No. 13-1174

IN THE

Supreme Court of the United States

ELLEN GELBOIM AND LINDA ZACHER,
INDIVIDUALLY FOR THEMSELVES AND ON BEHALF OF
ALL OTHERS SIMILARLY SITUATED,
Petitioners,

v.

BANK OF AMERICA CORPORATION ET AL.,
Respondents.

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

REPLY BRIEF FOR THE PETITIONERS

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REPLY BRIEF FOR THE PETITIONERS

The district court held as a matter of law that no plaintiff in any action in the LIBOR multidistrict litigation (MDL) could have antitrust standing to sue respondents for violations of the Sherman Act. *See* Pet. App. 155a-56a. On that basis, the district court "dismissed the federal antitrust claims in all of the actions." Resp. Br. 11. *See also* Pet. App. 219a; J.A. 60-61 (docket entry 286). Because petitioners' action asserted only an antitrust claim, there is no dispute that their "complaint had been dismissed in its entirety." Resp. Br. 2*; see also id.* 12. The court's docket accordingly provided that petitioners' action was "terminat[ed]." Pet. App. 12a.[1]

For the reasons set forth in petitioners' opening brief, the district court's ruling was both a "final judgment" for purposes of the "final judgment rule" and an appealable "final decision" under 28 U.S.C. § 1291. *See* Pet. Br. 16-29. And because the court dismissed the sole claim in petitioners' "action," the order was not subject to Federal Rule of Civil Procedure 54(b). *See id*. 40-46. Indeed, the district court itself recognized that petitioners could "appeal as of right because their complaint[] [was] dismissed in [its] entirety." Pet. App. 220a.

The Second Circuit held to the contrary that it had the discretion to decline to exercise appellate

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[1] Because the district court did not separately enter judgment, it was entered 150 days later as a matter of law. Fed. R. Civ. P. 58(c)(2)(B). Respondents have abandoned any suggestion that no judgment was entered. *See* Pet. Reply 6 n.1; BIO 23 n.8.

jurisdiction. *Id*. 2a. Respondents supported that rule below, but now abandon it. Resp. Opp. to Motions for Reconsideration 8-10, ECF No. 141, No. 13-3565 (2d Cir. Nov. 27, 2013); Br. 22 n.7.

Respondents' new theory is that the district court's order is never "a final decision, appealable as of right, while the actions remain consolidated." Br. 15. They principally rely on the policy argument that an MDL transferee court must have the discretion to control the proceedings before it, including whether to permit an appeal from a decision dismissing an action. *E.g.*, *id.* 3, 16.

Respondents' arguments lack merit. Policy considerations cannot override a statute granting the courts of appeals jurisdiction over "*all* final decisions" of the district courts, 28 U.S.C. § 1291 (emphasis added), or the plain, established use of the term "action" in 28 U.S.C. § 1407 and the Federal Rules to refer to a single lawsuit—like petitioners'—rather than a group of actions assembled for limited purposes under a pretrial consolidation order.

To the extent respondents' policy concerns have any weight, they are no basis to affirm the court of appeals' judgment. This Court can address all of them by recognizing that transferee courts supervising MDL litigation have many tools to manage their dockets without disregarding statutory appellate rights. For example, a court may defer decision in a particular consolidated action until it is ready to issue a decision in all of them; it may stay an action pending developments in others; and it may order that judgment not be entered after ruling on a dispositive

motion. *See* Fed. R. Civ. P. 58(b)(1). The *only* act by a district court that triggers a statutory right to appeal is *exactly* what the court did here: entering a judgment resolving all of the claims in a complaint and thus terminating the action.

The judgment accordingly should be reversed.

I. The District Court's Order Dismissing Petitioners' Action Was An Appealable Final Judgment And Was Not Subject To Rule 54(b).

In 28 U.S.C. § 1291, Congress provided for an appeal as a matter of right from all "final decisions" of the district courts. The type of order issued in this case—a judgment finally dismissing the action—is the clearest example imaginable of an immediately appealable "final decision." There is nothing left for the district court to do in petitioners' case. *See, e.g.*, *Sullivan v. Finkelstein*, 496 U.S. 617, 628 (1990) (explaining that such judgments are "at the core of matters appealable"); *Catlin v. United States*, 324 U.S. 229, 236 (1945) (explaining that once a motion to dismiss had been granted and judgment of dismissal entered, "clearly there would have been an end of the litigation and appeal would lie").[2]

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[2] While respondents (Br. 21, 25) quote *Mohawk Industries, Inc. v. Carpenter*, 558 U.S. 100, 106 (2009), as broadly stating that a final judgment "disassociates" the district court from "the proceedings"—which they would read to include all of the MDL litigation in every action—this Court actually explained that a final judgment is one that disassociates the court from "the case."

Respondents' refusal to recognize that the district court's judgment gives rise to a right to appeal is also incompatible with the statute and rules that govern the timing of a Section 1291 appeal from a judgment that "denies all relief" in a civil action. *See* 28 U.S.C. § 2107(a) (setting jurisdictional 30 day notice of appeal deadline from entry of judgment); Fed. R. App. P. 4(a)(1)(A) (implementing Section 2017); Fed. R. Civ. P. 58(b)(1)(C) (requiring clerk to enter judgment promptly when district court "denies all relief") and (c)(2)(B) (making entry of judgment automatic if clerk fails to promptly enter). Respondents must acknowledge that the district court's judgment dismissing petitioners' complaint is a "final decision."[3] But under respondents' rule, a notice of appeal may not be filed until all the pretrial proceedings conclude in every action in the MDL and the period of consolidation ends. Respondents cannot explain how,

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[3] Otherwise, Rule 54(b), on which respondents extensively rely, would not be available. *Sears, Roebuck & Co. v. Mackey*, 351 U.S. 424, 437 (1956) ("The District Court cannot, in the exercise of its discretion, treat as 'final' that which is not 'final' within the meaning of § 1291.").

For the same reason, respondents' expansive reading of Rule 54(b) violates the Rules Enabling Act. *See* Pet. Br. 44-45; *Sibbach v. Wilson & Co.*, 312 U.S. 1, 10 (1941). Respondents argue that their construction of the Rule does not narrow the appellate jurisdiction conferred by Section 1291 because "dismissal of fewer than all claims in consolidated litigation is not a final decision for purposes of Section 1291." Br. 40. But this Court expressly recognized in *Sears* that every judgment finally resolving a claim is a "final decision" under Section 1291. *See* 351 U.S. at 437.

under their rule, the date of the district court's judgment springs forward to the close of the pretrial proceedings in order to facilitate a later appeal.

Respondents argue that the governing provision is not Section 1291 but instead Rule 54(b), under which the putative appellant must ask the district court to issue a separate ruling that its order is immediately appealable because there is no just reason to delay an appeal. But district courts have never had the discretion to decide whether a judgment finally disposing of a case is immediately appealable. *See, e.g.*, *McLish v. Roff*, 141 U.S. 661, 665 (1891) (describing the availability of appeals from final judgments under the Judiciary Act of 1789); Carleton M. Crick, *The Final Judgment as a Basis for Appeal*, 41 Yale L.J. 539, 549 (1932) (explaining that the Judiciary Act continued the English practice of permitting appeals from final judgments at law, and departed from English equity practice by providing for appeals only from final decrees).

Rule 54(b)—which exists to permit *early* appeals before an action is finally resolved, not to delay them afterward, *see* Pet. Br. 15-16—is thus inapplicable by its terms. The Rule "'does not apply to a single claim action. . . . It is limited expressly to multiple claim actions in which 'one or more but less than all' of the multiple claims have been finally decided and are found otherwise to be ready for appeal.'" *Liberty Mut. Ins. Co. v. Wetzel*, 424 U.S. 737, 742-43 (1976) (quoting *Sears*, 351 U.S. at 434).

Here, the district court dismissed petitioners' single-claim action in its entirety. Respondents argue

to the contrary that *all* the complaints in an MDL are a single action. They thus refer to petitioners suit as "one constituent in a consolidated district-court action," Br. 1, but they conspicuously cite nothing—no statute, rule, or decision—in support of that characterization. *See also id.* 2 ("constituent in a consolidated action" (citing nothing)), 3 &15 ("some of the claims in a consolidated action" (citing nothing either time)), 16 ("one unit of litigation" (citing nothing)).

In fact, the civil Rules uniformly use the term "action" to refer to a lawsuit arising from a single complaint—here, the complaint setting forth petitioners' antitrust claims. *See* Pet. Br. 26-27, 41-42 n.19. From the earliest days of the civil rules it has been clear that the "civil action," Fed. R. Civ. P. 2, is instituted "by filing a complaint with the court," Fed. R. Civ. P. 3. That "civil action" is the "unit" that the courts have always considered—not some other undefined "unit" comprising multiple civil actions. *See, e.g.*, *In re Saco Local Dev. Corp.*, 711 F.2d 441, 443 (1st Cir. 1983) (Breyer, J.) ("Traditionally, every civil action in a federal court has been viewed as a 'single judicial unit,' from which only one appeal would lie."); *see also In re Mass. Helicopter Airlines, Inc.*, 469 F.2d 439, 441 (1st Cir. 1972) ("[T]he literal reading of Rule 54(b) in conjunction with Rules 2 and 3 would foreclose any interpretation which mandates certification [under Rule 54(b)] in all consolidated action settings.").

Respondents' interpretation of the consolidation process is moreover at odds with this Court's precedents, which establish that consolidated actions

retain their separate status. *Johnson v. Manhattan Ry.*, 289 U.S. 479, 496-97 (1933); *Mut. Life Ins. Co. of N.Y. v. Hillmon*, 145 U.S. 285, 293 (1892).[4]

Under the MDL procedures established by Section 1407 in particular, transferred actions are not merged with each other; instead, they are placed together into "consolidated pretrial proceedings"—*i.e.*, a temporary, limited consolidation that does not extend to trial,

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[4] Citing *Bowsher v. Synar*, 478 U.S. 714 (1986), and *Secretary of the Interior v. California*, 464 U.S. 312 (1984), respondents argue that consolidated actions are a single unit for appellate jurisdiction purposes. Not so. Those decisions merely held that the Court could reach the merits in consolidated actions because at least one plaintiff had standing. *See* 478 U.S. at 721; 464 U.S. at 319 n.3. Importantly, the various plaintiffs raised indistinguishable claims for relief. Thus, as long as one plaintiff had standing, the Court's resolution of the merits would not change, and it was unnecessary to resolve the other plaintiffs' standing. The Court did not impute the standing of one plaintiff to the others, much less hold that the consolidated cases were a single "unit" for jurisdictional purposes. By contrast, respondents never address *Butler v. Dexter*, 425 U.S. 262, 267 n.12 (1976), which dismissed an appeal, holding that despite consolidation of actions in the district court, "[e]ach case before this Court . . . must be considered separately to determine whether or not this Court has jurisdiction to consider its merits." To the extent that it remains an open question whether consolidation influences standing, the Court may address it in two pending consolidated cases: No. 13-1138, *Alabama Democratic Conference v. Alabama* and No. 13-895, *Alabama Legislative Black Caucus v. Alabama*. But as of now, no decision of this Court has ever suggested that consolidation in the district court results in a new "unit" for appellate jurisdiction purposes.

judgment, *or appeal*.[5] At the very least, whatever the effect of MDL proceedings "for so long as the action remains consolidated," Resp. Br. 3, once the district court dismissed petitioners' action, the "pretrial" proceedings in that action, as well as its consolidation with the other actions, were concluded. Petitioners accordingly had the right to appeal.

During the period of consolidation, MDL actions retain their separate status. Indeed, respondents seem to recognize as much, at least implicitly. *See, e.g.*, Resp. Br. 9-10 (recognizing the separate status of "an action brought by purchasers of over-the-counter

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[5] In enacting Section 1407, Congress decided (with only limited exceptions not applicable here) not to permit consolidation for all purposes. *See* Pet. Br. 29 n.14. Respondents do not dispute the district court's conclusion that it did not have the authority to consolidate the LIBOR actions "for all purposes." Resp. Br. 9.

Moreover, "a judge deciding whether to consolidate actions for all purposes is necessarily performing a different judicial function than a transferee judge who is supervising coordinated or consolidated pretrial proceedings under Section 1407." *In re S. Cent. States Bakery Prods. Antitrust Litig.*, 433 F. Supp. 1127, 1130 (J.P.M.L. 1977). Respondents are therefore incorrect to rely upon the principle that when complaints are consolidated *for all purposes*, then their appeals must be initiated together under Federal Rule of Appellate Procedure 4. Br. 27-28. As respondents' own cases acknowledge, that "depends on the degree to which [the] cases were consolidated in the district court"—*i.e.*, whether "they merged entirely." *Doe v. Howe Military Sch.*, 227 F.3d 981, 985 (7th Cir. 2000). Where actions are not consolidated "for all purposes"—as in MDL litigation—they are treated separately under Rule 4. *See id*. at 986-87.

LIBOR-based instruments," "an action brought by purchasers of LIBOR-based products on a domestic exchange," and "the present case"), 11 ("The court dismissed the federal antitrust claims in all of the actions[.]"), 12 ("The district court also left in place its stay on other actions[.]"). For all of respondents' emphasis that "[t]he Judicial Panel on Multidistrict Litigation has authority to administer MDL litigation," Br. 4, they ignore the Panel's own recognition that "[t]ransfer under Section 1407 does not transmute all transferred actions into a single action . . . . Instead, the separate nature of actions transferred to an MDL is preserved throughout each action's pendency whether the actions proceed in a coordinated or consolidated manner." *In re: Bear Creek Techs., Inc., ('722) Patent Litig.*, 858 F. Supp. 2d 1375, 1378 (J.P.M.L. 2012).

MDL litigation proceeds accordingly. The consolidated actions retain separate case numbers, separate parties, and separate attorneys. The transferee court manages each of them as a separate action—although it is empowered to do so efficiently. For example, the captions of documents filed in an MDL docket identify the specific actions to which the documents relate. *Compare, e.g.*, J.A. 277 (caption states that the order relates to "All Cases") *with id.* 288 (caption states that the order relates to Case No. 12-cv-1025 (NRB)). When documents relate to multiple actions, they simultaneously are entered on multiple dockets, and thus orders entered in this fashion constitute orders in each individual action. *See, e.g.*, J.A. 27 (docket entry 77 stating that the order was "[d]ocketed in all member and related cases pursuant

to instructions from Chambers). Discovery proceedings in MDL proceedings are routinely handled in the same fashion, through the expedient of multiple captions on a single document.[6]

The statute further provides that the actions must be dismissed individually. Thus, when the transferee district court enters an order dismissing an "action so transferred," it "terminat[es]" *that action*. 28 U.S.C. § 1407(a). "An action is closed by appropriate orders entered in the transferee court, without further involvement by the Panel or the original transferor court." Manual for Complex Litigation (Fourth) § 20.132, at 222 (2004).

Respondents also cannot explain the appealability of judgments in actions that are merely "coordinated," not consolidated, under the Section 1407. Here, for example, the MDL panel transferred "three individual actions brought by the Charles Schwab Corporation and related entities" arising from respondents' manipulation of LIBOR, Resp. Br. 10, but the district court expressly did "not consolidate these actions with the related class action complaints" or with each other. J.A. 285 n.5; Pet. App. 11a (consolidating only "the class action complaints pending in the MDL"); Resp. Br. 9.

The court's dismissal of the Schwab complaints, *see* Pet. App. 219a, is plainly appealable even under

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[6] This lays to rest respondents' argument (Br. 33-34) that the word "action" must be interpreted to include the entire MDL in order to facilitate pretrial management under Rules 16 and 26.

respondents' rule because the Schwab actions were not consolidated with other suits. That result shows how nonsensical respondents' emphasis on consolidation is, because the Schwab complaints allege federal antitrust claims that are functionally identical to petitioners'. *See id*. 37a. Respondents cannot explain the anomaly that their position permits immediate appeals by the Schwab plaintiffs but not petitioners. Correctly understood, there is no difference: the right to appeal turns on the fact that the district court entered a final judgment disposing of the complaints, not on whether the cases were consolidated.[7]

II. District Courts Already Have Discretion To Manage Their Dockets, Including Whether And When To Issue Appealable Final Judgments.

Respondents principally argue that district courts must have the discretion to control MDL litigation, including by determining that rulings disposing of actions ought not be immediately appealed. Resp. Br. 3, 16. As a threshold matter, supposed efficiency concerns cannot override the jurisdictional rules that Congress enacted by statute. *See supra* Part I.

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[7] There is no merit to respondents' reliance on 28 U.S.C. § 1292(b). That statute provides an avenue for appeal from orders that are not "otherwise appealable." It does not purport to define what those orders are. Respondents' position would allow a provision permitting interlocutory appeals to swallow the final judgment rule.

Moreover, despite respondents' rhetoric that permitting immediate appeals of orders dismissing actions will create "delay" and "inefficiency," Resp. Br. 43, they fail to identify *a single case* supporting that claim in practice. The rule that petitioners advocate has long been the law in the great majority of the country. *See* Pet. 9-11 (collecting decisions of the D.C., First, Third, Fifth, Sixth, Seventh, Eighth, and Eleventh Circuits). None of those courts has suggested that it has been inefficient.

The rule has been workable and efficient in multidistrict litigation, in particular. Respondents treat the Multidistrict Litigation Manual as authoritative, Br. 24, but fail to recognize that it explains that when the transferee court grants a defendant's dispositive motion "on all issues in some transferred cases, they become immediately appealable to the circuit having jurisdiction over appeals from the transferee court, while cases where other issues remain would not be appealable at that time." David F. Herr, Multidistrict Litigation Manual § 9:21 (2014).

Conversely, respondents' position creates the serious prospect of gross inefficiency because the same legal question will be appealed to multiple courts of appeals. Regularly, at the conclusion of MDL proceedings, district courts remand actions that include one or more dismissed claims to their originating district courts. *See* Pet. Br. 32-33. In this case, when the pretrial proceedings conclude, actions that have not been dismissed, but that include dismissed antitrust claims, will return to district

courts in *ten* different circuits. *Id*. When final judgments are eventually entered in those actions, the appeals from the district court's dismissal of the antitrust claims will be taken to all those different courts of appeals. It obviously would be vastly more efficient for all appeals from the district court's antitrust judgment to be decided together in the Second Circuit. Respondents' only answer is that Rule 54(b) certification for petitioners and all of the other antitrust plaintiffs should issue essentially as a matter of course to facilitate a single appeal. Br. 48-49. If so, the far more straightforward rule is to hold that the order is appealable as a matter of right.

Delaying an appeal until the end of pretrial proceedings is also inefficient because it raises the prospect that MDL defendants will be subject to multiple rounds of discovery. For example, if the court(s) of appeals reinstate(s) the antitrust claims after the pretrial proceedings conclude, the reinstated plaintiffs obviously will have the right to conduct discovery. *See* Pet. Br. 12-13, 31-33. This would require additional discovery in either the transferor courts (if the cases have been remanded) or the transferee court (if the MDL is reconstituted). Either way, it would impose massive unnecessary costs. Respondents' assertion that excluded parties can share the results of discovery conducted by others, Br. 50 n.17, misses the point. It is unlikely that all of the discovery pertinent to the antitrust claims will adequately be conducted by parties pursuing *other*, non-antitrust claims. Respondents also argue that it would be inefficient for the district court to stay all discovery pending an appeal. *Id*. 50-51. But stays will

not often be necessary. Respondents concede that appeals typically are resolved in less than a year. *See id*. 51. In this case, the district court rejected the antitrust claims on March 29, 2013, and discovery has not yet begun. Had an immediate appeal been permitted, no stay would have been necessary. And appellate courts can, of course, expedite appeals when appropriate; in fact, the Second Circuit does so for all appeals from dismissals under Rule 12(b)(6). *See* 2nd Cir. R. 31.2(b)(1)(B). Moreover, the district court need not stay all discovery pending an appeal: it can permit the discovery relevant to the surviving claims and stay only the discovery related to the antitrust claims—or employ whatever other "pretrial techniques" are appropriate "to efficiently manage this litigation." *E.g.*, *In re: Stanford Entities Sec. Litig.*, 655 F. Supp. 2d 1360, 1360 (J.P.M.L. 2009).

The value of an immediate appeal is especially clear in light of the strength of petitioners' position on the merits. Respondents—all competitor banks—engaged in horizontal price-fixing by collaborating to depress LIBOR, and thus suppress the amount of interest payable on LIBOR-based debt instruments. This practice directly injured plaintiffs holding those instruments by reducing the price they received for the use of their money. The district court acknowledged that such activity violates the antitrust laws *per se*, but nevertheless concluded that such a violation "does not necessarily establish antitrust injury" principally because, the district court found, the LIBOR-setting

process "was never intended to be competitive" since it is a "cooperative endeavor" of the BBA trade association. Pet. App. 44a.[8] The district court's ruling "departed radically from this Court's cases interpreting the antitrust injury requirement," Br. of Mayor & City of Baltimore 2,[9] and disregarded decades of precedent concerning relief for victims who pay more or receive less due to horizontal price-fixing.[10] Appellate review is imperative, and reversal likely.

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[8] *Contra Am. Soc'y of Mech. Eng'rs, Inc. v. Hydrolevel Corp.*, 456 U.S. 556, 571 (1982) (holding that trade association activities "can be rife with opportunities for anti-competitive activity."); *Am. Column & Lumber Co. v. United States,* 257 U.S. 377, 409-12 (1921) (affirming permanent injunction against American Hardwood Manufacturers' Association's "Open Competition Plan" because it was used by trade association to control output and price).

[9] *See Atlantic Richfield Co. v. USA Petroleum Co.*, 495 U.S. 328, 344 (1990) (explaining that "[p]er se and rule-of-reason analysis are . . . methods of determining whether a restraint is 'unreasonable,' but "[t]he purpose of the antitrust injury requirement is different," *i.e.*, to ensure "that the harm claimed by the plaintiff corresponds to the rationale for finding a violation of the antitrust laws in the first place."); *Blue Shield of Va. v. McCready*, 457 U.S. 465, 472, 482-83 (1982) (holding that courts should not "engraft artificial limitations on the § 4 remedy"; a "plaintiff need not 'prove an actual lessening of competition in order to recover'"; and an "increase in price resulting from a dampening of competitive market forces is assuredly one type of injury for which § 4 potentially offers redress").

[10] *See, e.g.*, *Chattanooga Foundry & Pipe Works v. City of Atlanta*, 203 U.S. 390, 396 (1906) (relief for buyers who pay more due to horizontal price fixing); *Mandeville Island Farms v. Am. Crystal Sugar Co.*, 334 U.S. 219, 235-36 (1948) (relief for sellers

In any event, respondents' policy arguments are *non sequiturs*. Even if this Court agrees that district courts should act as the "dispatchers" of appeals from rulings in MDL actions, Br. 35-36, it does not follow that a final decision dismissing an action from the MDL is not appealable unless certified under Federal Rule of Civil Procedure 54(b). The fact that the district court has discretion to manage its docket does not *ipso facto* convert a plainly final judgment into an interlocutory ruling. Instead, it means that this Court should make clear that district courts in MDL proceedings have wide discretion to issue orders short of dispositive final decisions triggering statutory appeal rights.

As respondents acknowledge (Br. 5-7), the district court can employ an array of tools in the exercise of its discretion. *See, e.g.*, Fed. R. Civ. P. 16(c)(2)(L) (empowering district courts to adopt "special procedures" for complex cases); *In re: Light Cigarettes Mktg. & Sales Practices Litig.*, 856 F. Supp. 2d 1330, 1332 n.2 (J.P.M.L. 2012) ("Each multidistrict litigation is unique, and transferee judges have broad discretion to determine the course and scope of pretrial proceedings."). For example, the court may conclude that the legal issues presented by the consolidated actions are interrelated, so that it would not be

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who receive less due to horizontal price fixing); *see also* 2A Philip E. Areeda & Herbert Hovenkamp, Antitrust Law ¶ 391b (3d ed. 2007) (injuries from horizontal price fixing present "the easy cases" of antitrust injury).

efficient to resolve one action in isolation. In that instance, the district court will not take the inefficient course of dismissing the one action separately from the others; instead, it will decide them together. In turn, if dismissal is granted, the appeals will proceed together rather than separately.

Deferring action is not the court's only option. The district court controls which actions proceed, and on what schedule. If the court prefers, it can stay various actions in order to allow lagging actions to develop. *See, e.g.*, *Clinton v. Jones*, 520 U.S. 681, 706 (1997) ("The District Court has broad discretion to stay proceedings as an incident to its power to control its own docket."); *In re: Stanford Entities Sec. Litig.*, 655 F. Supp. 2d at 1360 (recognizing the court's power to put different actions on different tracks). Or, it can deny a motion to dismiss an action without prejudice, signaling how it intends to rule but stating that it will hear a renewed motion at a later date when all of the actions can be adjudicated at once. Or, the court may issue a ruling granting a dispositive motion in one action, but also ordering that judgment not be entered until all of the actions are ready for a decision. *See* Fed. R. Civ. P. 58(b)(1) (providing that judgment will be entered "unless the court orders otherwise").

A right to appeal will arise only when the district court eventually exercises its discretion to finally dismiss one or more actions. There is accordingly no tension between petitioners' position and "the sound discretion of the district court to identify, in the first instance, when an early appeal is appropriate." Resp. Br. 16.

In this case, the district court determined that it was appropriate to resolve finally whether any plaintiff has antitrust standing to bring a claim. The court no doubt did so because that is an entirely separate question from the other legal issues presented by the litigation. For their part, respondents cannot explain what benefit will accrue if the antitrust appeals in this case are delayed while the district court continues to manage the other civil actions raising distinct claims, such as state law claims for unjust enrichment and claims under the Commodity Exchange Act. None is apparent. *See* Pet. Br. 36. Respondents' position produces not an "occasional inconvenience," Resp. Br. 26, but rather a pointless, multi-year delay.

Indeed, the district court *itself* has never suggested that an immediate appeal of its decision should be precluded because the antitrust standing question is bound up with issues raised by other parties' claims. Respondents reason from the false premise that, in every form of consolidation, the district court "has decided that the cases ought to proceed as one unit of litigation while consolidated." *Id*. 16. MDL consolidation arises not from a broader judgment that the actions should be litigated together in the district court and the court of appeals but instead an initial conclusion that the varied actions involve "common questions of *fact*." *Id*. 3 (citing 28 U.S.C. § 1407(a) (emphasis added)), 7 (citing the

LIBOR MDL order).[11] The district court's subsequent determination to issue a final judgment in one of the actions is a crystal-clear expression of its judgment that all the actions do *not* need "to proceed as one unit."

The district court thus dismissed petitioners' antitrust claim expressly contemplating that the order was appealable as a matter of right. Pet. App. 220a. To be sure, the district court did later deny petitioners leave to appeal under Rule 54(b). J.A. 294. But the court found that petitioners could not satisfy the high standard for Rule 54(b) relief, *see infra* at 23 n.12, only "[i]n light of the court of appeals' dismissal of petitioners' appeal," Resp. Br. 13, because—in the Second Circuit's view—permitting an immediate appeal would be an inappropriate exercise of its discretion. Pet. App. 2a. It would have been surprising for the district court to effectively overturn the court of appeals' judgment on that point and grant petitioners a right to appeal immediately. *See* J.A. 294 ("[G]iven the reaction of the Second Circuit more than once, it truly is time to give it up . . . .").

Nor is there merit to the suggestion (Resp. Br. 15) that appeal should be delayed because some antitrust claims remain unresolved in the district court. The district court's sweeping ruling governs every such claim because it turns on features of LIBOR, which are

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[11] *Contra* Resp. Br. 4-5 (incorrectly stating that MDL proceedings arise from "a constellation of cases arguably presenting common *issues*" (emphasis added)).

common to every action. *See* Pet. App. 12a-13a, 155a-56a; Br. of Mayor & City Council of Baltimore 7-8. Indeed, the court expressly applied the ruling to dismiss *every* antitrust claim in *every* then-pending case. *See* Pet. Br. 7, n.5 (citing J.A. 60-61 (docket entry 286)). For their part, respondents agree that any assertion that an antitrust claim could survive the district court's broad ruling is meritless. Br. 11-12, 41. They stress that "petitioners' federal antitrust claim is virtually identical" to that raised in the other actions. *Id.* 2. And in briefing recently filed in the district court, respondents argued as much. *See* Joint Mem. of Law in Support of Defendants' Motion to Dismiss Direct Action Claims Covered by Prior Rulings 2-5, ECF No. 746, No. 11-md-2262-NRB (S.D.N.Y. Nov. 5, 2014). Thus, the antitrust litigation in the district court is effectively over, and there is no reason to delay an appeal from the district court's antitrust ruling.

Respondents also rely heavily on the principle that interlocutory appeals are inefficient and disfavored. But the final dismissal of an action is—by definition—not interlocutory. *See, e.g.*, 15A Charles Alan Wright & Arthur R. Miller, Federal Practice & Procedure § 3914.6 (2d ed.) ("[T]here are far too many cases holding that dismissal of an entire action is final to provide a comprehensive set of citations."). There is nothing left for the district court to do in the case. *See supra* at 3. In any event, neither party's rule produces more or fewer appeals, or even necessarily appeals at different times, because under each party's rule, the district court has control over the timing of appealable judgments. The dispute instead turns on *how* the right to appeal is triggered.

Respondents finally raise the prospect that some plaintiffs will proceed on appeal—including perhaps the weakest ones—while other plaintiffs will remain mired in the district court because their complaints contain other distinct claims that have not been finally resolved. Br. 46. But both parties recognize the same solution to that concern: the district court will grant Rule 54(b) certification to the plaintiffs in the actions that have not been dismissed.

That is the appropriate use of the Rule: there would be no just reason for the plaintiffs remaining in the district court not to be permitted to appeal the dismissal of their claim, given that another appeal on the same issue is proceeding. Thus, in this case, the district court originally contemplated that petitioners would appeal the dismissal of their complaint, and granted Rule 54(b) certification to other plaintiffs whose complaints included antitrust claims. Pet. App. 220a. The district court withdrew that certification only after the Second Circuit held that petitioners could not appeal. *Id*. 222a. If petitioners' appeal is reinstated, there is every reason to believe the district court will permit all of the antitrust plaintiffs to move forward as well.

III. Requiring The Parties To Litigate Whether An Appeal Is Permitted Under Rule 54(b) Will Produce Wasteful Litigation.

Although petitioners' position easily accommodates respondents' policy concerns regarding the need for MDL courts to control the litigation before them, there is an important practical difference between the parties' positions. Respondents' proposed

rule produces unnecessary collateral litigation. Under petitioners' straightforward approach, the district court enters a judgment dismissing a complaint from the MDL when it believes that the legal question before it can appropriately be resolved immediately, including on appeal.

By contrast, adopting respondents' position will require extensive litigation over whether an immediate appeal is appropriate under Rule 54(b). The district court must decide a motion under the Rule, which can require extensive briefing, argument, and analysis. *See, e.g.*, *Krys v. Pigott*, 749 F.3d 117, 126 (2d Cir. 2014) (describing case in which district court issued a partial final judgment under Rule 54(b) in July 2012, the court of appeals vacated and remanded for a more detailed explanation of reasons for the order, and the district court issued a new order, culminating in an appellate decision almost two years later). This case—in which the district court has been forced to resolve repeated requests under Rule 54(b), and respondents suggest that petitioners try yet again—is a perfect example. *See* Pet. App. 219a-21a (Rule 54(b) judgment granted), 222a (then revoked); J.A. 294-96 (then refused); Resp. Br. 41-42. If the district court permits an appeal, then the court of appeals, in turn, must decide whether the district court abused its discretion. *See, e.g.*, *Krys*, 749 F.3d at 126.

The litigation that respondents envision is not only wasteful, it is a complete misfit under Rule 54(b); it is unclear how it would be resolved without the lower courts developing a new and entirely

unpredictable body of law specific to MDL proceedings. In every other context, there is a strong presumption against granting certification under Rule 54(b), precisely because—as respondents emphasize—there is a strong preference against immediate appeals of interlocutory orders.[12] But respondents do not contend that this presumption properly applies to these circumstances. To the contrary, they all but concede that Rule 54(b) certification should effectively be granted as a matter of course to avoid the prospect that a single legal ruling will later produce duplicative appeals in multiple circuits. *See* Resp. Br. 48-49.

Because the district court's order was an appealable final judgment, and because adhering to the plain and settled meaning of the governing statutes and Rule 54(b) fully accommodates the policy concerns raised by respondents, the court of appeals' judgment should be reversed.

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[12] *E.g.*, *Novick v. AXA Network, LLC*, 642 F.3d 304, 310 (2d Cir. 2011) (certification should be granted "sparingly"); *O'Bert v. Vargo*, 331 F.3d 29, 41 (2d Cir. 2003) (certification should be granted "only in the infrequent harsh case").

CONCLUSION

The judgment of the Second Circuit should be reversed.

Respectfully submitted,

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