No. 13-1174

In the Supreme Court of the United States

ELLEN GELBOIM, ET AL., PETITIONERS,

v.

BANK OF AMERICA CORPORATION, ET AL.

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

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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QUESTION PRESENTED

Whether when actions are consolidated for pretrial purposes, an order disposing of the claims in one of the actions is immediately appealable as a matter of right, notwithstanding other avenues to appeal such as the entry of partial judgment pursuant to Federal Rule of Civil Procedure 54(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

parent 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.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases:

Cases—Continued:

Cases—Continued:

BRIEF FOR THE RESPONDENTS IN OPPOSITION

Respondents respectfully submit that the petition for a writ of certiorari should be denied.

OPINIONS BELOW

The order of the court of appeals dismissing petitioners' appeal for lack of jurisdiction (Pet. App. A) is not reported. The order of the court of appeals denying petitioners' motion for reconsideration (Pet. App. B) is not reported. The opinion of the district court granting in relevant part respondents' motion to dismiss (Pet. App. F) is reported at 935 F. Supp. 2d 666. The opinion of the district court denying petitioners leave to amend their complaint (Pet. App. G) is reported at 962 F. Supp. 2d 606.

JURISDICTION

The order of the court of appeals dismissing petitioners' appeal was entered on October 30, 2013. A motion for reconsideration was denied on December 16, 2013 (Pet. App. B). On March 7, 2014, Justice Ginsburg extended the time within which to file a petition for a writ of certiorari to and including April 15, 2014, and the petition was filed on March 26, 2014. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Like plaintiffs in over 60 other actions, petitioners have brought suit alleging manipulation of the London Interbank Offered Rate (LIBOR). Petitioners' case

has been consolidated in the district court with many of those other LIBOR-related actions for pretrial proceedings. When such proceedings resulted in the dismissal of some claims (including petitioners') but not others, rather than seek certification under Federal Rule of Civil Procedure 54(b) or 28 U.S.C. 1292(b), petitioners instead sought to take an immediate appeal.[1] They did so even though their case overlaps substantially with the cases still pending—at least 29 of which advance the exact same claim on virtually identical allegations—and the district court's resolution of those pending cases could moot the need for piecemeal appeals. The court of appeals held in those circumstances that it lacked appellate jurisdiction, see Pet. App. 1a-2a, and it subsequently denied reconsideration, see *id.* at 3a-4a.

1. *Factual Background.*

This case is one of many arising out of the alleged manipulation of LIBOR. LIBOR is an interest rate benchmark that is calculated for ten currencies, including the U.S. dollar. For each of those currencies, the British Bankers Association (BBA) has assembled a panel of banks whose interest rate submissions are used to calculate the benchmark. Every business day, the banks on each panel report to an independent administrator the rate at which they believe that they could borrow funds of the given currency in a reasonable market size from other banks in the London money market. Those submissions are used to calcu-

[1] This Court and lower courts have referred to the entry of partial final judgment pursuant to Rule 54(b) as certification, see, *e.g.*, *Johanns* v. *Livestock Mktg. Ass'n*, 544 U.S. 550, 556 (2005), and this brief accordingly refers to the procedure the same way.

late LIBOR for each currency, and then both the submissions and LIBOR are published each morning. See Pet. App. 20a-23a.

Since April 2011, over 60 actions have been filed in or removed to federal courts across the country alleging that the panel banks conspired to manipulate U.S. Dollar LIBOR between 2005 and 2011. Plaintiffs in all of those actions contend that banks on the U.S. Dollar LIBOR panel made submissions that did not accurately reflect their expected borrowing rates. Because the cases involve "common questions of fact," including "factual issues arising from allegations concerning defendants' participation in the [U.S. Dollar LIBOR] panel," the Judicial Panel on Multidistrict Litigation (JPML) ordered that the cases be transferred to the United States District Court for the Southern District of New York for "coordinated or consolidated pretrial proceedings." *In re Libor-Based Fin. Instruments Antitrust Litig.*, 802 F. Supp. 2d 1380, 1381 (J.P.M.L. 2011).

2. *Procedural History and the District Court's Rulings*.

a. As a result of the JPML's order, the district court consolidated all of the then-pending putative class actions for pretrial proceedings. See Pet. App. 11a.[2] The court grouped those cases into three categories, each with a single lead action:

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[2] The district court initially consolidated the pending class actions for all purposes in Novmber 2011, but it subsequently consolidated the cases solely for pretrial purposes in July 2012. See Pet. App. 11a.

- the present case, brought by petitioners Ellen Gelboim and Linda Zacher on behalf of purchasers of LIBOR-based debt securities, alleging a federal antitrust claim (Bondholder Action);
- an action brought by purchasers of over-the-counter LIBOR-based instruments, alleging a federal antitrust claim and a state unjust enrichment claim (OTC Action); and
- 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 *et seq*. (Exchange Action).

See Pet. App. 17a, 18a n.1, 59a, 148a, 153a. The court also appointed lead counsel in the OTC and Exchange Actions, who then filed consolidated amended complaints in those cases. See 1:11-md-2262, Doc. No. 66 (S.D.N.Y. Nov. 29, 2011) (Doc. No.); Doc. No. 130 (Apr. 30, 2012); Doc. No. 134 (Apr. 30, 2012).

In addition to the three lead putative class actions, there were also three individual actions pending before the district court brought by The Charles Schwab Corporation and other Schwab entities (Schwab Actions). See Pet. App. 17a. Like all of the putative class plaintiffs, the Schwab plaintiffs asserted a federal antitrust claim. See *id.* at 18a n.1. They also asserted claims under the Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U.S.C. 1961 *et seq*.; and the Cartwright Act, Cal. Bus. & Prof. Code § 16700 *et seq*., which is California's antitrust statute. See Pet. App. 18a n.1, 37a, 124a. In addition, the

Schwab plaintiffs asserted the same common law claim for unjust enrichment as the Exchange and OTC plaintiffs, as well as other common law claims for interference with economic advantage and breach of the implied covenant of good faith. See *id.* at 150a.

b. In April 2012, the plaintiffs in those six cases—the Bondholder, OTC, and Exchange Actions, and the three individual Schwab Actions—filed amended complaints containing essentially identical factual allegations. See Pet. App. 20a n.2, 27a. In June 2012, respondents jointly moved to dismiss all of those claims. Shortly thereafter, however, many new complaints were filed, and "[i]t 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." *Id.* at 17a-18a. Accordingly, in August 2012, the court stayed all later-filed LIBOR-related actions, pending its decision on whether to dismiss the Bondholder, OTC, Exchange, and Schwab Actions. See *id.* at 18a. The court indicated its intent to use its rulings in those cases to guide the organization and disposition of the later-filed suits. See *ibid.*

In March 2013, the district court granted in part and denied in part respondents' motions to dismiss. See Pet. App. 16a-158a. The court dismissed the federal antitrust claim in all of the actions and the state antitrust claim in the Schwab Actions. See *id.* at 18a & n.1, 155a, 157a. The court also dismissed the RICO claim in the Schwab Actions. See *id.* at 124a, 157a. Having dismissed all of the federal claims in the OTC and Schwab Actions, the court declined to exercise supplemental jurisdiction over the remaining state common law claims in those cases. See *id.* at

147a-148a, 157a. That left only the federal CEA claims and state unjust enrichment claim at issue in the Exchange Action. The court dismissed the unjust enrichment claim, see *id.* at 155a, but held that the CEA claims survived in part, see *id.* at 95a, 156a, 159a n.1.

c. In the wake of the district court's decision, the parties filed several different motions. In August 2013, the district court addressed those motions. See Pet. App. 159a-218a. First, the court denied all of the putative class action plaintiffs leave to amend their antitrust claims. Second, the court denied reconsideration of its ruling on the CEA claims, but without prejudice to respondents' later filing a similar motion. Third, 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. Fourth, the court denied a request by the Exchange plaintiffs to certify for interlocutory appeal a question related to their CEA claims. See *id.* at 160a-161a. The net effect of those rulings was that all of the claims in the Bondholder and Schwab Actions were dismissed, but further proceedings were required on remaining claims in the Exchange and OTC Actions. The district court also left in place its stay on other actions in order to avoid "addressing individual cases piecemeal rather than comprehensively." *Id.* at 216a.

Further proceedings continued to unfold just as the district court's order contemplated. In the fall of 2013, respondents filed motions seeking dismissal of the remaining claims: the federal claims in the Exchange Action for commodities manipulation and the state claims in the OTC Action for unjust enrichment

and breach of the implied covenant of good faith and fair dealing. See Doc. No. 417 (Sept. 20, 2013); Doc. No. 418 (Sept. 20, 2013); Doc. No. 452 (Oct. 9, 2013); Doc. No. 507 (Nov. 26, 2013).[3] In turn, plaintiffs in the Exchange Action moved to amend the factual allegations in their complaint and also sought reconsideration of certain aspects of the district court's ruling on their CEA claims. See Doc. No. 396 (Sept. 6, 2013). In February 2014, the district court held a hearing on the parties' motions and its decision is pending.

3. *Petitioners' Proposed Appeal.*

a. Although petitioners' action was consolidated with the cases that remain pending before the district court, both petitioners and the Schwab plaintiffs filed notices of appeal relating to the dismissal of their claims. See Pet. App. 220a. One of those claims, however—*i.e.*, the federal antitrust claim—had also been asserted and dismissed in the Exchange and OTC Actions. Plaintiffs in the Exchange and OTC Actions therefore sought "to join in the pending appeals only to the extent that they raise the issues of antitrust standing and antitrust injury." *Ibid.* The district court reasoned that, because "there [were] already appeals raising issues that affect all four categories of plaintiffs equally, judicial efficiency would be served by permitting the [Exchange and OTC] plaintiffs to participate in the existing appeals to the limited extent requested." *Id.* at 220a-221a. The court therefore directed entry of final judgment on the federal

[3] Respondents filed a motion for reconsideration and a renewed motion to dismiss, but this brief refers to those pending filings as motions to dismiss for the sake of convenience.

antitrust claims in the Exchange and OTC Actions pursuant to Rule 54(b). See *id.* at 221a.

As the foregoing procedural history illustrates, the proposed appeal attempted to present a hodgepodge of issues to the court of appeals: the federal antitrust claim in all of the actions; the state antitrust claim in the Schwab Actions; and the RICO claim in the Schwab Actions. See Doc. No. 409 (Sept. 17, 2013) (petitioners' notice of appeal); Doc. No. 429 (Sept. 23, 2013) (Schwab plaintiffs' notice of appeal). Meanwhile, other federal claims (under the CEA) and state claims (for unjust enrichment and breach of the implied covenant of good faith and fair dealing) remained pending before the district court. Respondents' motions to dismiss those claims have been under submission for several months and are ripe for decision. If granted, the district court could enter a judgment disposing of all claims in the Bondholder, Exchange, OTC, and Schwab Actions.

b. In October 2013, the court of appeals dismissed petitioners' appeal and the Schwab plaintiffs' appeal *sua sponte* in a one-paragraph, unpublished order. See Pet. App. 1a-2a. The court determined that it lacked jurisdiction over the appeals because "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. The court relied in part on its previous decision in *Houbigant, Inc.* v. *IMG Fragrance Brands, LLC*, 627 F.3d 497 (2010) (per curiam), in which the court explained that, 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." *Id.* at 498 (quoting *Hageman* v. *City Investing Co.*, 851 F.2d 69, 71 (2d Cir. 1988)).

In light of the court of appeals' order, the district court withdrew its Rule 54(b) certification of the antitrust claims in the Exchange and OTC Actions. See Pet. App. 222a. The court's earlier certification had been "premised on the pendency of appeals on the same claim by bondholder and Schwab plaintiffs." *Ibid.* The Exchange and OTC plaintiffs thereafter again sought certification, this time joined by petitioners and the Schwab plaintiffs. See Doc. No. 522 (Jan. 10, 2014). At a hearing in February 2014, the district court declined to certify a piecemeal appeal: "[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. I'm not saying that I'm ever certifying the question. But we're not picking and choosing particular questions and sending them up." Doc. No. 551, at 78 (Feb. 25, 2014).

c. Petitioners and the Schwab plaintiffs moved for reconsideration of the order dismissing their appeals. Notably, petitioners made none of the arguments that they now present to this Court: they did not argue that Second Circuit precedent was incorrect or in conflict with precedent from other circuits. Nor did petitioners request that the Second Circuit grant en banc review to resolve any conflict. Rather, petitioners argued that the Second Circuit's presumption against piecemeal appeals applies only to cases consolidated for all purposes, not cases (like theirs) consolidated for pretrial proceedings. See 13-3565, Doc. No. 134, at 8-9, 12-14 (2d Cir. Nov. 15, 2013); 13-3565, Doc. No.

144, at 4 (2d Cir. Dec. 9, 2013). In December 2013, the court of appeals denied reconsideration without further comment. See Pet. App. 3a-4a. Petitioners now seek this Court's review, but the Schwab plaintiffs do not.

ARGUMENT

This case is one of more than 60 related actions pending before the district court for pretrial proceedings. Although that court continues to bring this sprawling litigation under control, petitioners nevertheless contend that they are entitled to take an immediate appeal because their claim is among those that have been dismissed. Fortunately for petitioners, there is a remedy tailor-made for that situation: the entry of a partial final judgment under Federal Rule of Civil Procedure 54(b). Unfortunately for petitioners, the district court denied their request for relief under Rule 54(b) because, at least at this juncture, a piecemeal appeal would be inefficient and disruptive. Petitioners' case overlaps substantially with many of the cases still pending, at least 29 of which advance the exact same claim on virtually identical allegations. The district court was understandably reluctant to grant petitioners an early appeal when it is still actively managing other parallel cases.

In any event, the key point is that Rule 54(b) provides an avenue for appeal from consolidated pretrial proceedings when there is no just reason for delay. As a practical matter then, it is inconsequential whether litigants are automatically entitled to appeal from such proceedings as of right. The only putative appeals screened out by Rule 54(b) are those that, in the judgment of district courts on the front lines of

litigation, would squander judicial resources and disserve sound decision-making. Because that has hardly proven to be a concern, no one has asked the Advisory Committee to address the issue in the Federal Rules—and no litigant has asked this Court to review the issue in nearly a quarter-century. Even now, petitioners do not address the merits of the decision below: they say nothing about why that decision is supposedly incorrect or why the current system is in need of revision.

In the face of petitioners' silence, this Court should not grant a once-in-a-generation request to constrain the discretion of district courts and unsettle the structure for handling consolidated cases. The critical and inherent authority of trial courts to manage their own dockets cannot be disputed. The question presented here arises almost exclusively in large and complex consolidated proceedings—which is to say, the set of cases in which trial courts' flexibility is most crucial to reaching timely and just resolution. Moreover, Congress and the Advisory Committee already have channeled that discretion through procedural mechanisms like Rule 54 and 28 U.S.C. 1292 that allow appeals in appropriate cases. What petitioners want is an additional and automatic pathway to appeal, in the most challenging of administrative circumstances, even when the equities and interests of justice dictate that immediate appeal is not warranted. It is easy to see why that position has not been popular with parties before the Advisory Committee or this Court, and why petitioners do not defend it on the merits here.

Even assuming that the question presented were sufficiently important to warrant this Court's review, this case would be an exceedingly poor vehicle for ad-

dressing it. Petitioners said not a word below about the need for the Second Circuit to overrule its case law and adopt the approach of any sister circuit. Because petitioners never raised below the question they now seek to present, the court of appeals never had the opportunity to consider and pass upon whatever arguments petitioners may wish to advance. Moreover, it is not even apparent that petitioners need the relief they belatedly request. The district court currently has before it dispositive motions that, if granted, might yield a final and appealable judgment. And if that does not happen, petitioners may again seek the entry of judgment under Rule 54(b) for their antitrust claim at some point in the future. Before this Court grants review of a question that comes before it so infrequently, it ought to be clear that petitioners have exhausted their options and still face the prospect of interminable appellate delay.

A. The Question Presented Is Not Practically Important And Does Not Warrant This Court's Review

Petitioners begin by conflating (Pet. 7) two different categories of cases: those consolidated for all purposes and those consolidated solely for pretrial purposes. With respect to the former, there does not appear to be any disagreement among the courts of appeals. They have uniformly held that when actions are fully consolidated, an order disposing of only some of the consolidated claims or actions is not appealable as a matter of right.[4] Of course, district courts fre-

[4] See, *e.g.*, *Florida Wildlife Fed'n, Inc.* v. *Administrator, U.S. E.P.A.*, 737 F.3d 689, 693 (11th Cir. 2013); *Blackman* v. *District of Columbia*, 456 F.3d 167, 175 n.9 (D.C. Cir. 2006); *Alinsky* v. *United*

quently allow an appeal under Federal Rule of Civil Procedure 54(b) by "direct[ing] entry of a final judgment as to one or more, but fewer than all, claims or parties if * * * there is no just reason for delay." But absent certification under Rule 54(b), parties are not entitled to appeal orders that dispose of only pieces of fully consolidated litigation.

The issue before this Court is far narrower and less consequential. Petitioners' putative class action has been consolidated with similar actions solely for pretrial purposes. See Pet. App. 10a-11a. The limited question here is thus whether when actions are consolidated for pretrial purposes, an order disposing of the claims in one of the actions is immediately appealable even while pretrial proceedings remain ongoing. Petitioners are correct (Pet. 7-11) that the courts of appeals have taken different approaches to that limited question, but there is a straightforward reason why the dispute has not been brought to this Court during the last quarter-century: the differences in theory have long proven unimportant in practice. That is why petitioners simply assert "[t]here can be no dispute" that the issue "is sufficiently important," without making any attempt to substantiate their assertion. Pet. 11. An issue that comes along once in a generation hardly cries out for this Court's review.

1. As an initial matter, the question here is purely procedural. It concerns *when*—not *whether*—a limited category of appeals will go forward. Petitioners

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States, 415 F.3d 639, 642-643 (7th Cir. 2005); *Global Naps, Inc.* v. *Verizon New England, Inc.*, 396 F.3d 16, 22 (1st Cir. 2005); *McLaughlin* v. *Mississippi Power Co.*, 376 F.3d 344, 350 (5th Cir. 2004); *Hall* v. *Wilkerson*, 926 F.2d 311, 314 (3d Cir. 1991).

will have their day in appellate court, and whether that day falls tomorrow or further in the future does not affect the substantive rights of any party. Moreover, like many other purely procedural issues, the timing of appellate review is generally governed by the Federal Rules. See Fed. R. Civ. P. 54(b); Fed. R. App. P. 4(a); see also *Sears, Roebuck & Co.* v. *Mackey*, 351 U.S. 427, 438 (1956) (upholding Rule 54(b) as consistent with the final-decision requirement in 28 U.S.C. 1291); *Bolin* v. *Sears, Roebuck & Co.*, 231 F.3d 970, 974 & nn.18-19 (5th Cir. 2000) ("[T]he timing rules for appellate review are generally set forth by rule, not by statute."). Accordingly, the Civil Rules Advisory Committee could revise Rule 54(b) and provide that certification is mandatory rather than discretionary in these circumstances, but that committee—not this Court—is the appropriate body to consider petitioners' arguments in the first instance.

2. The availability of certification under Rule 54(b), however, has obviated the need for any change in practice. Under Rule 54(b), a district court may enter final judgment as to particular claims or parties when "there is no just reason for delay." In other words, a party whose claims are dismissed from consolidated proceedings can appeal when the "interest of sound judicial administration" and "the equities involved" so require. *Curtiss-Wright Corp.* v. *Gen. Elec. Co.*, 446 U.S. 1, 8 (1980) (internal quotation marks omitted). Parties to consolidated proceedings regularly satisfy that standard. See, *e.g.*, *In re Terrorist Attacks on September 11, 2001*, 714 F.3d 659, 672 (2d Cir. 2013) (hearing an appeal pursuant to Rule 54(b) certification in a consolidated action); *Bayer*

Healthcare Pharm., Inc. v. *Watson Pharm., Inc.*, 713 F.3d 1369, 1373 n.3 (Fed. Cir. 2013) (same); *In re Gentiva Sec. Litig.*, No. 10-cv-5064, 2014 WL 814952, at *7 (E.D.N.Y. Mar. 3, 2014) (entering Rule 54(b) certification in a consolidated action).

As a practical matter then, it is unimportant whether litigants are entitled to appeal from consolidated pretrial proceedings, because they may appeal under Rule 54(b) whenever there is no just reason for delay. See, *e.g.*, *Curtiss-Wright Corp.*, 446 U.S. at 8; *James* v. *Price Stern Sloan, Inc.*, 283 F.3d 1064, 1067 n.6 (9th Cir. 2002) ("In reality, issuance of a Rule 54(b) order is a fairly routine act that is reversed only in the rarest instances."); *Intergraph Corp.* v. *Intel Corp.*, 253 F.3d 695, 699 (Fed. Cir. 2001) ("District courts have substantial discretion in determining when there is no just cause for delay in entering judgment under Rule 54(b)."); *Ginett* v. *Computer Task Group, Inc.*, 962 F.2d 1085, 1096 (2d Cir. 1992) ("Only those claims 'inherently inseparable' from or 'inextricably interrelated' to each other are inappropriate for rule 54(b) certification.").

Indeed, the question presented affects only two classes of cases: actions in which a party has elected not to move for certification, and actions in which the district court has determined in response to a Rule 54(b) request that judicial administrative interests and equity weigh against an immediate appeal. See, *e.g.*, *Pitzer* v. *City of East Peoria*, No. 08-CV-1120, 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 SpA* 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."). Those are hardly the types of cases that ought to clog the appellate courts or on which this Court should expend its limited resources.

Courts have recognized that the availability of certification under Rule 54(b) significantly diminishes the importance of whether litigants are entitled to immediate appeals as of right. See *In re Refrigerant Compressors Antitrust Litig.*, 731 F.3d 586, 592 (6th Cir. 2013) (noting that 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"); *Page Plus of Atlanta, Inc.* v. *Owl Wireless, LLC*, 733 F.3d 658, 659, 660 (6th Cir. 2013) (describing Rule 54(b) as a "safety valve[]" that permits "appeals where the benefits of an immediate appeal from a non-final order outweigh the costs"); see also *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 LLC*, 453 F.3d 1166, 1173-1174 (9th Cir. 2006) (same).[5]

[5] Rule 54(b) is not the only route to appellate court. Section 1292(a) of Title 28 provides appellate jurisdiction over certain types of interlocutory orders. Section 1292(b) also allows a district court to certify an interlocutory appeal when "[its] order involves a controlling question of law as to which there is substantial ground for difference of opinion and * * * an immediate appeal from the or-

In some cases, litigants have even obtained certification while attempting to appeal by right, or had their appeals dismissed without prejudice to seeking certification. See *Keshner* v. *Nursing Pers. Home Care*, No. 13-1688-cv, 2014 WL 1303166, at *3 (2d Cir. Apr. 2, 2014) (court of appeals deferred consideration of its jurisdiction, directed the district court to decide certification, and then upheld jurisdiction after certification under Rule 54(b)); *Kersh* v. *Gen. Council of Assemblies of God*, 804 F.2d 546, 547 n.1 (9th Cir. 1986) (observing that although the court initially lacked jurisdiction "to review only one of two consolidated cases, * * * [s]ubsequently, the appellant obtained a proper Rule 54(b) certification"); see also *Griffin* v. *Jefferson Parish School Bd.*, 51 Fed. Appx. 929 (5th Cir. 2002) (per curiam) ("We dismiss the appeal without prejudice to give the parties an opportunity to request Rule 54(b) certification."). Whatever the distinctions in theory between the circuits' approaches, they have not amounted to a meaningful difference in practice.

3. That is why, as far as petitioners say and respondents have been able to determine, this issue has

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der may materially advance the ultimate termination of the litigation." See *In re Refrigerant Compressors Antitrust Litig.*, 731 F.3d at 592 (noting that, like Rule 54(b), Section 1292(b) mitigates whatever hardship parties in consolidated proceedings might otherwise face). Petitioners correctly did not seek certification under Section 1292(b), because their appeal does not present a debatable and controlling legal question and would not materially advance the ultimate termination of the broader multidistrict litigation. But that is simply evidence that an appeal in their particular case is not warranted at this time; it is not evidence of any systemic need for "judicial expansion" of the various routes to appeal. *Ibid.*

not been brought to this Court's doorstep for nearly a quarter-century. In 1990, the Court granted certiorari to resolve the question in *Erickson* v. *Maine Cent. R. Co.*, 498 U.S. 807, but subsequently dismissed the case after the parties settled, see 498 U.S. 1018 (1990). Petitioners have not pointed to another certiorari petition raising the question since *Erickson*'s Term.[6] Since that time, the Court apparently has not received even a single request to wade back into these waters. Petitioners focus instead (Pet. 7-8) on the fact that most circuits have addressed the question in the past couple of decades. But that says nothing about any need for this Court's review. What petitioners lack is any evidence that, in the circuits not affording an unqualified right to immediate appeal, the absence of such a right has been a practical problem notwithstanding other appellate avenues like Rule 54(b).

Petitioners fall back on the argument that appealability "has the *potential* to arise not only from every body of litigation that is subject to coordination by the Judicial Panel on Multidistrict Litigation, but each time a district court consolidates related actions." Pet. 11-12 (emphasis added). The JPML, however, transfers thousands of cases each year for coordinat-

[6] While *Erickson* was pending, another petitioner presented the same question and pointed to the same four-way circuit split as petitioners do here. See Petition for a Writ of Certiorari at i, *Gerstin* v. *Spann*, No. 90-205, 1990 WL 10058749 (Aug. 1, 1990). Shortly after this Court dismissed the writ of certiorari in *Erickson*, it denied the writ in *Gerstin*. See *Gerstin* v. *Spann*, 498 U.S. 1046 (1991). Simply put, nothing has changed in the last 23 years to warrant a different result here. If anything, the intervening decades only confirm the lack of any need for this Court's review.

ed or consolidated pretrial proceedings.[7] And that is on top of the countless other actions consolidated by district courts. Given the widespread use of consolidation, it is telling that petitioners' speculative harms have not come to pass. The reason again is that routes to appeal like Rule 54(b) and 28 U.S.C. 1292 mitigate whatever hardship litigants might otherwise face. At the least, the Court should not address this question without some showing—which petitioners have not even attempted here—that Rule 54(b) has failed to strike the appropriate balance between finality and preservation of judicial resources.

The petition is academic for another reason: petitioners do not actually say why they believe that the court of appeals erred or what approach they would urge this Court to adopt on the merits. They simply point to the circuit conflict and say that this Court should address "the interplay between 28 U.S.C. § 1291, Federal Rule of Civil Procedure 42(a), Federal Rule of Civil Procedure 54(b), and (in multidistrict proceedings) 28 U.S.C. § 1407." Pet. 12. But this is not a law school examination. Respondents cannot defend the court of appeals' judgment without knowing why it is supposedly incorrect, and petitioners have thus left this Court (and respondents) guessing how the parties will join issue on the merits. Petitioners may be reticent to say more because then it would

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[7] See *United States Courts: Judicial Panel on Multidistrict Litigation*, Administrative Office of the United States Courts, http://www.uscourts.gov/Statistics/JudicialBusiness/2013/judicial-panel-multidistrict-litigation.aspx (noting that during 2013 alone the JPML transferred 5,521 cases for coordinated or consolidated pretrial proceedings).

be clear precisely what they are defending: the expenditure of judicial resources on appeals that, by definition, are not in the interests of sound judicial administration or equity (because if they were, litigants could invoke Rule 54(b)). Indeed, as explained below, this is just such a case: an appeal here makes little sense in light of the cases and claims still pending before the district court. See pp. 26-28, *infra*.

4. Questions about timing and docket management are typically best left to the sound judgment of courts on the front lines of litigation. As this Court has previously recognized, "[t]he function of the district court under [Rule 54(b)] is to act as a 'dispatcher.'" *Curtiss–Wright Corp.*, 446 U.S. at 8 (quoting *Sears*, 351 U.S. at 435; internal citation omitted). In light of the district court's unique perspective on litigation as a whole, "[i]t is left 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." *Ibid.* (quoting *Sears*, 351 U.S. at 435); see *id.* at 10-11 ("[W]e are reluctant either to fix or sanction narrow guidelines for the district courts to follow."); *Sears*, 351 U.S. at 435 (recognizing lower courts' "demonstrated need for flexibility" in deciding whether to permit partial appeals under Rule 54(b)). To the extent that there is any real difference in practice between the circuits' approaches to appeals in consolidated cases, that is the natural result of allowing courts to manage their dockets, oversee often unwieldy litigation, and help to ensure that appellate judicial resources are deployed appropriately.

The need for such flexibility is particularly pronounced in "a sprawling multidistrict matter such as

this," which "presents a special situation [where] 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 Judicial Panel on Multidistrict Litigation." *In re Asbestos Products Liab. Litig. (No. VI)*, 718 F.3d 236, 247 (3d Cir. 2013); see *In re Phenylpropanolamine (PPA) Products Liab. Litig.*, 460 F.3d 1217, 1232 (9th Cir. 2006) ("[M]ultidistrict litigation is a special breed of complex litigation where the whole is bigger than the sum of its parts. The district court needs to have broad discretion to administer the proceeding as a whole.").

Here, for instance, more than 60 LIBOR-related cases from across the country are pending before the district court. Those cases have a complicated procedural history, and they raise a host of overlapping federal and state claims that the district court continues to address "in a manner that is both careful and efficient." 1:11-md-2262, Doc. No. 226, at 2 (J.P.M.L. Jun. 6, 2013). In circumstances like these, district courts are the best positioned to determine when partial appeals are warranted under Rule 54(b). This Court should not grant a once-in-a-generation request to constrain discretion in the lower courts and thereby unsettle the system for handling consolidated cases and multidistrict litigation.

B. This Case Is Not An Appropriate Vehicle For Resolving The Question Presented In Any Event

Even assuming that appealability as of right in consolidated pretrial proceedings were sufficiently important to warrant this Court's review, this case

would be an exceedingly poor vehicle for addressing that issue. Petitioners never pressed their current arguments below, and thus the court of appeals never considered them. No doubt the Second Circuit would be surprised to learn that its circuit precedent is now under wholesale attack, because petitioners said not a word below about the need for the Second Circuit to overrule its case law and adopt the approach of any other circuit. Moreover, it is not even apparent that petitioners need the relief they belatedly seek. The district court currently has before it dispositive motions that, if granted, might yield a final and appealable judgment. And if that does not happen, petitioners may again seek certification under Rule 54(b) for their antitrust claim at some point in the future. Before this Court grants certiorari to consider a question that arises so infrequently and has so little real-world significance, it ought to be certain that petitioners actually face the prospect of undue appellate delay.

1. This Court's traditional rule precludes a grant of certiorari when "the question presented was not pressed or passed upon below." *United States* v. *Williams*, 504 U.S. 36, 41 (1992) (internal quotation marks omitted); see *Cutter* v. *Wilkinson*, 544 U.S. 709, 718 n.7 (2005) ("[W]e are a court of review, not of first view."); *Pennsylvania Dep't of Corr.* v. *Yeskey*, 524 U.S. 206, 212-213 (1998) ("Where issues are neither raised before nor considered by the Court of Appeals, this Court will not ordinarily consider them.") (quoting *Adickes* v. *S.H. Kress & Co.*, 398 U.S. 144, 147, n. 2 (1970)). When petitioners assert new substantive arguments that attack the decision below, they ask this Court unnecessarily "to abandon [its]

usual procedures in a rush to judgment without a lower court opinion." *FCC* v. *Fox Television Stations, Inc.*, 556 U.S. 502, 529 (2009); cf. *United States* v. *United Foods, Inc.*, 533 U.S. 405, 417 (2001).

Here, petitioners were not simply silent below: they chose to press a very different set of arguments. When the Second Circuit dismissed petitioners' appeal, its brief order relied in part on its previous decision in *Houbigant, Inc.* v. *IMG Fragrance Brands, LLC*, 627 F.3d 497 (2010) (per curiam). See Pet. App. 2a.[8] In *Houbigant*, the district court had dismissed one of two consolidated cases, and the Second Circuit held that it lacked appellate jurisdiction over the dismissed case. See 627 F.3d at 498-499. As relevant here, the Second Circuit explained that, 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." *Id.* at 498 (quoting *Hageman* v. *City Investing Co.*, 851 F.2d 69, 71 (2d Cir. 1988)).[9]

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[8] The Second Circuit also appeared to rely on the fact that the district court did not enter judgment as required by Federal Rule of Civil Procedure 58, because judgment was neither set out in a separate document nor noted on the docket. See Pet. App. 2a; Fed. R. Civ. P. 58(a) and (c)(2). Whether there is even a valid judgment in this case presents a substantial threshold question that could prevent the Court from reaching the merits of appealability as of right in consolidated pretrial proceedings. That provides yet another reason why further review would not be appropriate here.

[9] The Second Circuit reasoned that the presumption was not overcome in *Houbigant* because "the pending and dismissed actions overlap[ped] in potentially significant ways," "resolution of the pending action could [have] moot[ed] the central issue in th[e] ap-

In their reconsideration papers below, petitioners argued that the *Houbigant/Hageman* presumption against piecemeal appeals applies to cases consolidated for all purposes, but not cases (like theirs) consolidated only for pretrial purposes. See 13-3565, Doc. No. 134, at 12 (2d Cir. Nov. 15, 2013) ("[W]hile the consolidation at issue in *Houbigant*—and in *Hageman*—was a full consolidation under Rule 42(a), the Bondholder [A]ction was consolidated with the other class actions here for *pretrial purposes only*.") (emphasis in original); *id.* at 8-9, 13-14 & n.7; 13-3565, Doc. No. 144, at 4 (2d Cir. Dec. 9, 2013) ("Dismissal of the appeals was error because *Houbigant* and *Hageman* do not apply.") (capitalization omitted). Petitioners also argued that, even if the *Houbigant/Hageman* presumption applied, it was rebutted on the facts of their appeal. See *id.* at 11 ("Even if the *Hageman* presumption applies, this case presents facts rebutting it.") (capitalization omitted). In other words, petitioners contended that for two distinct reasons they were entitled to appeal under circuit precedent.

What petitioners never contended, however, was that Second Circuit precedent is incorrect and should be discarded in favor of some other approach. They did not seek en banc review and they said nothing about the circuit conflict that now forms the basis of their plea for this Court's review. See Pet. i, 7-11. That was undoubtedly a strategic choice. Petitioners were aware that other circuits have adopted different

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peal," and "the district court [was] still actively engaged in decisionmaking." 627 F.3d at 498-499. As explained below, those same reasons apply in this case. See pp. 26-28, *infra*.

approaches, because respondents candidly called that fact to the court of appeals' attention—and did so precisely to point out that the circuit precedent on which petitioners relied did not in fact support appellate jurisdiction. See 13-3565, Doc. No. 141, at 9 (2d Cir. Nov. 27, 2013); see also *Missouri* v. *Jenkins*, 515 U.S. 70, 104 (1995) (O'Connor, J., concurring) ("Beyond the plain words of the question presented, the State's opening brief placed respondents on notice of its argument.").

Even then, petitioners did not challenge Second Circuit precedent in their reply brief. Doing so, of course, would have elevated the significance of the court of appeals' dismissal order, and petitioners' decision reflected the strategic choice that arguing for a favorable *application* of circuit precedent was more likely to be effective than outright criticism. See, *e.g.*, *NLRB* v. *RELCO Locomotives, Inc.*, 734 F.3d 764, 796 (8th Cir. 2013) ("The fact that RELCO initially decided not to pursue this argument * * * is a strategic decision whose consequences it must accept."); *United States* v. *Cooper*, 243 F.3d 411, 416 (7th Cir. 2001) (finding argument waived because failure to raise it in district court "was clearly a strategic decision rather than a mere oversight"). Only now, having failed to prevail on that limited ground, do petitioners set their sights higher. That is the type of gamesmanship this Court's traditional presentation rule exists to prevent. And it has resulted in the type of decision least suited to this Court's review: a brief unpublished order devoid of any analysis related to the question presented.

2. Setting aside the late-breaking nature of petitioners' arguments, there is no need for immediate

review of their appeal. In the fall of 2013, respondents filed motions to dismiss the remaining claims in the Exchange and OTC Actions, *i.e.*, the federal claims for commodities manipulation (Exchange Action) and the state claims for unjust enrichment and breach of the implied covenant of good faith and fair dealing (OTC Action). See pp. 6-7 & n.3, *supra*. Those motions have been pending before the district court for several months and are ripe for decision any day. If they are granted, that could moot petitioners' case in this Court, because petitioners could attempt to appeal from a judgment in the district court disposing of all claims in the Bondholder, Exchange, OTC, and Schwab Actions.

Even if the district court allows some claims by other plaintiffs to proceed, petitioners may still seek to have their antitrust claim certified for appeal under Rule 54(b). The district court has been understandably reluctant to spin off a series of appeals as it actively manages this extensive litigation, which includes many claims materially similar to petitioners'. But the court has suggested that, once it has addressed all of plaintiffs' claims and clarified the legal landscape, it will consider whether to grant certification in an orderly way. As the court explained in response to plaintiffs' latest request for certification, "[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.* I'm not saying that I'm ever certifying the question. But we're not picking and choosing particular questions and sending them up." Doc. No. 551, at 78 (emphasis added).

Petitioners may see some tactical advantage in running straight to the court of appeals ahead of other plaintiffs raising the same claim, but the district court is charged with sensibly managing the entire consolidated litigation. At least at this point in time, an appeal by petitioners standing alone does not make sense given the extensive overlap between petitioners' case and many of the other cases. Plaintiffs in the Exchange, OTC, and Schwab Actions all assert the same federal antitrust claim as petitioners. Until the district court resolves the remaining claims in the Exchange and OTC Actions (which could happen any day), those plaintiffs are before the district court. And because plaintiffs in the Schwab Actions have not sought this Court's review, petitioners would be the only ones taking an appeal on a claim common to all the actions if they were granted an immediate appeal now. Doubtless other appeals would follow raising that exact same federal antitrust claim, as well as a similar state antitrust claim and a host of other claims, both federal and state. That type of appellate balkanization would squander judicial resources and disserve sound decision-making.

The inefficiencies imposed on this multidistrict litigation by allowing petitioners' piecemeal approach could be particularly severe because, in addition to the three sets of consolidated putative class actions and the individual Schwab actions, there are more than 35 other stayed actions pending below. At least 29 of those actions raise antitrust claims, and plaintiffs in at least two of the putative class actions seek to represent groups that overlap with petitioners' proposed class. The district court thus has a far greater range of issues and interests to consider, and

"[i]t would be improvident to interject appellate review into a case where the district court is still actively engaged in decisionmaking." *Houbigant*, 627 F.3d at 499. The district court should be permitted instead to move forward; address the handful of remaining claims at issue in the Exchange and OTC Actions; and then, if any claims survive respondents' pending motions to dismiss, decide in due course whether Rule 54(b) certification is warranted on discrete sets of claims to provide both finality and clarity to petitioners and other plaintiffs.

CONCLUSION

For the reasons set forth above, the petition for a writ of certiorari should be denied.

Respectfully submitted.

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