No. 13-1174

IN THE

Supreme Court of the United States

ELLEN GELBOIM, *et al.*,
Petitioners,

v.

BANK OF AMERICA CORPORATION, *et al.*,
Respondents.

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

BRIEF FOR RESPONDENTS

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QUESTION PRESENTED

Whether, when cases are consolidated for pretrial purposes, an order that dismisses the claims in one of the consolidated cases but does not terminate the pretrial proceedings is immediately appealable as of right under 28 U.S.C. § 1291, rather than at the sound discretion of the district court under Federal Rule of Civil Procedure 54(b) or 28 U.S.C. § 1292(b).

CORPORATE DISCLOSURE STATEMENT

Respondent Bank of America, N.A. is wholly owned by BANA Holding Corporation, which in turn is wholly owned by BAC North America Holding Company, which in turn is wholly owned by NB Holdings Corporation, which in turn is wholly owned by respondent Bank of America Corporation. Respondent Bank of America Corporation has no parent corporation and no publicly held company owns 10% or more of its stock.

Respondent The Bank of Tokyo-Mitsubishi UFJ, Ltd. is wholly owned by Mitsubishi UFJ Financial Group, Inc.

Respondent Barclays Bank PLC is wholly owned by Barclays PLC.

Respondent Citibank, N.A. is wholly owned by Citicorp, which in turn is wholly owned by respondent Citigroup Inc. Respondent Citigroup Inc. has no parent corporation and no publicly held company owns 10% or more of its stock.

Respondent Coöperatieve Centrale Raiffeisen-Boerenleenbank B.A. (Rabobank) has no parent corporation and no publicly held company owns 10% or more of Rabobank.

Respondent Credit Suisse Group AG has no parent corporation and no publicly held company owns 10% or more of its stock.

Respondent Deutsche Bank AG has no parent corporation and no publicly held company owns 10% or more of its stock.

Respondent HBOS plc is wholly owned by respondent Lloyds Banking Group plc, which has no par-

ent corporation and no publicly held company owns 10% or more of its stock.

Respondent HSBC Bank plc is wholly owned by respondent HSBC Holdings plc, which has no parent corporation and no publicly held company owns 10% or more of its stock.

Respondent JPMorgan Chase Bank, N.A. is wholly owned by respondent JPMorgan Chase & Co., which has no parent corporation and no publicly held company owns 10% or more of its stock.

Respondent The Norinchukin Bank has no parent corporation and no publicly held company owns 10% or more of its stock.

Respondent Portigon AG (f/k/a WestLB AG) has no parent corporation and no publicly held company owns 10% or more of its stock.

Respondent Royal Bank of Canada has no parent corporation and no publicly held company owns 10% or more of its stock.

Respondent The Royal Bank of Scotland Group plc has no parent corporation and no publicly held company owns 10% or more of its stock.

Respondent UBS AG has no parent corporation and no publicly held company owns 10% or more of its stock.

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BRIEF FOR RESPONDENTS

INTRODUCTION

Section 1291 of Title 28 confers appellate jurisdiction over "final decisions of the district courts of the United States." That provision reflects the long-settled rule in the federal courts "forbidding piecemeal disposition on appeal of what for practical purposes is a single controversy." *Cobbledick* v. *United States*, 309 U.S. 323, 325 (1940). The purpose of that rule, this Court has recognized, is to ensure "a healthy legal system." *Id.* at 326. The question presented here is whether the rule bars an immediate appeal as of right when one constituent in a consolidated district-court action is dismissed from ongoing pretrial proceedings. It does.

Petitioners brought suit in the Southern District of New York alleging manipulation of the U.S. Dollar London Interbank Offered Rate (LIBOR). Their lawsuit was consolidated for pretrial purposes with numerous other cases making similar allegations, so that a single district court could manage them "for practical purposes [as] a single controversy." *Cobbledick*, 309 U.S. at 325. When the district court dismissed some claims (including petitioners') but not others, petitioners filed an immediate appeal.

Petitioners maintain that, from their vantage point, the litigation was at an end because their complaint had been dismissed in its entirety. That is not the right perspective from which to answer the question. Consolidation serves the interests of the judicial system as a whole, as does the federal policy against piecemeal appeals. Here, the district court proceedings are ongoing, and petitioners' federal antitrust claim is virtually identical to one raised in approximately 26 of the other pending cases, many of which encompass additional claims not yet addressed or resolved in the consolidated pretrial proceedings.

Petitioners contend that the final judgment rule and the Federal Rules of Civil Procedure not only permit, but require (on pain of forfeiture), an immediate appeal whenever one constituent in a consolidated action is dismissed, notwithstanding the pendency and progress of the consolidated action. That position would run counter to a policy Congress has long deemed fundamental to a well-functioning legal system: discouraging piecemeal appeals. Petitioners' rule would lead to delay, confusion, the proliferation of appeals, and incentives to engage in claim-splitting. The effects would be particularly acute in multidistrict litigation, where Congress has recognized that the need

for careful planning, coordination, and management by the district court is at its zenith. The district judge in such cases is uniquely well positioned to assess when issues common to the consolidated litigation have been sufficiently developed to make appellate review efficient and to avoid premature, piecemeal appeals. Moreover, petitioners' rule would have minimal countervailing benefit to the parties or judicial economy more broadly, as the availability of certification under Rule 54(b) or 28 U.S.C. § 1292(b) mitigates the ills petitioners hypothesize without opening the spigot of interim appeals as of right.

An order disposing of only some of the claims in a consolidated action is not immediately appealable, even if it disposes of all of one party's claims, for as long as the action remains consolidated. That rule is faithful to the final judgment rule and the policy against piecemeal appeals, is consistent with 28 U.S.C. § 1291 and the Federal Rules of Civil Procedure, and is clear and easily administrable—"a major virtue in a jurisdictional statute," *Hertz Corp.* v. *Friend*, 559 U.S. 77, 94 (2010). Under that rule, the court of appeals lacked jurisdiction over petitioners' appeal.

STATEMENT

A. The MDL Process

This case arises from multidistrict litigation (MDL) composed of over 60 lawsuits. Congress enacted the MDL statute, 28 U.S.C. § 1407, to "promote the just and efficient conduct" of "civil actions involving one or more common questions of fact" pending in different federal district courts, *id.* § 1407(a). The statute was a response to "the federal courts' experience with a massive prosecution of electrical equipment manufacturers

for antitrust violations, which had been rendered manageable only by conducting joint pretrial proceedings" on an ad hoc basis. *In re PPA Prods. Liab. Litig.*, 460 F.3d 1217, 1229-1230 (9th Cir. 2006). "Congress saw a need to create a mandatory version of that procedure to govern cases such as 'civil antitrust actions …, common disaster (air crash) actions, patent and trademark suits, products liability actions and securities law violation actions, among others.'" *Id.* (quoting H.R. Rep. No. 90-1130, at 3 (1968)).

Congress intended the system to "'assure uniform and expeditious treatment in the pretrial procedures in multidistrict litigation.'" *PPA Litig.*, 460 F.3d at 1230; *see also In re Library Editions of Children's Books*, 297 F. Supp. 385, 386 (J.P.M.L. 1968) (Wisdom, J.) ("'The basic purpose of assigning [multiple litigation] to a single judge is to provide for uninterrupted judicial supervision and careful, consistent planning and conduct of pretrial and trial proceedings' that will eliminate or reduce conflict and duplication of effort." (alteration in original)).

The Judicial Panel on Multidistrict Litigation (JPML) has authority to administer the MDL statute and to transfer cases to a single district court where coordination or consolidation will serve "the convenience of parties and witnesses" and "promote the just and efficient conduct" of the litigation. 28 U.S.C. § 1407(a). An MDL thus "bring[s] before a single judge all of the federal cases, parties, and counsel comprising the litigation." *Manual for Complex Litigation (Fourth)* § 20.132 (2004) (*MCL*).

The establishment of MDL proceedings and the transfer of related cases to the MDL court are left to the sound discretion of the JPML. Once the JPML becomes aware of a constellation of cases arguably pre-

senting common issues, it "analyzes each group of cases in light of the statutory criteria and the primary purposes of the MDL process to determine whether transfer is appropriate." *PPA Litig.*, 460 F.3d at 1230. Those criteria include "the progress of discovery, docket conditions, familiarity of the transferee judge with the relevant issues, and the size of the litigation." *Id.*

The JPML's judgment to transfer cases to an MDL court is intended to ensure efficient resolution of all the lawsuits taken as a whole, not the expedited disposition of any particular case. *See, e.g.*, *In re Stirling Homex Sec. Litig.*, 442 F. Supp. 547, 550 (J.P.M.L. 1977) (per curiam) ("The Panel's statutory mandate is to weigh the interests of all parties and to consider multidistrict litigation as a whole in light of the purposes of Section 1407."); *Children's Books*, 297 F. Supp. at 386 (rejecting "a worm's eye view of Section 1407" that would favor "the interest of each plaintiff" over the interests of "multiple litigation as a whole"); *see also* Transfer Order 2, Dkt. 355 (S.D.N.Y. June 6, 2013) ("In deciding issues of transfer under Section 1407, we look to the overall convenience of the parties and witnesses, not just those of a single plaintiff or defendant in isolation.").[1]

Upon transfer of an action to the transferee court, "the jurisdiction of the transferor court ceases and the transferee court has exclusive jurisdiction." *MCL* § 20.131. "A transferee judge exercises all the powers of a district judge in the transferee district under the

[1] Indeed, consistent with its focus on the interests of all parties and the court system as a whole, the JPML may transfer actions to an MDL even when the MDL court has already dismissed identical claims in previously transferred actions in the consolidated proceedings. *See, e.g.*, *In re Merscorp Inc. RESPA Litig.*, 560 F. Supp. 2d 1371, 1372 (J.P.M.L. 2008).

Federal Rules of Civil Procedure[.]" *PPA Litig.*, 460 F.3d at 1230-1231. "This includes authority to decide all pretrial motions, including dispositive motions such as motions to dismiss, motions for summary judgment, motions for involuntary dismissal under Rule 41(b), motions to strike an affirmative defense, and motions for judgment pursuant to a settlement." *Id.* at 1231.[2] Likewise, "during the period of the 1407(a) transfer, any appeals—interlocutory or after summary judgment—go to the court of appeals for the transferee court, not the courts of appeals for the transferor circuits." *In re Korean Air Lines Disaster of Sept. 1, 1983*, 829 F.2d 1171, 1178-1179 (D.C. Cir. 1987) (D.H. Ginsburg, J., concurring).

As long as cases remain consolidated before the MDL court, the transferee judge is accorded substantial discretion to manage an often sprawling docket and to guide the matter to a just and efficient resolution:

> For it all to work, multidistrict litigation assumes cooperation by counsel and macro-, rather than micro-, judicial management because otherwise, it would be an impossible task for a single district judge to accomplish. Coordination of so many parties and claims requires that a district court be given broad discretion to structure a procedural framework for moving the cases as a whole as well as individually, more so than in an action involving only a few parties and a handful of claims.

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[2] MDL proceedings with overlapping putative class actions require particularly acute oversight from the transferee judge. *See In re Plumbing Fixture Cases*, 298 F. Supp. 484, 493 (J.P.M.L. 1968) ("It is in the field of class action determinations in related multidistrict civil actions that the potential for conflicting, disorderly, chaotic judicial action is the greatest.").

PPA Litig., 460 F.3d at 1231-1232; *see also In re San Juan Dupont Plaza Hotel Fire Litig.*, 111 F.3d 220, 229 (1st Cir. 1997) (transferee judge must be accorded sufficient discretion to be able to "'uncomplicate matters'" in an MDL).

"In practice, … the vast majority of transferred cases are disposed of completely in the transferee court[.]" *In re Food Lion FLSA Litig.*, 73 F.3d 528, 532 (4th Cir. 1996). In instances where the pretrial proceedings do not dispose entirely of the case, the JPML must remand individual cases to the transferor courts for trial. 28 U.S.C. § 1407(a). "When remand occurs depends upon the circumstances of the litigation and the recommendation of the transferee court." *PPA Litig.*, 460 F.3d at 1231 (citing *MCL* § 20.133).[3]

B. LIBOR MDL

The JPML established MDL No. 2262—*In re LIBOR-Based Financial Instruments Antitrust Litigation*—in August 2011 (JA29), for cases involving "common questions of fact … arising from allegations concerning defendants' participation" in the U.S. Dollar LIBOR panel (Pet. App. 6a). Transfer, the JPML explained, would "eliminate duplicative discovery, prevent inconsistent pretrial rulings on class certification, discovery, and other pretrial issues, and conserve the resources of the parties, their counsel and the judici-

[3] *See, e.g.*, Order 16, Dkt. 117, *In re Fenofibrate Patent Litig.*, No. 11-md-2241 (S.D.N.Y. Dec. 28, 2012) ("The Clerk of the Court is directed to enter judgment in favor of defendants, close this case, and notify the [JPML] that this litigation is now completed."); Order 7, Dkt. 17082, *In re Agent Orange Prod. Liab. Litig.*, No. 79-md-381 (E.D.N.Y. Mar. 11, 2005) ("All the above-listed cases in the MDL 381 litigation have been dismissed. The Clerk of this court is respectfully requested to notify the Clerk of the MDL Panel.").

ary." *Id.* 7a. Since the establishment of the MDL, more than 60 lawsuits—including those filed by petitioners and their amici—have proceeded together before the Honorable Naomi Reice Buchwald in the Southern District of New York. Judge Buchwald's management of the cases, the JPML has repeatedly remarked, has been "careful and efficient." Transfer Order 2, Dkt. 355; Transfer Order 1, Dkt. 378 (S.D.N.Y. Aug. 7, 2013).

1. Following transfer, the plaintiffs then before the MDL court moved "to consolidate the class action complaints" for all purposes "pursuant to Federal Rule of Civil Procedure 42(a)." Pet. App. 10a-11a; *see* JA273-276. Plaintiffs explained that the cases "all arise from common facts" (concerning respondents' participation in setting LIBOR) and "share substantially overlapping legal claims." JA273, JA274. Any differences between the cases "do not outweigh the interests of judicial economy served by consolidation" (JA276) of all the LIBOR cases "into a single action" (JA273), such as "eliminat[ing] duplicative discovery, prevent[ing] inconsistent pretrial rulings, and conserv[ing] the resources of the parties, their counsel and the judiciary" (JA274). "Accordingly," the plaintiffs concluded, "all of the [LIBOR suits], and any similar actions that are subsequently filed in or transferred to this District should be consolidated." JA276. The district court granted the plaintiffs' request for consolidation "for all purposes." JA286. The court also took other steps to manage the sprawling litigation, including appointing interim class counsel for several putative classes of plaintiffs. JA281.

Petitioners filed their complaint in the Southern District of New York almost six months after the JPML transferred the LIBOR cases there and two months after the district court consolidated the LIBOR

cases for all purposes. JA5, JA30. Seeking to represent a putative class of bondholders, petitioners told the court that their complaint was "related" to the preexisting litigation and requested, in the court's words, "to have [it] consolidated with the consolidated case" already pending. Tr. 5:18, 8:10, Dkt. 117 (S.D.N.Y. Mar. 12, 2012). The district court agreed. *Id.* 9:16. At petitioners' request—so that "the coordinated pursuit of this litigation on the plaintiffs' side of the case [could] continue" (Pls.' Mot. 2, Dkt. 201 (S.D.N.Y. Aug. 13, 2012))—the court also entered a pretrial order appointing petitioners' attorneys as interim class counsel to represent a putative bondholder class. JA288-293.

The district court subsequently concluded that its authority to consolidate cases for all purposes under Rule 42(a) extended only to cases filed in the Southern District of New York (like petitioners' case), and not to cases filed in other federal districts (like many other cases transferred to the MDL). The court accordingly withdrew its prior order of consolidation, which extended to both types of cases. Pet. App. 10a-11a. It then issued a blanket order, "consolidat[ing] the class action complaints pending in the MDL for pretrial purposes only." *Id.* 11a.

2. The district court grouped the then-pending consolidated putative class actions into three categories, each with a single lead case:

- an action brought by purchasers of over-the-counter LIBOR-based instruments, alleging a federal antitrust claim and a state unjust-enrichment claim ("OTC plaintiffs");
- an action brought by purchasers of LIBOR-based products on a domestic exchange, alleging a federal antitrust claim, a state unjust-

enrichment claim, and claims under the Commodity Exchange Act (CEA), 7 U.S.C. §§ 1-26 ("Exchange plaintiffs"); and

- the present case, brought by petitioners on behalf of purchasers of LIBOR-based debt securities, alleging a federal antitrust claim ("Bondholder plaintiffs").

See Pet. App. 17a, 37a, 59a-60a, 148a, 153a. In addition to the three categories of putative class actions, three individual actions brought by the Charles Schwab Corporation and related entities ("Schwab plaintiffs") were also pending before the court. *Id.* 17a. The Schwab plaintiffs asserted a federal antitrust claim, as well as RICO and various state-law claims. *Id.* 37a, 124a, 150a.

The consolidated complaints were, as amended, "essentially identical in their allegations regarding the [case] background … and the misconduct that defendants allegedly committed." Pet. App. 20a n.2. All plaintiffs advanced the same primary motives for respondents' purported misbehavior and "devote[d] the bulk of their complaints to amassing evidence that LIBOR was fixed at artificially low levels." *Id.* 24a; *see also id.* 38a.

Respondents moved to dismiss the claims in these lead cases. Many new LIBOR-related complaints were filed while motion practice was underway. "It quickly became apparent" to the district court that "new complaints would continue to be filed" and "waiting for the 'dust to settle' would require an unacceptable delay in the proceedings." Pet. App. 17a, 18a. Accordingly, the court stayed all such newly filed LIBOR-related actions pending its decision on motions to dismiss the claims of the Bondholder, OTC, Exchange, and Schwab plaintiffs. *Id.* 18a. The court intended to use its rulings on those

motions to "clarif[y] the legal landscape" and guide the organization and disposition of the later-filed suits. *Id.*

3. In March 2013, the district court granted in part and denied in part respondents' motions to dismiss. Pet. App. 16a-158a. The court dismissed the federal antitrust claims in all of the actions, as well as the federal RICO and state antitrust claims of the Schwab plaintiffs and the unjust-enrichment claims of the Exchange plaintiffs. *Id.* 155a-157a. Having dismissed all of the federal claims raised by the OTC and Schwab plaintiffs, the court declined to exercise supplemental jurisdiction over their remaining state-law claims. *Id.* 147a-148a, 157a. But the court determined that the Exchange plaintiffs had possibly stated a viable CEA claim, subject to timeliness questions the court was not yet "in a position to address." *Id.* 97a.

Motion practice continued, including motions to amend and for reconsideration. In August 2013, the district court denied all of the putative class action plaintiffs leave to amend their antitrust claims. Pet. App. 192a-200a. The court also denied reconsideration of its ruling on the CEA claims, but without prejudice to respondents' later filing of a similar motion. *Id.* 170a-180a. Finally, the court permitted the OTC plaintiffs to reassert their claim for unjust enrichment and to add a claim for breach of the implied covenant of good faith and fair dealing. *Id.* 200a-215a.[4]

[4] The district court also denied a request by the Exchange plaintiffs to certify for interlocutory appeal a question related to their CEA claims. Pet. App. 162a-170a. The court acknowledged that it had the power to do so under 28 U.S.C. § 1292(b), but found that the Exchange plaintiffs had "not even approached satisfying the requirements" of that statute. *Id.* 170a; *see id.* 163a ("'It is a

The net effect of those rulings was that all claims asserted by petitioners and the Schwab plaintiffs were dismissed, but further proceedings were required on remaining claims by the Exchange and OTC plaintiffs. The district court also left in place its stay on other actions to avoid "addressing the individual cases piecemeal rather than comprehensively." Pet. App. 216a.

C. Petitioners' Appeal

1. Petitioners and the Schwab plaintiffs filed notices of appeal in September 2013. JA1, JA175-177. The Exchange and OTC plaintiffs then sought, under Rule 54(b), entry of partial final judgment on their own federal antitrust claims, which the district court had also dismissed for failure to plead antitrust injury. The latter plaintiffs argued that allowing an appeal only by petitioners would be inequitable because the other plaintiffs "should be permitted to brief and argue the appeal that will determine the major issue on their Sherman Act claims—whether antitrust injury is sufficiently pled—at the same time" as petitioners. *See* OTC Pls.' Ltr. 2, Dkt. 414 (S.D.N.Y. Sept. 18, 2013).

The district court agreed, on the (mistaken) premise than an "appeal as of right" by petitioners would already be pending and, in that "atypical context," "there is no just reason" to permit petitioners but not the other plaintiffs to present "the issues of antitrust standing and antitrust injury" to the court of appeals. Pet. App. 220a, 221a. The court therefore entered a partial final judgment on the Exchange and OTC plaintiffs' federal antitrust claims under Rule 54(b). *Id.* 221a.

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basic tenet of federal law to delay appellate review until a final judgment has been entered.'").

2. The court of appeals dismissed petitioners' and the Schwab plaintiffs' appeals for lack of an appealable final judgment: "[A] final order has not been issued by the district court as contemplated by 28 U.S.C. § 1291, and the orders appealed from did not dispose of all claims in the consolidated action." Pet. App. 2a. Under circuit precedent, "'when there is a judgment in a consolidated case that does not dispose of all claims which have been consolidated, there is a strong presumption that the judgment is not appealable absent Rule 54(b) certification.'" *Houbigant, Inc.* v. *IMG Fragrance Brands*, 627 F.3d 497, 498 (2d Cir. 2010) (per curiam).

Petitioners and the Schwab plaintiffs moved for reconsideration. JA2. Petitioners argued for "[e]arly appellate determination of the antitrust issue," which they described as common to "[n]umerous cases" still pending in the district court. Recons. Mem. 8 & n.8, Dkt. 134 (2d Cir. Nov. 15, 2013). The court of appeals denied reconsideration. Pet. App. 3a-4a.

3. In light of the court of appeals' dismissal of petitioners' appeal, the district court withdrew the Rule 54(b) certification for the Exchange and OTC plaintiffs' federal antitrust claims, as that order was "premised on the pendency of appeals on the same claim by [petitioners] and [the] Schwab plaintiffs." Pet. App. 222a.

The court denied requests from petitioners and the Exchange and OTC plaintiffs to reconsider: "[T]his case has a wonderful host of interesting issues. We could send six issues up to the circuit. We're not doing that. We're not doing it seriatim. We're going to clean up this complaint…. [W]e're not picking and choosing particular questions and sending them up." JA294. Petitioners' counsel persisted, asking whether the court might "entertain the 54(b) [request] several months" in

the future, after deciding "the various motions to dismiss" still pending or contemplated in the MDL. JA296. The court stated that it was "not prepared to give … an answer on that now," but did not rule out future certification. *Id.*

D. Ongoing Proceedings In The MDL

In keeping with its "careful and efficient" case management (Transfer Order 2, Dkt. 355), the district court has continued to keep the MDL proceedings moving apace. Motion practice in the lead cases continued during late 2013, and the court resolved those motions in June 2014, further narrowing the scope of the MDL. The court observed that "three major opinions" and "hundreds, if not thousands, of pages of briefing materials" had been necessary merely to "resolve the threshold question" of "what claims, if any," plaintiffs had adequately pled. Order 79, Dkt. 568 (S.D.N.Y. June 23, 2014).

The district court and the parties then undertook to apply the court's three major opinions in "a case-by-case determination of which claims remain in all the pending cases," including those that had been stayed. JA298. That process remains largely incomplete. Among other things, there are bondholder plaintiffs other than petitioners who raise federal antitrust claims identical to petitioners' and who seek to represent a potentially overlapping putative class, but who also raise additional, distinct, and still-pending claims.[5]

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[5] Compl. ¶¶ 1, 29, 153-162, Dkt. 1, *Guaranty Bank & Trust* v. *Credit Suisse Group*, No. 13-cv-346 (S.D.N.Y. Jan. 15, 2013) (raising, federal antitrust, state antitrust, unfair competition, and consumer protection claims); Compl. ¶¶ 11, 174-184, Dkt. 1, *SEIU Pension Plans Master Trust* v. *Bank of Am.*, No. 13-cv-1456

In addition, the plaintiffs disagree on whether dismissal of the antitrust claims in the lead cases disposed of all the antitrust claims in the MDL proceeding. For instance, the Federal Deposit Insurance Corporation and the Federal Home Loan Mortgage Corporation ("Freddie Mac")—plaintiffs in a previously stayed case—argue that their federal antitrust claims "materially differ" from petitioners' claims. JA314; *see id.* (claiming to allege different "agreements, relevant markets, and harms to competition"). Numerous other plaintiffs take a similar view of their own antitrust claims, likewise arguing that their claims remain viable notwithstanding the court's prior orders. *See* NCUA Ltr. 2, Dkt. 612 (S.D.N.Y. Aug. 20, 2014); Principal Fin. Ltr. 2-3, Dkt. 613 (S.D.N.Y. Aug. 20, 2014). The district court has not yet ruled on the matter. Other plaintiffs do not dispute that their pending antitrust claims are governed by the court's prior orders, but have sought to "preserve [their] appellate rights" on those claims while their other federal and state claims are resolved. JA323; *see* JA338, JA345, JA355 n.5.

SUMMARY OF ARGUMENT

I. An order disposing of some of the claims in consolidated actions is not a final decision, appealable as of right, while the actions remain consolidated—even when it disposes of all of one party's claims. That clear, rigorous, and easily administrable rule accords with Section 1291 and the longstanding federal policy against piecemeal appeals. Under that rule, the judgment of the court of appeals should be affirmed.

(S.D.N.Y. Mar. 5, 2013) (raising federal antitrust, unjust enrichment, and restitution claims).

The courts of appeals have uniformly held (with one possible exception) that, when a district court consolidates actions for all purposes, an order dismissing fewer than all the claims in the consolidated proceedings is not a final decision. The same rule should obtain when the district court consolidates actions only for more limited purposes, such as for pretrial proceedings. When the district court has determined that consolidation is appropriate, it has decided that the cases ought to proceed as one unit of litigation while consolidated. The court's decision to consolidate actions for a period of the proceedings should not be undone by automatic piecemeal appeals during that period. Such a clear rule is especially important for consolidated pretrial proceedings in multidistrict litigation, where Congress has recognized that centralized management before a single decisionmaker is indispensable to the "just and efficient conduct" of the litigation. 28 U.S.C. § 1407(a).

II. Rather than an automatic appeal under Section 1291, Rule 54(b) and Section 1292(b) are the appropriate mechanisms for early appellate review while consolidated proceedings are ongoing. Those procedures rely on the sound discretion of the district court to identify, in the first instance, when an early appeal is appropriate—a task uniquely suited to the district court given its familiarity with the litigation and with the reasons for consolidation. District courts have been using these mechanisms effectively for years in consolidated litigation, particularly including MDLs, to mitigate the hardships that petitioners contend would result if litigants had to wait before taking an appeal.

III. Petitioners' contrary rule—that consolidation has no effect on finality—will create a number of real-world harms with minimal corresponding benefits. Most notably, it will result in seriatim appeals, leading

to piecemeal appellate consideration of the same controversy and to substantial inefficiencies and delays. Moreover, the rule will undercut the district courts' ability to manage complex, consolidated proceedings by eliminating their role as the "dispatchers" of appeals—a result particularly harmful in the MDL context, where the need for effective management is paramount. The rule will also prejudice other litigants who will not have an appeal as of right under petitioners' rule by making it more likely that the party with the weakest case will be the first to present the contested issue on appeal. Finally, the rule will encourage strategic "argument splitting" by plaintiffs' counsel to maximize the chances of early appellate review.

Against this welter of likely deleterious results, petitioners identify little concrete benefit to their rule, which controls only when, not whether, parties in consolidated litigation will have an appeal as of right. Indeed, petitioners are unable to identify *any* case where a rule barring automatic appeal would have resulted in incremental or prejudicial delay.

ARGUMENT

I. DISMISSAL OF PETITIONERS' CLAIM IS NOT AN APPEALABLE FINAL JUDGMENT

A. The Final Judgment Rule Is Essential To A Well-Functioning Judicial System

As early as the Judiciary Act of 1789, Congress provided for appeals in civil cases only from "final decrees and judgments." Ch. 20, § 22, 1 Stat. 73, 84. The final judgment rule, now codified in Section 1291, "has changed little since then." *Midland Asphalt* v. *United States*, 489 U.S. 794, 798 (1989). Then, as now, the rule is understood to reflect a congressional imperative

"forbidding piecemeal disposition on appeal of what for practical purposes is a single controversy." *Cobbledick*, 309 U.S. at 325. "From the very foundation of our judicial system," Congress has sought "to save the expense and delays of repeated appeals in the same suit, and to have the whole case and every matter in controversy in it decided in a single appeal." *McLish* v. *Roff*, 141 U.S. 661, 665-666 (1891); *see Luxton* v. *North River Bridge Co.*, 147 U.S. 337, 341 (1893) ("The case is not to be sent up in fragments by successive writs of error.").

The requirement that proceedings in the district court be final before an appeal may be taken "is not a technical concept" but rather a practical means "for achieving a healthy legal system." *Cobbledick*, 309 U.S. at 326. It prevents "the harassment and cost of a succession of separate appeals from the various rulings to which a litigation may give rise." *Id.* at 325. It also "conserv[es] … judicial energy" and "eliminat[es] … delays caused by interlocutory appeals." *Catlin* v. *United States*, 324 U.S. 229, 234 (1945). The finality requirement reflects "the deference that appellate courts owe to the trial judge as the individual initially called upon to decide the many questions of law and fact that occur in the course of a trial." *Firestone Tire & Rubber* v. *Risjord*, 449 U.S. 368, 374 (1981). Repeated appellate intervention would threaten "the prerogatives of district court judges, who play a 'special role' in managing ongoing litigation." *Mohawk Indus.* v. *Carpenter*, 558 U.S. 100, 106 (2009); *see Cohen* v. *Beneficial Indus. Loan Corp.*, 337 U.S. 541, 546 (1949) ("Appeal gives the upper court a power of review, not one of intervention.").

To be sure, "[i]mmediate review of every trial court ruling" might result in "more prompt correction of erroneous decisions." *Richardson-Merrell, Inc.* v. *Koller*, 472 U.S. 424, 430 (1985). By deferring appellate review

until district court proceedings are complete, the final judgment rule may occasionally result in duplicative proceedings on remand. "But that inconvenience is one which … Congress contemplated in providing that only final judgments should be reviewable." *Roche* v. *Evaporated Milk Ass'n*, 319 U.S. 21, 30 (1943). The risk of such possible hardship to individual litigants must be measured against the "debilitating effect on judicial administration caused by piecemeal appellate disposition of what is, in practical consequence, but a single controversy." *Eisen* v. *Carlisle & Jacquelin*, 417 U.S. 156, 170 (1974). And that risk is considerably lessened by the established discretionary mechanisms for appellate review notwithstanding ongoing district court proceedings, such as Rule 54(b). *See infra* Part II.

This Court has consistently taken a rigorous approach to the final judgment rule. For a decision to be final, it must "end[] the litigation on the merits" and "dispos[e] of the whole case," *Catlin*, 324 U.S. at 233, so that nothing in "the matter remains open, unfinished or inconclusive," *Cohen*, 337 U.S. at 546. Entry of a final, appealable judgment is the act "'by which a district court disassociates itself from'" the proceedings, ending its "'special role' in managing ongoing litigation," and sending the entire controversy up to the court of appeals. *Mohawk*, 558 U.S. at 106.

B. An Order Dismissing Some But Not All Consolidated Claims Is Not A Final Judgment

An order disposing of fewer than all of the pending claims in consolidated cases is not final in the sense required by Section 1291. It does not end the district court's role in supervising the ongoing consolidated litigation; moreover, an immediate appeal from such an order virtually ensures that the court of appeals will be

required to consider the controversy in pieces. That is especially true in MDLs, where the winnowing of claims is but one step in the extensive and complex pretrial management required of the district court.

1. Consolidation for all purposes

Rule 42(a) permits a district court to consolidate together "actions before the court [that] involve a common question of law or fact." Consolidation may entail "join[ing] for … trial any or all matters at issue." Fed. R. Civ. P. 42(a)(1). But the court may also, in its discretion, determine that "the length of time required to conclude multiple suits as against a single one" and the "relative expense … of the single-trial, multiple-trial alternatives" instead weigh in favor of consolidation for a more limited duration, such as for pretrial proceedings or discovery. *Arnold* v. *Eastern Air Lines*, 681 F.2d 186, 193 (4th Cir. 1982).

When cases are consolidated for all purposes under Rule 42(a), the courts of appeals (with the possible exception of the Sixth Circuit) have uniformly recognized that an order disposing of only some of the consolidated claims or cases is not a final judgment appealable under Section 1291. *See*, *e.g.*, *United States ex rel. Hampton* v. *Columbia/HCA Healthcare*, 318 F.3d 214, 216 (D.C. Cir. 2003).[6] That consensus sensibly applies the final judgment rule.

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[6] *See also Global NAPs* v. *Verizon New Eng.*, 396 F.3d 16, 22 (1st Cir. 2005); *Hall* v. *Wilkerson*, 926 F.2d 311, 314 (3d Cir. 1991); *Ringwald* v. *Harris*, 675 F.2d 768, 771 & n.7 (5th Cir. 1982); *Alinsky* v. *United States*, 415 F.3d 639, 642 (7th Cir. 2005); *Mendel* v. *Production Credit Ass'n of Midlands*, 862 F.2d 180, 182 (8th Cir. 1988); *Huene* v. *United States*, 743 F.2d 703, 705 (9th Cir. 1984); *Trinity Broad.* v. *Eller*, 827 F.2d 673, 675 (10th Cir. 1987) (per curiam); *Schippers* v. *United States*, 715 F.3d 879, 884 (11th Cir.

The final judgment is the action "'by which a district court disassociates itself from'" the proceedings. *Mohawk*, 558 U.S. at 106. When the district court disposes of only some of the claims or cases that it has determined should be consolidated for adjudication together, it has done precisely the opposite—determining, in effect, that further proceedings are necessary at least as to some claims. Moreover, appellate review of the disposition of only some of the consolidated claims or cases would result in "piecemeal disposition on appeal" of claims the district court has decided should be treated "for practical purposes [as] a single controversy." *Cobbledick*, 309 U.S. at 325; *see*, *e.g.*, *Spraytex, Inc.* v. *DJS&T*, 96 F.3d 1377, 1382 (Fed. Cir. 1996) ("[S]ince consolidated cases tend to be based on the same factual circumstances, appellate review of the total consolidated case serves the purposes of appellate efficiency.").

2. Consolidation for pretrial purposes

The question that has divided the courts of appeals is whether a different rule should apply when cases are consolidated only for more limited purposes, such as for pretrial purposes only. *See*, *e.g.*, *Global NAPs* v. *Verizon New Eng.*, 396 F.3d 16, 22-23 (1st Cir. 2005) (noting split). There is no reason for a different rule in those contexts.

2013); *Spraytex, Inc.* v. *DJS&T*, 96 F.3d 1377, 1382 (Fed. Cir. 1996); *cf. Houbigant*, 627 F.3d at 498 (applying circuit's presumption of non-finality to dismiss appeal); *Eggers* v. *Clinchfield Coal*, 11 F.3d 35, 39 (4th Cir. 1993) (multifactor test including "whether a case has been consolidated for all purposes"). The Sixth Circuit has not been consistent in its approach. *Compare Advey* v. *Celotex Corp.*, 962 F.2d 1177, 1181 (6th Cir. 1992), *with Beil* v. *Lakewood Eng'g & Mfg.*, 15 F.3d 546, 551 (6th Cir. 1994).

When the district court has determined that consolidation is appropriate for any purpose, it has decided that the cases ought to proceed as one litigation unit as long as those purposes are being pursued or satisfied. During whatever period of consolidation, an order disposing of only some of the claims or cases should not be appealable as a final decision under Section 1291, although it may be appealable under other mechanisms, such as Rule 54(b). *See infra* Part II. The type of consolidation (pretrial or for all purposes) affects not *how deeply* the cases are bound together but rather *how long*. While consolidated, cases should travel together, whether in the district court or in the courts of appeals. *See, e.g.*, *Korean Air Lines*, 829 F.2d at 1178-1179 (D.H. Ginsburg, J., concurring) ("[D]uring the period of the 1407(a) transfer, any appeals—interlocutory or after summary judgment—go to the court of appeals for the transferee court, not the courts of appeals for the transferor circuits."); *Spraytex*, 96 F.3d at 1380 (consolidated cases should be treated "similar[ly] to a case with several claims or counterclaims"); *Trinity Broad.* v. *Eller*, 827 F.2d 673, 675 (10th Cir. 1987) (per curiam) (contrary rule "would lead to … piecemeal review" on appeal).[7]

[7] The rule advocated here is pellucid—"a major virtue in a jurisdictional statute," *Hertz Corp.*, 559 U.S. at 94—and provides the requisite certainty to litigants. *See, e.g.*, *Huene*, 743 F.2d at 704. The case-by-case approach adopted by some courts of appeals—including, in a modified form, by the Second Circuit, *see supra* p. 13 (discussing court's "strong presumption" rule)—is inconsistent with the purpose of the final judgment rule, to prevent "the mischief of economic waste and of delayed justice" that piecemeal appellate review would cause. *Radio Station WOW* v. *Johnson*, 326 U.S. 120, 124 (1945). By leaving the time for taking an appeal uncertain whenever cases are consolidated for less than all purposes, the case-by-case approach invites needless litigation over the threshold question of finality. *See, e.g.*, *Eggers*, 11 F.3d at 39

Petitioners resist by contending (Br. 19) that consolidation of any kind and any duration "does not merge multiple civil actions into a single one." Thus, petitioners say, a party to consolidated litigation may—indeed, must—appeal as soon as her claims are concluded, as if her case were standing alone. Were they correct, petitioners' rule would apply equally whether cases were consolidated for all purposes or only some. This would gut the policy against piecemeal appeals across all forms of consolidated litigation and would overturn the law of virtually every federal circuit. *See supra* p. 20 & n.6.

Petitioners also contend that dismissal of their claims is a final judgment because it "ended all litigation on the merits of *petitioners'* sole claim for relief," notwithstanding other proceedings on other plaintiffs' claims—including overlapping putative class claims. Pet. Br. 10 (emphasis added). But the same could be said in any multiparty, multiclaim suit, and a district court's final resolution of only some parties' claims in such a suit is not "immediately appealable, even if [the claims] are in some sense separable from the remaining unresolved claims." *Curtiss-Wright Corp.* v. *General Elec.*, 446 U.S. 1, 8 (1980). That the district court has finished with petitioners' individual claims is immaterial; what matters is the system of appellate review as a whole. The relevant question from that vantage point is not whether individual litigants or claims are ready

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(applying circuit's multi-factor test). A case-by-case approach also requires the court of appeals, rather than the district court, to evaluate the nature and extent of the consolidation of the proceedings and thus "take[s] from the district court that made the original decision to consolidate" the subsequent decision whether an appeal, despite ongoing proceedings, is appropriate. *Huene*, 743 F.2d at 705; *see also infra* p. 35 (explaining district court's central role in dispatching appeals under Rule 54(b)).

for an appeal, but rather whether the district court's supervision of the litigation is complete. *See Cobbledick*, 309 U.S. at 326.

3. Multidistrict litigation

a. A clear rule requiring a final resolution of all consolidated proceedings before an appeal under Section 1291 is especially important for consolidated pretrial proceedings in MDLs.

The MDL statute does not prescribe how the transferee court is to manage the proceedings. Instead, "[t]he question of how the cases are to be coordinated or consolidated in the transferee court is for the transferee court to determine." 15 Wright et al., *Federal Practice and Procedure* § 3865 (4th ed. 2013). In some cases, including the present one, the transferee court may determine that some or all of the pending actions should be consolidated for pretrial purposes; in others, the transferee court may determine that only limited coordination is appropriate—as, for example, when related proceedings are pending in state court. *See* Herr, *Multidistrict Litigation Manual* § 5:25 (2014).

When the transferee court has determined that consolidation is appropriate, it has decided that the "just and efficient conduct" of the litigation requires that the consolidated claims and cases proceed together for pretrial purposes, as one unit. 28 U.S.C. § 1407(a). Indeed, a principal aim of centralized MDL proceedings is to prevent the "needless duplication of effort" that would result if each transferred action were instead to proceed on its own separate course. S. Rep. No. 90-454, at 4 (1967). The district court—not the litigants or the court of appeals—is uniquely positioned to survey the litigation and determine whether treatment as a single,

consolidated unit is warranted. *See FedEx Ground Package Sys.* v. *United States JPML*, 662 F.3d 887, 890 (7th Cir. 2011) ("'[I]n most instances the transferee judge has an acute sense about the procedural steps necessary to advance the litigation in the fairest and most efficient way.'"); *see also In re New Cingular Wireless, PCS Data Servs. Litig.*, 988 F. Supp. 2d 1375, 1376 (J.P.M.L. 2013) ("The extent to which pretrial proceedings are coordinated or consolidated in the transferee court … is best addressed by the transferee judge.").

The transferee court's decision to bind related claims together for consolidated treatment during the pretrial phase of proceedings should not be undone by immediate appeals from the dismissal of fewer than all of the consolidated claims. Such a dismissal is not a final decision in the sense required by Section 1291. Far from leaving "nothing for the court to do," *Catlin*, 324 U.S. at 233, it is merely one step in the complex pretrial management required of the transferee court. For example, when the district court grants in part and denies in part a motion to dismiss consolidated claims, it has effectively determined that discovery may be appropriate as to some of the claims; other pretrial proceedings may also remain, including class certification, appointment of (non-interim) class counsel, and summary judgment on other claims, which by definition involve common questions of fact. Only after the termination of such pretrial proceedings can the district court be said to have "'disassociate[d] itself'" from the consolidated litigation. *Mohawk*, 558 U.S. at 106.

As set forth in more detail below (at 43-47), petitioners' contrary rule—that consolidation does not affect finality, even in multidistrict litigation—would vitiate the efficiencies the MDL procedure is intended to create and would invite the ills the final judgment rule

seeks to eliminate. Under petitioners' approach, the district court's resolution of any individual set of claims would immediately occasion appellate review, despite the district court's ongoing efforts at "centralized management" of other closely related claims. H.R. Rep. No. 90-1130, at 2. Rather than "conservation of judicial energy" and "elimination of delays," *Catlin*, 324 U.S. at 234, petitioners' rule would require the court of appeals to reconsider the underlying controversy each time an appeal was taken. Each seriatim appeal would require the district court to consider whether to forge ahead or await further appellate guidance. Rather than respect "the ability of district judges to supervise litigation," *Richardson-Merrell*, 472 U.S. at 430, petitioners' rule would threaten interference with the district court's efforts to manage and resolve what are among the most challenging proceedings a court may encounter.

b. There is no unfairness in requiring parties who benefit from the consolidated treatment of their claims in an MDL to encounter the occasional inconvenience associated with consolidated proceedings. Since Congress created the MDL system in 1968, that system has provided litigants with both benefits and costs. On the one hand, plaintiffs and defendants can pool resources, avoid the costs of duplicative pretrial proceedings, minimize the discovery burdens on non-parties, lessen the risks of conflicting rulings in different courts, and facilitate settlements. On the other hand, consolidation of transferred actions "can change the rights of parties considerably." Gerson, Note, *The Appealability of Partial Judgments in Consolidated Cases*, 57 U. Chi. L. Rev. 169, 182 (1990). Parties may have to litigate outside their preferred venue, and the appointment of lead counsel may "prevent each litigant from conducting his case as he wishes." *Id.* Consolidation for centralized

pretrial management alters standard single-action litigation in the interests of efficiency and judicial economy, and district courts are charged with managing the resulting trade-offs in any particular litigation.

Here, for example, petitioners sought consolidation to avail themselves of the benefits that consolidation brings. *See supra* pp. 8-9. Petitioners then successfully moved to be designated as interim lead plaintiffs for a putative class of bondholders. JA288-293. Petitioners' counsel also "entered into a joint prosecution agreement" with the other interim lead counsel, which meant pooling resources to find "consulting experts," prepare "a response to [the] motion to dismiss," and assess "the ongoing disclosures of new factual information relating to the litigation." Pls.' Mot. 3-4. Petitioners thus recognized the benefits of consolidation: close and efficient cooperation with other plaintiffs and efficient judicial management. Those factors now counsel against petitioners' effort to obtain separate early consideration of their individual case on appeal, despite the pendency of other putative bondholder class actions asserting causes of action in addition to a federal antitrust claim, as well as additional complaints by other plaintiffs raising the same federal antitrust claim in the MDL.

C. Petitioners' Rule Is Inconsistent With The Treatment Of Consolidated Actions As One Unit In Other Appellate Jurisdiction Contexts

Consolidated cases are treated as a single unit in other appellate jurisdiction contexts; respondents' position thus has the virtue of consistency with other relevant rules. For example, Federal Rule of Appellate Procedure 4(a)(4) provides that the time for appeal runs from the date on which certain post-judgment motions are resolved. Courts have uniformly ruled that

the time under Rule 4(a)(4) does not begin to run until all such post-judgment motions are resolved in the consolidated litigation as a whole. *See Doe* v. *Howe Military Sch.*, 227 F.3d 981, 985 (7th Cir. 2000) ("the filing of a timely motion under Fed. R. Civ. P. 59(e) by one party suffice[s] to toll the time for filing a notice of appeal for all parties" in consolidated litigation); *Advey* v. *Celotex Corp.*, 962 F.2d 1177, 1180 (6th Cir. 1992); *see also Harcon Barge* v. *D&G Boat Rentals*, 746 F.2d 278, 288 (5th Cir. 1984) (treating consolidated cases as one unit for purposes of Rule 4(a)(4)), *aff'd*, 784 F.2d 665 (5th Cir. 1986) (en banc).

Similarly, Rule 4(a)(3) provides that when "one party timely files a notice of appeal, any other party may file a notice of appeal within 14 days after the date when the first notice was filed." Courts have recognized that the provision applies across consolidated cases, so that a notice filed in one case starts the 14-day clock for a notice to be filed in another case consolidated with it. *See, e.g.*, *EEOC* v. *West La. Health Servs.*, 959 F.2d 1277, 1280-1281 (5th Cir. 1992); *Jackson Jordan, Inc.* v. *Plasser Am.*, 725 F.2d 1373, 1374 (Fed. Cir. 1984).

Finally, Rule 4(a)(1) extends the 30-day period for filing an appeal to 60 days when the federal government is a party. Several courts have held that when a case between private parties is consolidated with a case involving the government, the 60-day deadline applies to all the consolidated cases. *See, e.g.*, *Cablevision Sys. Dev.* v. *MPAA*, 808 F.2d 133, 135 (D.C. Cir. 1987); *In re Perry Hollow Mgmt.*, 297 F.3d 34, 39 (1st Cir. 2002); *In re Adams Apple*, 829 F.2d 1484, 1487 (9th Cir. 1987); *Donovan* v. *Tierra Vista, Inc.*, 796 F.2d 1259, 1260 (10th Cir. 1986). What all of these cases recognize is that, for

various purposes of appellate jurisdiction, consolidated cases should be treated as a single unit of litigation.

D. Petitioners' Contrary Doctrinal Arguments Are Meritless

1. Petitioners suggest (Br. 23) this Court has already decided the question presented in *Johnson* v. *Manhattan Railway Co.*, 289 U.S. 479 (1933), which petitioners read as establishing that "consolidated actions retain their separate identities." *Johnson*, however, does not address the finality requirement in Section 1291.

In *Johnson*, parties seeking to challenge prior orders in a receivership suit brought a new action before a different judge, who consolidated the second suit with the first, which would have conceivably permitted the parties to circumvent the formidable barriers that otherwise prevent collateral attack on prior judgments. 289 U.S. at 492-494. The consolidation order was reversed by the court of appeals, *id.* at 496, and its propriety was not before this Court, *see id.* at 494 (noting that review was not granted as to "the reversal of the consolidating decree"). In dictum, the Court observed that generally "consolidation is permitted as a matter of convenience and economy in administration, but does not merge the suits into a single cause, or change the rights of the parties," and thus that it would not have "alter[ed] the nature of the attack" on the prior judgment. *Id.* at 496-497. Whether the consolidated suit was a collateral or direct challenge had nothing to do with finality. *See*, *e.g.*, *Ivanov-McPhee* v. *Washington Nat'l Ins.*, 719 F.2d 927, 929 n.1 (7th Cir. 1983) (*John-*

son "did not involve any issue relating to the finality of a judgment as a predicate for appeal").[8]

Petitioners claim (Br. 24-25) that Rule 42(a) incorporates *Johnson*. But even if *Johnson* could be read as broadly as petitioners contend, Rule 42(a) did not codify pre-Rules authority in that respect. The Advisory Committee note expressly states that "in so far as the" predecessor consolidation statute at issue in *Johnson* "differs from this rule, it is modified." Fed. R. Civ. P. 42 advisory committee's note; *see Ringwald* v. *Harris*, 675 F.2d 768, 771 n.4 (5th Cir. 1982) (emphasizing the danger of relying on pre-Rules authority in interpreting Rule 42(a)).[9] And as particularly relevant here, the Advisory Committee note to Rule 42 states that "[f]or the entry of separate judgments, see Rule 54(b)." The Committee's note implies that although "consolidation may not in every respect merge separate actions into a single suit," it may "cause otherwise separate actions to

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[8] Petitioners also rely (Br. 23-24, 27) on *Mutual Life Insurance Co.* v. *Hillmon*, 145 U.S. 285 (1892), but that case is no more helpful to them. The Court held there that consolidation did not alter the number of peremptory challenges available to each of the defendants. According to the Court, a defendant may not "be deprived, without its consent, of any right material to its defence, whether by way of challenge of jurors or of objection to evidence." 145 U.S. at 293. Again, whether a defendant may be deprived through consolidation "of any right material to its defence" is quite different from whether consolidated cases should be treated as a single unit, while consolidated, for purposes of appellate jurisdiction.

[9] The drafting history petitioners cite (Br. 25) suggests that Rule 42 was modified to *remove* the proposed limitation that only actions that could have been "originally … joined in a single action" could be consolidated, and thus to *expand* the power of consolidation. That hardly supports petitioners' view of the limited effect of consolidation on finality.

thenceforth be treated as a single judicial unit for purposes of Rule 54(b)." *Ringwald*, 675 F.2d at 771.

Finally, petitioners' overreading of *Johnson* is inconsistent with this Court's treatment of consolidated cases as a single unit in other situations. In *Bowsher* v. *Synar*, 478 U.S. 714 (1986), members of Congress and a union brought two separate suits challenging the constitutionality of the same federal statute. The district court consolidated the cases and, citing *Johnson*, conducted a separate standing inquiry for the plaintiffs in each case. *Synar* v. *United States*, 626 F. Supp. 1374, 1379 (D.D.C. 1986) (per curiam). On direct appeal, this Court concluded "that members of the Union" had standing and thus there was no need to "consider the standing issue as to the Union or Members of Congress." 478 U.S. at 721. As the Court recognized in *Bowsher*, consolidated cases may be treated as one unit for at least some purposes. *See also Secretary of Interior* v. *California*, 464 U.S. 312, 319 n.3 (1984); *Sandwiches, Inc.* v. *Wendy's Int'l*, 822 F.2d 707, 710 (7th Cir. 1987) ("We need not say that [*Bowsher* and *California*] have overruled *Johnson* in silence to conclude that 'consolidations' in a district court merge the case for at least some jurisdictional matters.").

2. Petitioners also argue (Br. 19-20) that requiring them to wait would be inconsistent with Section 1407 itself. Petitioners correctly observe that Section 1407 applies only when there are multiple "actions" that raise common questions. But Section 1407's text does not address whether those actions, once consolidated, should be treated as one unit for finality purposes during the consolidation.

Nor does this Court's decision in *Lexecon, Inc.* v. *Milberg Weiss Berhad Hynes & Lerach*, 523 U.S. 26

(1998), bear on the finality of judgment. *Lexecon* holds that, as Section 1407(a) plainly says, a transferred "action" that is not terminated during pretrial proceedings must be returned to its home district. *See id.* at 34. Just as an action stands alone before it is consolidated for pretrial proceedings under Section 1407, it again stands alone if remanded. The relevant question here is whether, while the consolidated litigation is ongoing, the parts are divisible from the whole for purposes of the final judgment rule. *Lexecon* does not answer that question.

3. Finally, petitioners contend (Br. 26) that treating actions consolidated for pretrial proceedings as one for purposes of the final judgment rule, as long as they remain consolidated, would be inconsistent with "the structure of the Federal Rules."

Petitioners frame the question as one of merger (Br. 26), *i.e.*, whether "[p]ermitting parties to merge multiple cases into a single action via consolidation" would "permit them to circumvent" the limits of the joinder rules. But allowing *the district court* to consolidate actions under Rule 42(a) or Section 1407 is quite different from allowing permissive joinder *by the parties* under Rule 20, and petitioners identify no persuasive reason to think that a district court lacks the power to achieve by order what parties may not do by pleading.

In any event, the Court need not resolve the metaphysical debate of whether consolidation "merges" many actions into one. Even if cases retain their individual character in some respects while they are consolidated, consolidation still binds the cases together in a way that can affect procedural disposition, including the timing of appeals. *See* Gerson, 57 U. Chi. L. Rev. at

182 ("If the courts never allowed consolidation to change the rights of parties, they would be unable to move consolidations along as procedural units.").

The Court should therefore decline petitioners' broad invitation (Br. 27) to opine on the nature and consequences of consolidation for all purposes. *See Sandwiches*, 822 F.2d at 709-710 ("[T]here are several kinds of consolidations. Generalizations that assume all consolidations are of one flavor do not always carry the day." (citations omitted)); *Ringwald*, 675 F.2d at 770 n.4 (discussing Wright & Miller's view that "there are distinctly different kinds of 'consolidation'"). The Court need only hold that consolidation for pretrial purposes affects the time for taking an appeal as of right while pretrial proceedings are ongoing.

That rule is entirely consistent with the relevant Federal Rules of Civil Procedure. Rule 54(b)—the single most important provision in the Rules for entry of judgment on fewer than all the claims in a proceeding—has been uniformly read to permit entry of judgment in a consolidated "action." Any contrary reading is indefensibly narrow (*see infra* p. 39), as is petitioners' attempt to read "action" in the Rules to refer always and only to an individual case, never a consolidated one. Rule 16(a) authorizes the district court to schedule a pretrial conference in "any action" pending before it. Petitioners could hardly contend that Rule 16 forbids a district court from conducting a single pretrial conference for a *consolidated* action and requires separate conferences for each transferred case in an MDL. Nor could petitioners reasonably contend that a transferee court is required to enter multiple protective orders—one for each of the consolidated proceedings. *See* Fed. R. Civ. P. 26(c)(1) (allowing for the entry of a protective order in "the action"); *see also, e.g.*, Fed. R. Civ. P.

26(b)(2)(C)(iii) (mandatory limits on discovery in "the action"). It would defeat the purpose of *consolidated* pretrial proceedings under Section 1407 if each of hundreds or thousands of transferred actions in an MDL proceeded separately for discovery.

II. EARLY APPELLATE REVIEW WHILE CONSOLIDATED PROCEEDINGS ARE ONGOING IS AVAILABLE AT THE SOUND DISCRETION OF THE DISTRICT COURT

The discretionary procedures of Rule 54(b) and Section 1292(b), not an appeal as of right under Section 1291, are the appropriate avenues for appeals while consolidated proceedings are ongoing. For years, lower courts have made effective use of these mechanisms to permit appeals that satisfy the relevant criteria and thereby have prevented the hardships that petitioners contend would otherwise accompany routine application of the final judgment rule in multidistrict litigation. Under petitioners' rule, the only additional appeals that would reach the circuit courts would be those the district courts adjudge undesirable while consolidated proceedings are ongoing. Those are hardly the types of cases that should clog the appellate courts.[10]

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[10] *See, e.g.*, *Pitzer* v. *City of E. Peoria*, 2010 WL 4879077, at *2 (C.D. Ill. Nov. 18, 2010) ("[A] 54(b) certification here would waste, rather than conserve judicial resources."); *UniCredito Italiano* v. *JPMorgan Chase Bank*, 288 F. Supp. 2d 485, 506 (S.D.N.Y. 2003) ("The dismissed and remaining claims here arise from essentially the same factual allegations; judicial economy will best be served if multiple appellate panels do not have to familiarize themselves with this case in piecemeal appeals.").

A. Rule 54(b) Allows District Courts To Dispatch Early Appeals When Appropriate

Under Rule 54(b), a district court may enter partial final judgment as to fewer than all claims or all parties when the court determines that "there is no just reason for delay." In other words, a party whose claims are dismissed from consolidated proceedings may appeal when the district court finds that "'the interest of sound judicial administration'" and "the equities involved" so require. *Curtiss-Wright*, 446 U.S. at 8.

"The timing of such a release is, with good reason, vested by the rule primarily in the discretion of the District Court[.]" *Sears, Roebuck & Co.* v. *Mackey*, 351 U.S. 427, 437 (1956). It is the district court, not the court of appeals or the parties, that is "'most likely to be familiar with the case and with any justifiable reasons for delay,'" *Curtiss-Wright*, 446 U.S. at 10, and thus it is the district court that Congress chose "to act as a 'dispatcher,'" *id.* at 8, to identify those instances when the interest of particular litigants in an early appeal outweighs the systemic costs of piecemeal appellate proceedings. *See id.* at 12 ("[T]he task of weighing and balancing the contending factors is peculiarly one for the trial judge, who can explore all the facets of a case."); 15A Wright et al., *Federal Practice and Procedure* § 3914.7 (2d ed. 1992) ("The choice to use the district judge as the 'dispatcher' who determines the desirability of immediate appeal takes advantage of the judge's close familiarity with the case." (footnote omitted)); *see also Spraytex*, 96 F.3d at 1382 ("The need for immediate appeal and the policy against piecemeal review can be weighed by the district court, subject to our review.").

Rule 54(b) does not obviate the need for a final judgment, which remains "a basic requirement for an appeal." *Sears*, 351 U.S. at 438. Rather, the Rule was adopted as a way to "administer[] that requirement in a practical manner in multiple claims actions," so the district court may "properly tim[e] the release of final decisions in multiple claims actions." *Id.* When the district court finally resolves a subset of claims, and it determines that those claims are "separable from the others remaining to be adjudicated … such that no appellate court would have to decide the same issues more than once even if there were subsequent appeals," *Curtiss-Wright*, 446 U.S. at 8, Rule 54(b) permits the court to certify that its work is done on those claims and that an appeal is ripe.

Many courts have recognized that this discretionary route to early appellate review significantly diminishes any undesirable hardship the final judgment rule may otherwise pose to particular litigants in complex modern litigation. *See, e.g.*, *In re Refrigerant Compressors Antitrust Litig.*, 731 F.3d 586, 592 (6th Cir. 2013) (even if litigants "would experience hardship if they had to wait until the end of pretrial proceedings to appeal," "other routes to an appellate court ordinarily will reduce any hardship that [litigants] might face"); *see also Page Plus of Atlanta* v. *Owl Wireless*, 733 F.3d 658, 659, 660 (6th Cir. 2013) (Rule 54(b) is a "safety valve[]" that permits "appeals where the benefits of an immediate appeal … outweigh the costs"); *Jordan* v. *Pugh*, 425 F.3d 820, 829 (10th Cir. 2005) ("Partial final judgment [under Rule 54(b)] is intended to serve the limited purpose of protecting litigants from undue hardship and delay in lawsuits involving multiple parties or multiple claims."); *SEC* v. *Capital Consultants*, 453 F.3d 1166, 1173-1174 (9th Cir. 2006) (similar).

B. District Courts Make Effective Use Of Rule 54(b) In Consolidated Litigation

1. District courts have proven adept at using Rule 54(b) to identify and certify those limited portions of consolidated proceedings for which an immediate appeal is warranted, even while litigation in the rest of the consolidated proceedings remains active. *See, e.g.*, *In re Peanut Crop Ins. Litig.*, 524 F.3d 458, 469-470 (4th Cir. 2008). Indeed, given the complexity of the substantive legal issues and the procedural posture of the cases, Rule 54(b) certification is particularly warranted in MDLs, as transferee courts have frequently recognized. *See, e.g.*, *Hill* v. *Henderson*, 195 F.3d 671, 677 (D.C. Cir. 1999) (MDL courts have "favored certification by the transferee court of potentially outcome determinative rulings for immediate, consolidated appeal").[11] Appellate decisions routinely confirm that Rule 54(b) is the proper mechanism for dispatching an early appeal in those circumstances.[12]

The need for district court discretion over such decisions is particularly compelling in MDLs because Section 1407 grants the JPML and district courts "the

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[11] Rule 54(b) has also been effectively used to dispatch early appeals in litigation consolidated under Rule 42(a). *See, e.g.*, *Allen* v. *Mayberg*, 2014 WL 2526125, at *1-2 (9th Cir. June 5, 2014); *Bayer Healthcare Pharm.* v. *Watson Pharm.*, 713 F.3d 1369, 1373 n.3 (Fed. Cir. 2013); *Massey, Inc.* v. *Moe's Sw. Grill*, 565 F. App'x 821, 823 (11th Cir. 2014) (per curiam); *In re Gentiva Sec. Litig.*, 2 F. Supp. 3d 384, 390-391 (E.D.N.Y. 2014).

[12] *See, e.g.*, *Blackman* v. *District of Columbia*, 456 F.3d 167, 175 n.9 (D.C. Cir. 2006); *Trinity Broad.*, 827 F.2d at 675; *see also Spraytex*, 96 F.3d at 1382 (no appellate jurisdiction without Rule 54(b) certification); *accord Bergman* v. *City of Atl. City*, 860 F.2d 560, 563 (3d Cir. 1988); *Hageman* v. *City Investing*, 851 F.2d 69, 71 (2d Cir. 1988); *Huene*, 743 F.2d at 705; *Ringwald*, 675 F.2d at 771.

power to consolidate cases and then manage them." Gerson, 57 U. Chi. L. Rev. at 190. In MDLs, "district courts continually evaluate the benefits and costs of joint proceedings," and "[t]hey can draw on this knowledge when making finality determinations." *Id.*; *see* Heyburn, *A View from the Panel*, 82 Tul. L. Rev. 2225, 2243-2244 (2008) ("A singular reason for our overall success in MDL cases is the quality of experience, motivation, organizational ability, and sheer tenacity that transferee judges bring to the process. Handling one (or more) of these difficult groups of cases is perhaps the greatest challenge that could be thrust upon a federal judge."). Rule 54(b) lodges the discretion to dispatch early appeals in precisely the courts "best able to evaluate the [e]ffect of an interim appeal on the parties and on the expeditious resolution of the entire action." *Huene* v. *United States*, 743 F.2d 703, 705 (9th Cir. 1984).

Often, as in this case, an MDL court issues successive rulings that dismiss some claims and permit others to go forward. If a plaintiff finds that she no longer has any live claims, she may request certification under Rule 54(b) to permit an immediate appeal, or she may pursue a later appeal under Section 1291 once pretrial proceedings have ended as a result of dismissal or remand of the other cases in the MDL. *See, e.g.*, *In re Loestrin 24 FE Antitrust Litig.*, 2014 WL 4368924, at *13 n.19 (D.R.I. Sept. 4, 2014) (inviting a motion for interlocutory appeal after one consolidated class's sole claim—a federal antitrust claim—was dismissed); *In re Mortgage Elec. Registration Sys. Litig.*, 2011 WL 4550189, at *12 (D. Ariz. Oct. 3, 2011) (dismissing all claims in 72 of the constituent cases and certifying appeal under Rule 54(b)). Placing discretion over interim

appeals in the hands of district court judges fits seamlessly with the MDL structure.[13]

2. Petitioners contend (Br. 39-47) that Rule 54(b) applies only to each individual constituent action in consolidated proceedings and thus is inapplicable when—as here—the district court dismisses all the claims in one of the constituent cases. That is incorrect, and it is telling that petitioners fail to identify any authority supporting their view.

Petitioners rely heavily on the use of the word "action" in Rule 54(b), which provides for the entry of partial final judgment in "an action." That term, however, is readily understood to encompass the entire consolidated litigation, rather than the constituent cases consolidated within that unit. *See supra* p. 33; Gerson, 57 U. Chi. L. Rev. at 180 ("A 'literal' reading of the rules simply does not resolve whether Rule 54(b) applies to consolidated cases."). Similarly, petitioners say (Br. 43) that Rule 54(b) does not apply when all of the claims in an action have been dismissed—as, for example, when the district court dismissed petitioners' sole claim. But that focus is again too narrow. Viewing the consolidated proceedings as a whole, Rule 54(b) allows for early

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[13] District courts overseeing MDL proceedings often certify appeals under Rule 54(b). *See Food Lion*, 73 F.3d at 533 (encouraging transferee courts to consider use of Rule 54(b) in MDL proceedings); *see also, e.g.*, *In re Terrorist Attacks on Sept. 11, 2001*, 714 F.3d 659, 672 (2d Cir. 2013); *In re Bank of Am. Sec., Derivative, & ERISA Litig.*, 2013 WL 5933649, at *3 (S.D.N.Y. Nov. 5, 2013); *In re FEMA Trailer Formaldehyde Prods. Liab. Litig.*, 2012 WL 1580665, at *5 (E.D. La. May 4, 2012); *In re ClassicStar Mare Lease Litig.*, 2012 WL 1080569, at *3 (E.D. Ky. Mar. 30, 2012); *In re Packaged Ice Antitrust Litig.*, 2011 WL 6209188, at *24 (E.D. Mich. Dec. 13, 2011); *In re MTBE Prods. Liab. Litig.*, 2010 WL 1328249, at *5 (S.D.N.Y. Apr. 5, 2010), *aff'd*, 725 F.3d 65 (2d Cir. 2013).

appellate review of a judgment disposing of some claims while part of an action involving other consolidated claims remains ongoing.

Petitioners also observe (Br. 41-42) that Rule 54(b) was intended to permit district courts greater leeway to deal "with difficulties arising from the joinder of disparate claims" within a single action. If anything, the Rule's purpose of providing flexibility in multiclaim actions favors reading it to apply to consolidated proceedings as well, where claims can be even more disparate.

Petitioners fall back (Br. 44-46) on the claim that the Rules Enabling Act, 28 U.S.C. § 2072, compels their reading of Rule 54(b). That simply begs the question whether petitioners are entitled to an appeal under Section 1291. If, as many courts have recognized (*see supra* pp. 20-21), dismissal of fewer than all claims in consolidated litigation is not a final decision for purposes of Section 1291, then petitioners have no appeal as of right and Rule 54(b) abridges nothing.

Finally, petitioners point (Br. 46-47) to other mechanisms that district courts can use to manage complex litigation, which supposedly render Rule 54(b) "unnecessary." But the availability of other, additional tools does not render Rule 54(b) superfluous; none of the measures identified by petitioners provides the district court with the same discretion to dispatch early appeals when appropriate. To the contrary, these other measures merely confirm the general thrust of the Federal Rules to afford district courts substantial discretion to oversee complex cases. It would be far more consonant with the architecture of the Rules to permit district courts—as they have traditionally done—to continue exercising control over the time for taking an appeal despite ongoing proceedings on other claims.

3. Here, the district court was well within its discretion to deny entry of partial final judgment on petitioners' claims. Other plaintiffs raise the same or closely related claims in the consolidated litigation, some on behalf of overlapping putative classes. Several plaintiffs contend that their federal antitrust claim is distinguishable from petitioners' dismissed claim; while wrong, that argument has not yet been addressed by the district court. *See supra* pp. 14-15. If granted an immediate appeal now, petitioners would be the only ones taking an appeal on a common claim.[14] Doubtless other appeals would follow raising that exact same and perhaps also a closely related federal antitrust claim. In fact, the inefficiencies of petitioners' piecemeal approach would be far more severe because, in addition to the three sets of consolidated putative class actions and the individual Schwab actions, there are approximately 40 other actions pending below. Approximately 26 of those actions raise federal antitrust claims. *See* Case Chart, Dkt. 574-1 (S.D.N.Y. Aug. 5, 2014); JA300-302. The district court therefore has sensibly suggested that, once it has addressed all of plaintiffs' claims and clarified the legal landscape, it may consider again

[14] Petitioners' amici—other plaintiffs in the MDL below—take issue with the district court's underlying antitrust decision. That decision is thorough and well-reasoned and has been cited with approval by several other courts. *See* Pet. App. 37a-59a, 192a-200a; *see, e.g.*, Order 4-5, Dkt. 6, *Mayfield* v. *British Bankers' Ass'n*, No. 14-cv-4735 (S.D.N.Y. July 22, 2014). In any event, its merits are not before the Court. At most, amici's efforts to attack the district court's decision in this Court merely confirm how inextricably intertwined petitioners' claims are with the consolidated claims of other plaintiffs, including amici. Petitioners and their amici should travel together, and all of their antitrust arguments should be considered together by the court of appeals at the same point in the proceedings.

whether to enter a partial final judgment as to a subset of claims in an orderly way. JA294. That is exactly the sort of discretionary management best left to the district court.

C. Section 1292(b) Is An Additional Avenue To Early Appellate Review

Any conceivable hardship from requiring particular parties to await the conclusion of consolidated proceedings before taking an appeal is further mitigated by Section 1292(b), which petitioners fail to address. Under that statute, a district court may certify for interlocutory appellate review any "order involv[ing] a controlling question of law as to which there is substantial ground for difference of opinion," when "immediate appeal from the order may materially advance the ultimate termination of the litigation." After certification, "the appellant still 'has the burden of persuading the court of appeals that exceptional circumstances justify a departure from the basic policy of postponing appellate review until after the entry of a final judgment." *Coopers & Lybrand* v. *Livesay*, 437 U.S. 463, 475 (1978).

Section 1292(b) was "[a]dopted with complex litigation in mind," *MCL* § 15.11, to address what Congress perceived as a "recognized need for prompt review of certain nonfinal orders," *Coopers & Lybrand*, 437 U.S. at 474. Like Rule 54(b), it offers a "route[] to an appellate court" before a complete final judgment, and thus "reduce[s] any hardship that plaintiffs might face" if otherwise required to await the complete termination of all proceedings in the district court before taking an appeal as of right. *Refrigerant Compressors*, 731 F.3d at 592. Like Rule 54(b), district courts use this provision effectively in consolidated litigation to permit early appellate consideration of particular legal questions

when doing so would materially advance the termination of the consolidated litigation. *See id.*

As with Rule 54(b), "Congress carefully confined the availability" of early appellate review under Section 1292(b) by interposing the district court as the initial gatekeeper for such appeals. *Coopers & Lybrand*, 437 U.S. at 474; *see id.* ("[T]he discretionary power to permit an interlocutory appeal is not, in the first instance, vested in the courts of appeals. A party seeking review of a nonfinal order must first obtain the consent of the trial judge." (footnote omitted)); *see also* Note, *Interlocutory Appeals in the Federal Courts Under 28 U.S.C. § 1292(b)*, 88 Harv. L. Rev. 607, 611 (1975) (noting "the emphasis in the [drafters'] deliberations on the trial judge's special ability to assess the future course of litigation and, therefore, the efficiency of allowing an immediate appeal"). Congress's choice to rely on the district court, in the first instance, to determine when early appellate review of questions of law may be appropriate confirms what is evident from Rule 54(b) itself: It is the district court, not individual litigants, that is best positioned to evaluate on a case-by-case basis whether the benefits of an early appeal outweigh the costs.

III. PETITIONERS' RULE WOULD CAUSE DELAY AND INEFFICIENCY WITH MINIMAL COUNTERVAILING BENEFIT

A. Petitioners' Approach Diminishes The Court System's Efficiency And Fairness

Petitioners' approach would impose real-world harms on both the court system and litigants.

First, petitioners' approach would cause needless seriatim appeals, clutter appellate dockets, and squander appellate judicial resources. Under their rule, every

time a district court disposes of the claims in an action that is consolidated with others, the affected party has an appeal as of right, notwithstanding that other parties asserting the same or very similar claims are precluded from having their appeals heard at the same time because they have other claims pending. Parties will doubtless feel obligated to attempt to appeal whenever an order even arguably resolves all of their individual claims, lest they forfeit their right to an appeal. There is no reason to expend the appellate courts' limited judicial resources by requiring them to consider successive appeals on the same issue, especially when each involves the same factual scenario and substantially the same underlying legal theories (even if the appellate court ultimately rejects them on stare decisis grounds), or to revisit the same controversy multiple times, rather than confronting it in "a unified package." *Cullen* v. *Margiotta*, 618 F.2d 226, 228 (2d Cir. 1980) (per curiam); *see also supra* pp. 25-26.

Concern for seriatim appeals is why the district court denied petitioners' Rule 54(b) request in this case. JA294; *see supra* pp. 13-14. Although petitioners would like the Second Circuit to consider their federal antitrust claim now, numerous other claims are still pending before the MDL court. Moreover, a number of plaintiffs in the formerly stayed cases maintain (incorrectly) that their federal antitrust claims remain viable. JA314; *see supra* pp. 14-15. If this Court adopts petitioners' rule, the Second Circuit would face at least three different appeals on the federal antitrust issue alone, brought by: (1) petitioners; (2) the Exchange and OTC plaintiffs; and (3) the FDIC, Freddie Mac, and other plaintiffs advancing purportedly distinct antitrust claims.

Second, petitioners' rule would interfere with the power of the district court to manage its docket, undermining this Court's remonstration that questions about timing and docket management are best left to the sound judgment of courts on the front lines of litigation. *See, e.g.*, *Landis* v. *North Am. Co.*, 299 U.S. 248, 254-255 (1936) (Cardozo, J.) (district court has the "power … to control the disposition of the cases on its docket with economy of time and effort for itself, for counsel, and for litigants" and such decisions are left to "the exercise of [the district court's] judgment"); *cf. Curtiss-Wright*, 446 U.S. at 8 (Rule 54(b) leaves it "to the sound judicial discretion of the district court to determine the 'appropriate time' when each final decision in a multiple claims action is ready for appeal" (quoting *Sears*, 351 U.S. at 435)).

Such interference is particularly unwarranted in the context of MDL proceedings. *See, e.g.*, *In re Asbestos Prods. Liab. Litig. (No. VI)*, 718 F.3d 236, 247 (3d Cir. 2013) (a "sprawling multidistrict matter … presents a special situation, in which the district judge must be given wide latitude with regard to case management in order to effectively achieve the goals set forth by the legislation that created the" JPML); *see also supra* Part I.B.3. A rule for finality that ignores consolidation is anathema to Section 1407's scheme for streamlining pretrial proceedings. It could also cause serious delay, especially if the district court waits for the appellate court's guidance before moving forward with the litigation. That result would unseat the district court from its role as the "dispatcher" of appeals. *See Curtiss-Wright*, 446 U.S. at 8; *see also In re World Trade Ctr. Disaster Site Litig.*, 469 F. Supp. 2d 134, 144 (S.D.N.Y. 2007) ("Appeals from interlocutory orders prolong judicial proceedings, add delay and expense to

litigants, burden appellate courts, and present issues for decisions on uncertain and incomplete records, tending to weaken the precedential value of judicial opinions.").

Allowing immediate appeals as of right from MDLs could, alternatively, result in the district court staying discovery for just the claims on appeal. But that result is equally undesirable, for it would lead to "placing the [various] cases on different discovery tracks—which would eliminate the efficiency advantages of [a] matter proceeding as an MDL." *In re Refrigerant Compressors Antitrust Litig.*, 2013 WL 4009023, at *5 (E.D. Mich. Aug. 5, 2013). Thus, petitioners' rule would have a significant detrimental impact on the efficiency of MDLs.

Third, petitioners' rule will often permit the party in a consolidated case with the weakest claim and arguments to control how an issue is presented on appeal. As petitioners acknowledge (Br. 36), their approach would not entitle other plaintiffs in this case with antitrust claims to appeal because those plaintiffs have other, live claims pending. There is no compelling reason to allow petitioners—but not other plaintiffs raising the same claim—to take an early appeal, as the Exchange and OTC plaintiffs argued in this case. *See* OTC Pls.' Ltr. 2. Indeed, the first-dismissed party may have been dismissed early precisely because its claims and arguments were the weakest, and its case the narrowest (raising only one among many conceivable claims still being litigated in the consolidated proceedings). Beyond merely being a poor representative, the first

party to reach the court of appeals may have interests quite different from those left behind.[15]

Fourth, petitioners' rule encourages gamesmanship. Instead of the normal approach of having a representative plaintiff bring all class claims at the outset, the rule may encourage plaintiffs' counsel to choose different representatives to assert different claims and then to seek to consolidate them. *See* Gerson, 57 U. Chi. L. Rev. at 182-183 (petitioners' rule "allows parties to effectively unravel consolidated cases; they can pursue separate appeals that may result in duplicative proceedings and piecemeal appeals—the very things that consolidation was designed to prevent"). This scenario is no remote possibility. *See, e.g.*, *Stearns* v. *Select Comfort Retail*, 2009 WL 4723366, at *15 (N.D. Cal. Dec. 4, 2009) (giving credence to defendants' argument that the named plaintiffs made a "strategic decision" to press only a subset of the possible claims on behalf of the class, while filing other claims as individual actions). In the context of this case, strategic "argument splitting" would allow immediate appeal from the dismissal of claims that, if joined at the outset, would have been appealable only after final judgment or pursuant to Rule 54(b) or Section 1292(b). *See* Wolff, *Preclusion in Class Action Litigation*, 105 Colum. L. Rev. 717, 746

[15] Congress has elsewhere recognized the detrimental effects of having an inadequate representative for a group of litigants. *See, e.g.*, 15 U.S.C. § 78u-4(a)(3)(B) (Private Securities Litigation Reform Act provisions concerning appointment of lead plaintiff). By contrast, petitioners' rule makes it more likely that the plaintiff who represents the MDL before the court of appeals will have a weak case. That plaintiff's appeal would both potentially prejudice the other parties in the consolidated action and deny the court of appeals the opportunity to hear the strongest possible arguments on the issue.

(2005) ("Class counsel sometimes perceive a strategic benefit in pressing only certain legal arguments in their request for relief, deliberately choosing to forgo potentially meritorious claims.").

B. Petitioners' Approach Offers Little Concrete Benefit

Petitioners fail to identify substantial benefits to their rule, particularly when viewed in light of the wide array of problems the rule would cause. The question presented is when—not whether—petitioners and similarly situated parties will have an appeal as of right. If the issue raised by petitioners is truly a significant problem, there is a straightforward solution: This Court, as advised by the appropriate advisory committees, could revise Rule 54(b) and provide that certification is mandatory rather than discretionary in these circumstances. The rulemaking process is the appropriate mechanism for any necessary revisions to Rule 54(b). *See Mohawk*, 558 U.S. at 113 ("[R]ulemaking, 'not expansion by court decision,' [is] the preferred means for determining whether and when prejudgment orders should be immediately appealable." (quoting *Swint* v. *Chambers County Comm'n*, 514 U.S. 35, 48 (1995))). That there has been no such groundswell to revise Rule 54(b)—despite a decades-long circuit split—is telling.

Petitioners are thus left to trot out a parade of speculative horribles, none of which has proven to be a concern in practice. *First*, petitioners raise (Br. 32) the specter that, once this MDL concludes, "post-trial appeals will be heard by as many as ten different circuits." They do not identify even one example of multiple, parallel post-MDL appeals, and in fact courts can and do use Rule 54(b) precisely to avoid that result.

See supra pp. 37-39 & n.13 (noting MDL courts often grant discretionary appeals under Rule 54(b) or Section 1292(b) before remanding); *see also* 17 *Moore's Federal Practice* § 112.06[3] (3d ed. 2014) ("The [JPML] and the courts properly hold the view that if a party wishes to appeal a decision of the transferee court, the better practice is to allow the appeal prior to remand." (citation omitted)); *In re Air Crash off Long Island, N.Y. on July 17, 1996*, 27 F. Supp. 2d 431, 435-436 (S.D.N.Y. 1998).[16]

Second, petitioners point (Br. 31) to the prospect that "discovery and trial preparation effort will need to be repeated" absent an early appeal. But the possibility of repeating trial proceedings cannot categorically outweigh the certainty of repeating appellate proceedings. Otherwise, there would be no federal policy against piecemeal appeals; many cases carry the potential of replicated proceedings if a final decision is reversed on appeal. *See Brunswick Corp.* v. *Sheridan*,

[16] Respondents are aware of only one instance in which an MDL resulted in appeals to multiple circuits, and in that case there were issues of state law not common to all the consolidated cases. *See FedEx*, 662 F.3d at 889-891. In that circumstance, it makes sense to have transferor courts address questions of state law arising within their respective circuits. Even if the specter of multiple parallel appeals were real, petitioners' approach would do nothing to diminish the problem in cases such as this one. Although petitioners' single antitrust claim has been dismissed, plaintiffs from as many as ten different circuits have coupled their antitrust claims with other claims that could conceivably survive pretrial proceedings. *See* Pet. Br. 32 & n.17. On petitioners' approach, those plaintiffs would have no right of appeal on their antitrust claims until all of their claims have been resolved—potentially after remand to and trial in a court within another circuit. By contrast, under respondents' rule, district courts have discretion to manage their dockets to minimize or eliminate the possibility of such parallel appeals.

582 F.2d 175, 185 (2d Cir. 1978) (Friendly, J.) ("The policy against piecemeal appeals of intertwined claims should not be subverted by the specters of additional trials[.]"); *see also Spiegel* v. *Trustees of Tufts Coll.*, 843 F.2d 38, 46 (1st Cir. 1988) ("Virtually *any* interlocutory appeal from a dispositive ruling said to be erroneous contains the potential for requiring a retrial.").[17]

Moreover, some duplication of effort will often be preferable to the alternative proposed by petitioners, which will frequently warrant staying much or all discovery in the consolidated proceedings during the appeal. Stays of discovery do not come without costs, as appeals can take months, if not years, to resolve. In 2013, it took non-habeas civil suits an average of over

[17] Petitioners' concerns about being excluded from or having to duplicate relevant discovery (Br. 31) are groundless. The JPML and transferee courts have long recognized that "procedures are available whereby any discovery" already completed in an action "may be made available to all interested parties in all actions." *In re South Cent. States Bakery Prods. Antitrust Litig.*, 433 F. Supp. 1127, 1129 (J.P.M.L. 1977); *see also, e.g.*, *MCL* § 11.455 (in "related cases pending before the same judge," "[i]t may … be economical for the judges to afford parties in the present litigation access to depositions previously taken in other litigation"); *MCL* § 11.423 (similar). It makes no difference that petitioners' antitrust claim may raise factual issues different from those subject to discovery during the pendency of their appeal, as transferee courts have substantial discretion to manage the case as to both "discovery with respect to any non-common issues" and "discovery on common issues." *In re Chiquita Brands Int'l ATS & S'holders Derivative Litig.*, 536 F. Supp. 2d 1371, 1372 (J.P.M.L. 2008); *see also In re Cessna 208 Series Aircraft Prods. Liab. Litig.*, 560 F. Supp. 2d 1380, 1380, 1381 (J.P.M.L. 2008) (transferring new cases to an MDL that was "at an advanced stage," so that "a single judge … can structure pretrial proceedings to consider all parties' legitimate discovery needs while ensuring that common parties and witnesses are not subjected to discovery demands that duplicate activity that will occur or has already occurred in other actions").

11 months to go from the notice of appeal to the issuance of a final decision; further, nearly 90% of private civil cases were affirmed. The Second Circuit is typical—the average was 11.5 months and the affirmance rate was 91%.[18] Postponing discovery so that an appellate court can review a decision—which the district court likely did not think worthy of appeal and which the court of appeals will likely affirm—makes subsequent discovery proceedings lengthier and will drain the resources of litigants and the judiciary alike.

Finally, petitioners contend that prohibiting automatic appeal will result in unjustifiable delay for cases such as theirs. Despite four-plus decades of MDLs, petitioners have not put forward a single example of an interim MDL appeal—or any interim appeal in a consolidated case—prejudicially delayed. Petitioners rely (Br. 38-39) on three counterfactuals, which are meant to show that plaintiffs could have been harmed by delay in the absence of a right to immediate appeal. These examples, however, actually confirm the wisdom of leaving decisions about interlocutory review in the hands of district court judges.

Petitioners first point to *In re Katrina Canal Breaches Litigation*, 345 F. App'x 1 (5th Cir. 2009) (per curiam). In that consolidated action, the district court granted interlocutory appeals on over 20 occasions un-

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[18] *See* Administrative Office of the U.S. Courts, *Judicial Business 2013: Statistical Tables—U.S. Courts of Appeals*, tbls. B-4A, B-5, *available at* http://www.uscourts.gov/Statistics/JudicialBusiness/2013/statistical-tables-us-courts-appeals.aspx; *see also* Guthrie & George, *The Futility of Appeal*, 32 Fla. St. U. L. Rev. 357, 360 & fig. 3 (2005) (overall affirmance rate in courts of appeals nearly 90% in early 2000s).

der Rule 54(b) or Section 1292(b).[19] Petitioners are correct that one set of plaintiffs appealed under Section 1291 without invoking Rule 54(b) or Section 1292(b), and the Fifth Circuit permitted the appeal. But given the district court's willingness to grant interlocutory appeals, there is no reason to think that the court would necessarily have forced those plaintiffs to wait years for appellate review.

Petitioners' reliance on *Evans* v. *Akers*, 534 F.3d 65 (1st Cir. 2008), fares no better. Petitioners contend that, had the law of the circuit not permitted an appeal as of right because the proceedings were consolidated for fewer than all purposes, one set of plaintiffs would have had to wait up to a year before taking an appeal. That is not a picture of hardship, and it is questionable as a factual matter.[20] In any event, nothing in that case suggests that the district court would not have used Rule 54(b) or Section 1292(b) in its discretion to mitigate any genuine hardship from the one-year delay, had plaintiffs requested such relief.

Similarly, *DaSilva* v. *Esmore Correctional Services*, 167 F. App'x 303, 307 n.3 (3d Cir. 2006), involved

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[19] *See, e.g.*, Dkts. 2142, 2148, 3245, 3540, 3666, 6733, 1803, 10315, 10725, 11342, 11343, 11656, 11658, 14995, 15218, 16015, 18541, 18601, 19562, 19704, 20085, *In re Katrina Canal Breaches Litig.*, No. 05-cv-4182 (E.D. La.) (granting Rule 54(b) or Section 1292(b) certifications).

[20] Petitioners state (Br. 38) that, by the time one case, *Bunch* v. *W.R. Grace & Co.*, 555 F.3d 1 (1st Cir. 2009), was decided on appeal, the other case, *Evans*, already had been remanded and settled. In fact, the settlement agreement in *Evans* was finalized and executed *after* the First Circuit issued its decision in *Bunch*. *See* Pls.' Mem. 10, Dkt. 235, *Evans*, No. 04-cv-11380 (D. Mass. June 5, 2009). The parties in *Evans* may well have been waiting for a decision in *Bunch* before concluding their settlement.

a scenario where the jurisdiction's case law permitted immediate appeal. As a result, plaintiffs suffered no delay. Petitioners' argument thus rests on the slender reed that the district court hypothetically might have unreasonably refused to certify an appeal under Rule 54(b), even though district courts have certified interlocutory appeals in remarkably similar situations. *See, e.g.*, *In re Bank of Am. Sec., Derivative, & ERISA Litig.*, 2013 WL 5933649, at *3 (S.D.N.Y. Nov. 5, 2013).

After scouring 45 years' worth of MDL dockets, these three cases are apparently the most compelling petitioners can find. This scant support for their position speaks volumes about the lack of need to adopt petitioners' rule constraining the discretion of district court judges over the timing of interlocutory appeals.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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APPENDIX

28 U.S.C. § 1291. Final decisions of district courts

The courts of appeals (other than the United States Court of Appeals for the Federal Circuit) shall have jurisdiction of appeals from all final decisions of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, except where a direct review may be had in the Supreme Court. The jurisdiction of the United States Court of Appeals for the Federal Circuit shall be limited to the jurisdiction described in sections 1292(c) and (d) and 1295 of this title.

28 U.S.C. § 1292. Interlocutory decisions

(a) Except as provided in subsections (c) and (d) of this section, the courts of appeals shall have jurisdiction of appeals from:

(1) Interlocutory orders of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, or of the judges thereof, granting, continuing, modifying, refusing or dissolving injunctions, or refusing to dissolve or modify injunctions, except where a direct review may be had in the Supreme Court;

(2) Interlocutory orders appointing receivers, or refusing orders to wind up receiverships or to take steps to accomplish the purposes thereof, such as directing sales or other disposals of property;

(3) Interlocutory decrees of such district courts or the judges thereof determining the rights

and liabilities of the parties to admiralty cases in which appeals from final decrees are allowed.

(b) When a district judge, in making in a civil action an order not otherwise appealable under this section, shall be of the opinion that such order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation, he shall so state in writing in such order. The Court of Appeals which would have jurisdiction of an appeal of such action may thereupon, in its discretion, permit an appeal to be taken from such order, if application is made to it within ten days after the entry of the order: *Provided, however*, [t]hat application for an appeal hereunder shall not stay proceedings in the district court unless the district judge or the Court of Appeals or a judge thereof shall so order.

(c) The United States Court of Appeals for the Federal Circuit shall have exclusive jurisdiction—

(1) of an appeal from an interlocutory order or decree described in subsection (a) or (b) of this section in any case over which the court would have jurisdiction of an appeal under section 1295 of this title; and

(2) of an appeal from a judgment in a civil action for patent infringement which would otherwise be appealable to the United States Court of Appeals for the Federal Circuit and is final except for an accounting.

(d)(1) When the chief judge of the Court of International Trade issues an order under the provisions of section 256(b) of this title, or when any judge of the

Court of International Trade, in issuing any other interlocutory order, includes in the order a statement that a controlling question of law is involved with respect to which there is a substantial ground for difference of opinion and that an immediate appeal from that order may materially advance the ultimate termination of the litigation, the United States Court of Appeals for the Federal Circuit may, in its discretion, permit an appeal to be taken from such order, if application is made to that Court within ten days after the entry of such order.

(2) When the chief judge of the United States Court of Federal Claims issues an order under section 798(b) of this title, or when any judge of the United States Court of Federal Claims, in issuing an interlocutory order, includes in the order a statement that a controlling question of law is involved with respect to which there is a substantial ground for difference of opinion and that an immediate appeal from that order may materially advance the ultimate termination of the litigation, the United States Court of Appeals for the Federal Circuit may, in its discretion, permit an appeal to be taken from such order, if application is made to that Court within ten days after the entry of such order.

(3) Neither the application for nor the granting of an appeal under this subsection shall stay proceedings in the Court of International Trade or in the Court of Federal Claims, as the case may be, unless a stay is ordered by a judge of the Court of International Trade or of the Court of Federal Claims or by the United States Court of Appeals for the Federal Circuit or a judge of that court.

(4)(A) The United States Court of Appeals for the Federal Circuit shall have exclusive jurisdiction of an appeal from an interlocutory order of a district court of

the United States, the District Court of Guam, the District Court of the Virgin Islands, or the District Court for the Northern Mariana Islands, granting or denying, in whole or in part, a motion to transfer an action to the United States Court of Federal Claims under section 1631 of this title.

(B) When a motion to transfer an action to the Court of Federal Claims is filed in a district court, no further proceedings shall be taken in the district court until 60 days after the court has ruled upon the motion. If an appeal is taken from the district court's grant or denial of the motion, proceedings shall be further stayed until the appeal has been decided by the Court of Appeals for the Federal Circuit. The stay of proceedings in the district court shall not bar the granting of preliminary or injunctive relief, where appropriate and where expedition is reasonably necessary. However, during the period in which proceedings are stayed as provided in this subparagraph, no transfer to the Court of Federal Claims pursuant to the motion shall be carried out.

(e) The Supreme Court may prescribe rules, in accordance with section 2072 of this title, to provide for an appeal of an interlocutory decision to the courts of appeals that is not otherwise provided for under subsection (a), (b), (c), or (d).

28 U.S.C. § 1407. Multidistrict litigation

(a) When civil actions involving one or more common questions of fact are pending in different districts, such actions may be transferred to any district for coordinated or consolidated pretrial proceedings. Such transfers shall be made by the judicial panel on multidistrict litigation authorized by this section upon its de-

termination that transfers for such proceedings will be for the convenience of parties and witnesses and will promote the just and efficient conduct of such actions. Each action so transferred shall be remanded by the panel at or before the conclusion of such pretrial proceedings to the district from which it was transferred unless it shall have been previously terminated: *Provided, however*, [t]hat the panel may separate any claim, cross-claim, counter-claim, or third-party claim and remand any of such claims before the remainder of the action is remanded.

(b) Such coordinated or consolidated pretrial proceedings shall be conducted by a judge or judges to whom such actions are assigned by the judicial panel on multidistrict litigation. For this purpose, upon request of the panel, a circuit judge or a district judge may be designated and assigned temporarily for service in the transferee district by the Chief Justice of the United States or the chief judge of the circuit, as may be required, in accordance with the provisions of chapter 13 of this title. With the consent of the transferee district court, such actions may be assigned by the panel to a judge or judges of such district. The judge or judges to whom such actions are assigned, the members of the judicial panel on multidistrict litigation, and other circuit and district judges designated when needed by the panel may exercise the powers of a district judge in any district for the purpose of conducting pretrial depositions in such coordinated or consolidated pretrial proceedings.

(c) Proceedings for the transfer of an action under this section may be initiated by—

(i) the judicial panel on multidistrict litigation upon its own initiative, or

(ii) motion filed with the panel by a party in any action in which transfer for coordinated or consolidated pretrial proceedings under this section may be appropriate. A copy of such motion shall be filed in the district court in which the moving party's action is pending.

The panel shall give notice to the parties in all actions in which transfers for coordinated or consolidated pretrial proceedings are contemplated, and such notice shall specify the time and place of any hearing to determine whether such transfer shall be made. Orders of the panel to set a hearing and other orders of the panel issued prior to the order either directing or denying transfer shall be filed in the office of the clerk of the district court in which a transfer hearing is to be or has been held. The panel's order of transfer shall be based upon a record of such hearing at which material evidence may be offered by any party to an action pending in any district that would be affected by the proceedings under this section, and shall be supported by findings of fact and conclusions of law based upon such record. Orders of transfer and such other orders as the panel may make thereafter shall be filed in the office of the clerk of the district court of the transferee district and shall be effective when thus filed. The clerk of the transferee district court shall forthwith transmit a certified copy of the panel's order to transfer to the clerk of the district court from which the action is being transferred. An order denying transfer shall be filed in each district wherein there is a case pending in which the motion for transfer has been made.

(d) The judicial panel on multidistrict litigation shall consist of seven circuit and district judges designated from time to time by the Chief Justice of the United States, no two of whom shall be from the same

circuit. The concurrence of four members shall be necessary to any action by the panel.

(e) No proceedings for review of any order of the panel may be permitted except by extraordinary writ pursuant to the provisions of title 28, section 1651, United States Code. Petitions for an extraordinary writ to review an order of the panel to set a transfer hearing and other orders of the panel issued prior to the order either directing or denying transfer shall be filed only in the court of appeals having jurisdiction over the district in which a hearing is to be or has been held. Petitions for an extraordinary writ to review an order to transfer or orders subsequent to transfer shall be filed only in the court of appeals having jurisdiction over the transferee district. There shall be no appeal or review of an order of the panel denying a motion to transfer for consolidated or coordinated proceedings.

(f) The panel may prescribe rules for the conduct of its business not inconsistent with Acts of Congress and the Federal Rules of Civil Procedure.

(g) Nothing in this section shall apply to any action in which the United States is a complainant arising under the antitrust laws. "Antitrust laws" as used herein include those acts referred to in the Act of October 15, 1914, as amended (38 Stat. 730; 15 U.S.C. 12), and also include the Act of June 19, 1936 (49 Stat. 1526; 15 U.S.C. 13, 13a, and 13b) and the Act of September 26, 1914, as added March 21, 1938 (52 Stat. 116, 117; 15 U.S.C. 56); but shall not include section 4A of the Act of October 15, 1914, as added July 7, 1955 (69 Stat. 282; 15 U.S.C. 15a).

(h) Notwithstanding the provisions of section 1404 or subsection (f) of this section, the judicial panel on multidistrict litigation may consolidate and transfer

with or without the consent of the parties, for both pretrial purposes and for trial, any action brought under section 4C of the Clayton Act.

Fed. R. App. P. 4. Appeal as of Right—When Taken

(a) APPEAL IN A CIVIL CASE.

(1) *Time for Filing a Notice of Appeal.*

(A) In a civil case, except as provided in Rules 4(a)(1)(B), 4(a)(4), and 4(c), the notice of appeal required by Rule 3 must be filed with the district clerk within 30 days after entry of the judgment or order appealed from.

(B) The notice of appeal may be filed by any party within 60 days after entry of the judgment or order appealed from if one of the parties is:

(i) the United States;

(ii) a United States agency;

(iii) a United States officer or employee sued in an official capacity; or

(iv) a current or former United States officer or employee sued in an individual capacity for an act or omission occurring in connection with duties performed on the United States' behalf—including all instances in which the United States represents that person when the judgment or order is entered or files the appeal for that person.

(C) An appeal from an order granting or denying an application for a writ of error *coram*

nobis is an appeal in a civil case for purposes of Rule 4(a).

(2) *Filing Before Entry of Judgment.* A notice of appeal filed after the court announces a decision or order—but before the entry of the judgment or order—is treated as filed on the date of and after the entry.

(3) *Multiple Appeals.* If one party timely files a notice of appeal, any other party may file a notice of appeal within 14 days after the date when the first notice was filed, or within the time otherwise prescribed by this Rule 4(a), whichever period ends later.

(4) *Effect of a Motion on a Notice of Appeal.*

(A) If a party timely files in the district court any of the following motions under the Federal Rules of Civil Procedure, the time to file an appeal runs for all parties from the entry of the order disposing of the last such remaining motion:

(i) for judgment under Rule 50(b);

(ii) to amend or make additional factual findings under Rule 52(b), whether or not granting the motion would alter the judgment;

(iii) for attorney's fees under Rule 54 if the district court extends the time to appeal under Rule 58;

(iv) to alter or amend the judgment under Rule 59;

(v) for a new trial under Rule 59; or

(vi) for relief under Rule 60 if the motion is filed no later than 28 days after the judgment is entered.

(B)(i) If a party files a notice of appeal after the court announces or enters a judgment—but before it disposes of any motion listed in Rule 4(a)(4)(A)—the notice becomes effective to appeal a judgment or order, in whole or in part, when the order disposing of the last such remaining motion is entered.

(ii) A party intending to challenge an order disposing of any motion listed in Rule 4(a)(4)(A), or a judgment's alteration or amendment upon such a motion, must file a notice of appeal, or an amended notice of appeal—in compliance with Rule 3(c)—within the time prescribed by this Rule measured from the entry of the order disposing of the last such remaining motion.

(5) *Motion for Extension of Time.*

(A) The district court may extend the time to file a notice of appeal if:

(i) a party so moves no later than 30 days after the time prescribed by this Rule 4(a) expires; and

(ii) regardless of whether its motion is filed before or during the 30 days after the time prescribed by this Rule 4(a) expires, that party shows excusable neglect or good cause.

(B) A motion filed before the expiration of the time prescribed in Rule 4(a)(1) or (3) may be ex parte unless the court requires other-

wise. If the motion is filed after the expiration of the prescribed time, notice must be given to the other parties in accordance with local rules.

(C) No extension under this Rule 4(a)(5) may exceed 30 days after the prescribed time or 14 days after the date when the order granting the motion is entered, whichever is later.

(6) *Reopening the Time to File an Appeal.* The district court may reopen the time to file an appeal for a period of 14 days after the date when its order to reopen is entered, but only if all the following conditions are satisfied:

(A) the court finds that the moving party did not receive notice under Federal Rule of Civil Procedure 77(d) of the entry of the judgment or order sought to be appealed within 21 days after entry;

(B) the motion is filed within 180 days after the judgment or order is entered or within 14 days after the moving party receives notice under Federal Rule of Civil Procedure 77(d) of the entry, whichever is earlier; and

(C) the court finds that no party would be prejudiced.

(7) *Entry Defined.*

(A) A judgment or order is entered for purposes of this Rule 4(a):

(i) if Federal Rule of Civil Procedure 58(a) does not require a separate document, when the judgment or order is entered in the civil docket under Federal Rule of Civil Procedure 79(a); or

(ii) if Federal Rule of Civil Procedure 58(a) requires a separate document, when the judgment or order is entered in the civil docket under Federal Rule of Civil Procedure 79(a) and when the earlier of these events occurs:

- the judgment or order is set forth on a separate document, or
- 150 days have run from entry of the judgment or order in the civil docket under Federal Rule of Civil Procedure 79(a).

(B) A failure to set forth a judgment or order on a separate document when required by Federal Rule of Civil Procedure 58(a) does not affect the validity of an appeal from that judgment or order.

* * *

Fed. R. Civ. P. 42. Consolidation; Separate Trials

(a) CONSOLIDATION. If actions before the court involve a common question of law or fact, the court may:

(1) join for hearing or trial any or all matters at issue in the actions;

(2) consolidate the actions; or

(3) issue any other orders to avoid unnecessary cost or delay.

(b) SEPARATE TRIALS. For convenience, to avoid prejudice, or to expedite and economize, the court may order a separate trial of one or more separate issues,

claims, crossclaims, counterclaims, or third-party claims. When ordering a separate trial, the court must preserve any federal right to a jury trial.

Fed. R. Civ. P. 54. Judgment; Costs

(a) DEFINITION; FORM. "Judgment" as used in these rules includes a decree and any order from which an appeal lies. A judgment should not include recitals of pleadings, a master's report, or a record of prior proceedings.

(b) JUDGMENT ON MULTIPLE CLAIMS OR INVOLVING MULTIPLE PARTIES. When an action presents more than one claim for relief—whether as a claim, counterclaim, crossclaim, or third-party claim—or when multiple parties are involved, the court may direct entry of a final judgment as to one or more, but fewer than all, claims or parties only if the court expressly determines that there is no just reason for delay. Otherwise, any order or other decision, however designated, that adjudicates fewer than all the claims or the rights and liabilities of fewer than all the parties does not end the action as to any of the claims or parties and may be revised at any time before the entry of a judgment adjudicating all the claims and all the parties' rights and liabilities.

(c) DEMAND FOR JUDGMENT; RELIEF TO BE GRANTED. A default judgment must not differ in kind from, or exceed in amount, what is demanded in the pleadings. Every other final judgment should grant the relief to which each party is entitled, even if the party has not demanded that relief in its pleadings.

(d) COSTS; ATTORNEY'S FEES.

(1) *Costs Other Than Attorney's Fees.* Unless a federal statute, these rules, or a court order provides otherwise, costs—other than attorney's fees—should be allowed to the prevailing party. But costs against the United States, its officers, and its agencies may be imposed only to the extent allowed by law. The clerk may tax costs on 14 days' notice. On motion served within the next 7 days, the court may review the clerk's action.

(2) *Attorney's Fees.*

(A) *Claim to Be by Motion.* A claim for attorney's fees and related nontaxable expenses must be made by motion unless the substantive law requires those fees to be proved at trial as an element of damages.

(B) *Timing and Contents of the Motion.* Unless a statute or a court order provides otherwise, the motion must:

(i) be filed no later than 14 days after the entry of judgment;

(ii) specify the judgment and the statute, rule, or other grounds entitling the movant to the award;

(iii) state the amount sought or provide a fair estimate of it; and

(iv) disclose, if the court so orders, the terms of any agreement about fees for the services for which the claim is made.

(C) *Proceedings.* Subject to Rule 23(h), the court must, on a party's request, give an opportunity for adversary submissions on the motion

in accordance with Rule 43(c) or 78. The court may decide issues of liability for fees before receiving submissions on the value of services. The court must find the facts and state its conclusions of law as provided in Rule 52(a).

(D) *Special Procedures by Local Rule; Reference to a Master or a Magistrate Judge.* By local rule, the court may establish special procedures to resolve fee-related issues without extensive evidentiary hearings. Also, the court may refer issues concerning the value of services to a special master under Rule 53 without regard to the limitations of Rule 53(a)(1), and may refer a motion for attorney's fees to a magistrate judge under Rule 72(b) as if it were a dispositive pretrial matter.

(E) *Exceptions.* Subparagraphs (A)-(D) do not apply to claims for fees and expenses as sanctions for violating these rules or as sanctions under 28 U.S.C. § 1927.