allegations of "parallel conduct that could just as well be independent action." *Id.* at 557.

C. In other circuits, unlike in the Second Circuit, allegations that are consistent with conspiracy but "susceptible to an equally likely interpretation" of lawful parallel conduct, App. 38a, do not state a plausible antitrust conspiracy claim.

For example, the rule applied by the Fourth Circuit in *SD3, LLC* v. *Black & Decker*—that allegations that are equally consistent with lawful parallel conduct cannot support an antitrust conspiracy claim—would have

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[9] This statement is respondents' basis for contending that one bank "knew, in advance of the submission deadline, the proposed confidential submissions of every ... panel bank." App. 36a-37a & n.19 (quoting OTC SAC ¶ 108, Dist. Ct. Dkt. No. 406). It cannot support the contention.

resulted in a different decision here. *Black & Decker* involved allegations that "major table-saw manufacturers conspired to ... corrupt a private safety-standard-setting process, ... with the aim of keeping [the plaintiff's table-saw safety] technology off the market." 801 F.3d at 418 The plaintiffs alleged that the defendants' representatives dominated a standard-setting panel that rejected their safety technology, voting "'as a bloc' to 'thwart'" its adoption. *Id.* at 420. The plaintiffs alleged a motive to conspire—the increased cost of the new technology if it became the industry standard, and the increased risk of lawsuits if the standard was adopted for any company that did not implement it. *Id.* at 419. The plaintiffs also alleged that, having thwarted the adoption of their technology as an industry standard, the defendants engaged in a "fake effort" to promote alternative standards to keep plaintiffs' technology off the market. *Id.* at 421.

The Fourth Circuit rejected this conspiracy theory as insufficient to state a claim. As that court explained, the plaintiffs might have pleaded that the standard-setting body had gotten it "wrong" in rejecting their technology, but even coupled with the parallel actions of the defendants in voting the "wrong" way as a bloc, the allegations were "equally consistent with legal behavior," and thus insufficient as a matter of law. *Black & Decker*, 801 F.3d at 437.[10]

Other circuits similarly reject as insufficient allegations that are equally consistent with parallel conduct.

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[10] *Black & Decker* allowed a separate alleged antitrust conspiracy—supported by detailed allegations of "an actual agreement to boycott"—to proceed to discovery. 801 F.3d at 433-434. Even those allegations of collusion among the same defendants did not change the outcome as to the standard-setting conspiracy.

See In re Musical Instruments & Equip. Antitrust Litig., 798 F.3d 1186, 1194 (9th Cir. 2015) ("'Allegations of facts that could *just as easily* suggest rational, legal business behavior by the defendants as they could suggest an illegal conspiracy"' are insufficient to plead a § 1 violation (emphasis added) (quoting *Kendall* v. *Visa U.S.A., Inc.*, 518 F.3d 1042, 1049 (9th Cir. 2008)); *In re Travel Agent Comm'n Antitrust Litig.*, 583 F.3d 896, 910 (6th Cir. 2009) ("[I]t is *just as likely* that American's 2001 commission cap was an effort to reduce its ... costs, with the ancillary hope that its competitors would follow its lead." (emphasis added)).

The importance of this question is only confirmed by this Court's grant of certiorari in *Osborn*. *Osborn* involves the question whether alleged participation in a business association that administers ATM access fee rules is sufficient to support an antitrust conspiracy claim. Pet.'s Br., No. 15-961, at i, 11-13. The court of appeals held that it was, because the defendants' alleged involvement suggested that they "*used* the ... associations to adopt and enforce a supracompetitive pricing regime for ATM access fees." *Osborn* v. *Visa Inc.*, 797 F.3d 1057, 1067 (D.C Cir. 2015). Petitioners in *Osborn* contend that the case against them should have been dismissed because the pleadings were "'merely consistent with'" concerted action, and were also consistent with unilateral action. Pet.'s Br., No. 15-961 at 13 (quoting *Twombly*, 550 U.S. at 557).

Osborn demonstrates that the issues raised here as to *Twombly*'s "merely consistent with" formulation, particularly as applied in the trade association context and particularly in cases that rely wholly on circumstantial allegations, are worthy of review. This Court would at a minimum be justified in holding this petition pending a decision in *Osborn*. Indeed, it would be justi-

fied in vacating the decision below and remanding if it accepts the *Osborn* petitioners' argument that alleged conduct that advances, and is explained entirely by, unilateral interests cannot support an antitrust conspiracy. That is the case here: The banks' alleged conduct is completely consistent with their independent interests in projecting financial health amidst a global liquidity crunch. *See, e.g.*, App. 34a-35a.

The Second Circuit's decision creates a sharp circuit split. This Court should grant review to reaffirm that the Court meant what it said in *Twombly* when it rejected conspiracy allegations that are "merely consistent with" collusion. 550 U.S. at 557.

III. The Questions Presented Are Exceedingly Important To Antitrust Law And The Global Economy

The decision of the court of appeals creates grave uncertainty in an area where predictability is essential. By allowing this case to move forward, the court of appeals expanded the ambit of the Sherman Act (with its potential for enormous treble-damages awards) to cases in which plaintiffs allege misrepresentations and "corruption" but not that any competitive process is impaired, or was ever in existence. This Court has long held that the antitrust laws were not meant to serve the function of general "'unfair competition' laws, business tort laws, or regulatory laws, [which] provide remedies for various 'competitive practices thought to be offensive to proper standards of business morality.'" *NYNEX*, 525 U.S. at 137 (quoting 3 Areeda & Hovenkamp, *Antitrust Law* ¶651d (rev. ed. 1996)); *see also Brooke Grp.*, 509 U.S. at 225. The decision below puts that basic proposition in doubt, and extends antitrust law to a realm where Congress never intended it to hold sway.

Just as the court of appeals' interpretation of the Sherman Act (including its related ruling on antitrust injury) to encompass non-competitive processes improperly expands the scope of antitrust liability, its ruling, contrary to *Twombly*, that allegations that are equally supportive of lawful conduct and conspiracy survive dismissal inappropriately allows antitrust claims to proceed based on little more than speculation. As a result, antitrust defendants will be subject to costly discovery and the *in terrorem* threat of a substantial verdict, based on unsubstantiated inferences from actions in a non-competitive setting that are equally consistent with unilateral, non-collusive activity. *See Twombly*, 550 U.S. at 566-567.

The possibility for expensive discovery and massive damages is at its zenith in this case. Discovery in the government investigations of only a handful of the panel banks reached into the millions of pages, and alleged class damages here are premised on global transactions in financial instruments by over a dozen international money center banks over a three-year period—potentially "trillions of dollars' worth of financial transactions." App. 31a. The need for clarity on these fundamental legal issues is particularly acute because the wrong result here could be economically devastating. Such substantial economic stakes cannot be allowed to rest on legal theories that should not even take respondents past the pleadings stage.

Review is important for the further reason that the Second Circuit's decision will have an impact on a significant number of cases in which the questions presented here might otherwise have continued to percolate. There are now many financial benchmark cases arising in the Southern District of New York involving inherently cooperative rate-setting processes like USD

LIBOR. Collectively, those cases involve financial stakes even more immense than this multi-district litigation alone—and in three of them (other than this one), district courts have held that plaintiffs pleaded no antitrust injury. *See 7 West 57th Street Realty Co.* v. *Citigroup, Inc.*, 2015 WL 1514539, at *15-*20 (S.D.N.Y. Mar. 31, 2015); *Mayfield* v. *British Bankers' Ass'n*, 2014 WL 10449597, at *3 (S.D.N.Y. July 22, 2014); *Laydon* v. *Mizuho Bank, Ltd.*, 2014 WL 1280464, at *7-*8 (S.D.N.Y. Mar. 28, 2014); *but see Alaska Elec. Pension Fund* v. *Bank of Am. Corp.*, 2016 WL 1241533, at *6-*7 (S.D.N.Y. Mar. 28, 2016).

The majority of these financial-benchmark cases arise within the Second Circuit because it includes the nation's financial center. It is unlikely that another court of appeals will have occasion to consider whether and how cooperative benchmark-setting processes may be subject to antitrust liability. And to the extent those other cases cannot be distinguished from this one, future Second Circuit panels will be "bound by the decision[] of [the] prior panel[]" absent this Court's review. *In re Zarnel*, 619 F.3d 156, 168 (2d Cir. 2010).

Because the Second Circuit failed to apply this Court's antitrust precedents in this especially high-stakes context, review is warranted.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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