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

BRIEF FOR THE PETITIONERS

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QUESTION PRESENTED

Whether and in what circumstances is the dismissal of an action that has been consolidated with other suits immediately appealable?

PARTIES TO THE PROCEEDINGS BELOW

Pursuant to Rule 14.1(b), the following parties were appellants below and petitioners in this Court:

Ellen Gelboim and Linda Zacher, individually for themselves and on behalf of all others similarly situated

The following parties were appellees below and are respondents in this Court:

Bank of America Corp.

Bank of America, N.A.

Barclays Bank plc

Citibank, N.A.

Citigroup Inc.

Coöperatieve Centrale Raiffeisen-Boerenleenbank B.A.

Credit Suisse Group AG

Deutsche Bank AG

HSBC Holdings plc

HSBC Bank plc

JPMorgan Chase & Co.

JPMorgan Chase Bank, N.A.

Lloyds Banking Group plc

The Norinchukin Bank

Royal Bank of Canada

The Royal Bank of Scotland Group plc

The Bank of Tokyo-Mitsubishi UFJ, Ltd.

UBS AG

WestLB AG (n/k/a Portigon AG)

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BRIEF FOR THE PETITIONERS

Petitioners respectfully request that this Court reverse the judgment of the United States Court of Appeals for the Second Circuit in this case.

OPINIONS BELOW

The district court's opinion granting respondents' motion to dismiss petitioners' claim (Pet. App. F) is published at 935 F. Supp. 2d 666. The district court's order denying petitioners leave to amend their complaint (Pet. App. G) is unpublished. The court of appeals' order dismissing petitioners' appeal (Pet. App. A) is unpublished.

JURISDICTION

The court of appeals entered its order dismissing petitioners' appeal (Pet. App. A) on October 30, 2013, and denied petitioners' timely request for reconsideration of that order (Pet. App. B) on December 16, 2013. On March 7, 2014, Justice Ginsburg extended the time to file this petition for certiorari to and including April 15, 2014. App. No. 13A913. The petition for a writ of certiorari was filed on March 26, 2014, and granted on June 30, 2014. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).[1]

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[1] Respondents never challenged this Court's jurisdiction per se, but argued that this case might become moot because the remainder of the LIBOR litigation may be resolved in their favor, such that all parties can appeal under the Second Circuit's precedents. BIO 25-26. As petitioners pointed out in their reply brief, respondents' projections are unrealistic. *See* Cert. Reply 7-8. Subsequent developments in the district court further buttress

RELEVANT STATUTORY PROVISIONS

28 U.S.C. § 1291 provides, in relevant part: "The courts of appeals . . . shall have jurisdiction of appeals from all final decisions of the district courts of the United States . . . ."

28 U.S.C. § 1407(a) provides, in relevant part:

> 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 determination 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, That 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.

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the claim that the litigation is not going to conclude before the Court has an opportunity to decide this case.

STATEMENT OF THE CASE

1. This civil action arises from a complaint alleging that respondents manipulated the London Interbank Offered Rate (LIBOR), which is the most important benchmark for short-term interest rates in the United States and around the world. LIBOR ostensibly identifies banks' short-term borrowing costs. It is an essential term in countless financial instruments.

The British Bankers Association (BBA) publishes LIBOR every day in ten currencies, including U.S. dollars. Various banks—respondents here—together provided the information that the BBA used to set the U.S. dollar LIBOR. It has been revealed, however, that respondents conspired to manipulate LIBOR by submitting false information. Respondents' collusion suppressed LIBOR, which directly suppressed the payments on LIBOR-linked financial instruments. Among those harmed were floating rate bondholders, who received artificially low interest payments for the use of their money.

Respondents' conduct gave rise to a variety of suits by parties claiming that they were injured by the suppression of U.S. dollar LIBOR. The Judicial Panel on Multidistrict Litigation (JPML) ordered that LIBOR-related litigation be transferred for pretrial proceedings to the United States District Court for the Southern District of New York. Pet. App. 5a-7a; *see* 28 U.S.C. § 1407(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.").

The LIBOR multidistrict litigation (MDL) proceedings include class as well as individual actions. The district court consolidated the then-pending class actions on November 29, 2011. *See* J.A. 289. Individual actions filed by entities related to Charles Schwab & Co. (Schwab) were also before the district court, but were not consolidated. *Id*. 289 n.5.

Several months later, the district court revoked its order consolidating the class cases and replaced it with a more limited one. *See* Pet. App. 10a. The court recognized that under the MDL statute its "authority over actions transferred from districts outside of the Southern District of New York extends only to pretrial matters," whereas Rule 42(a) "effectuates consolidation for all purposes (including trial) . . . ." *Id*. The court therefore ordered that the class actions in the MDL would be consolidated "for pretrial purposes only." Pet. App. 11a. The court did not direct the class action plaintiffs to file a single, integrated complaint. The Schwab actions remained separate from the class actions.

Respondents filed motions to dismiss the Schwab actions and three separate class action complaints:

> a. The complaint filed by Ellen Gelboim and Linda Zacher—petitioners in this Court—on behalf of purchasers of bonds with LIBOR-linked interest rates, alleging a single claim that the defendants had violated federal antitrust law;

b. A unified complaint on behalf of "over-the-counter" purchasers from one or more of the respondents, of LIBOR-linked instruments (known as "the OTC plaintiffs"), alleging a federal antitrust claim, as well as a state law claim for unjust enrichment;

c. A unified complaint on behalf of purchasers of LIBOR-linked instruments on exchanges (known as "the exchange plaintiffs"), alleging a federal antitrust claim, Commodity Exchange Act claims based on respondents' conduct regarding certain Eurodollar futures contracts, and a state law claim for unjust enrichment.

Meanwhile, roughly forty more LIBOR-related complaints were filed in or transferred to the Southern District of New York. Those complaints largely raised the same allegations as the previously filed complaints. The court stayed all proceedings on those follow-on complaints while it adjudicated the motions to dismiss the four non-stayed cases.[2] *See* Pet. App. 18a.

3. The district court denied in part respondents' motion to dismiss the exchange plaintiffs' claim under the Commodity Exchange Act. *Id*. 65a, 156a. The court also permitted the OTC plaintiffs to amend their complaint to assert state law claims for unjust

[2] For the purposes of this point, petitioners treat Schwab's three individual non-stayed actions as a single case.

enrichment and violation of the implied covenant of good faith and fair dealing. *Id*. 161a.[3]

But the district court granted respondents' motion to dismiss all the other claims set forth in all the non-stayed cases. *Id*. 18a-19a, 155a-58a. Particularly relevant here, the court held that no plaintiff could assert an antitrust claim because none could assert a cognizable antitrust injury. *Id*. 59a, 155a-56a. That ruling resolved the only claim for relief asserted in petitioners' complaint.

The court subsequently denied petitioners leave to file a second amended complaint. *Id*. 193a-200a. The court accordingly specified that the action was "dismissed in [its] entirety . . . ." *Id*. 219a. The case's docket provided that it was "terminat[ed] pursuant to instructions from Chambers . . . ." *Id*. 12a.[4]

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[3] Motion practice before the district court has continued on the surviving claims in the non-stayed actions. The district court decided the remaining motions by memorandum and order on June 23, 2014. *See In re LIBOR-Based Fin. Instruments Antitrust Litig*., No. 11-md-2262(NRB), 2014 WL 2815645 (S.D.N.Y. June 23, 2014). Substantially narrowed claims for commodities manipulation, breach of the implied covenant of good faith and fair dealing, and unjust enrichment remain pending in the non-stayed actions. *See id.* at *28.

[4] Because the court clerk did not enter judgment on a separate document as required by Federal Rule of Civil Procedure 58(b)(1)(C), judgment on its decision denying all relief in petitioners' action was deemed entered after 150 days pursuant to Federal Rule of Civil Procedure 58(c)(2)(B).

The district court applied its decision dismissing the LIBOR plaintiffs' antitrust claims not only to all the non-stayed cases (such as petitioners' complaint), but also to the stayed cases pending at that time.[5] As respondents subsequently represented to the district court, because all the claims "are based on the same core theory . . . none of the federal and state antitrust claims can survive." J.A. 304; *see also* J.A. 323, 338, 345, 358-59 (letters from attorneys in various stayed cases effectively acknowledging that the district court's order will result in dismissal of their antitrust claims); *but see* J.A. 314 (letter from FDIC and Freddie Mac asserting that their antitrust claims can proceed). The substantial majority of civil actions in the LIBOR MDL proceedings assert federal and/or state antitrust claims. *See* J.A. 309-11 (identifying actions raising an antitrust claim).

The district court also dismissed the Schwab plaintiffs' federal racketeering claim. Pet. App. 124a, 157a. Having dismissed all of Schwab's federal claims, the court declined to exercise supplemental jurisdiction over Schwab's remaining state law claims.

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[5] The court entered a docket entry "granting in part and denying in part Motion to Dismiss in" more than fifteen other cases: 1:13-cv-00598-NRB; 1:13-cv-00597-NRB; 1:12-cv-05723-NRB; 1:12-cv-05822-NRB; 1:12-cv-06056-NRB; 1:12-cv-06693-NRB; 1:12-cv-07461-NRB; 1:13-cv-00398-NRB; 1:13-cv-00626-NRB; 1:13-cv-00625-NRB; 1:13-cv-00627-NRB; 1:13-cv-00667-NRB; 1:13-cv-00346-NRB; 1:13-cv-00407-NRB; 1:13-cv-01135-NRB; 1:13-cv-01198-NRB; 1:13-cv-01456-NRB; and 1:13-cv-01016-NRB. *See* J.A. 60-61 (docket entry 286).

Id. 147a, 157a. Thus, like petitioners' antitrust suit, Schwab's civil actions were terminated in their entirety.

4. Federal law gives the courts of appeals "jurisdiction of appeals from all final decisions of the district courts . . . ." 28 U.S.C. § 1291. Petitioners accordingly filed a notice of appeal, as did Schwab. *See* J.A. 1.

The exchange and OTC plaintiffs sought to join the appeal with respect to their dismissed antitrust claims. They requested that the district court enter judgment under Federal Rule of Civil Procedure 54(b), which provides that "[w]hen an action presents more than one claim for relief . . . 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," and thus facilitate an immediate appeal. The district court granted the request, explaining that petitioners and Schwab were "in a position to appeal as of right because their complaints were dismissed in their entirety." Pet. App. 220a. Further, because petitioners' and Schwab's appeal "rais[e] issues that affect all four categories of plaintiffs equally . . . there [was] no just reason for delay[ing]" the exchange and OTC plaintiffs' appeals. *Id.* 220a-21a.

The court of appeals, however, dismissed petitioners' appeal, stating:

> This Court has determined *sua sponte* that it lacks jurisdiction over these 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. *See Coopers & Lybrand v. Livesay*, 437 U.S. 463, 467 (1978); *Houbigant, Inc. v. IMG Fragrance Brands, LLC*, 627 F.3d 497, 498 (2d Cir. 2010) (per curiam). Upon due consideration, it is hereby ORDERED that the appeals are DISMISSED.

Pet. App. 2a. The Second Circuit precedent cited by the court's order, *Houbigant*, 627 F.3d at 498, applied that court's prior ruling that "when there is a judgment in a consolidated case that does not dispose of all the claims which have been consolidated, there is a strong presumption that the judgment is not appealable absent Rule 54(b) certification." *Hageman v. City Investing Co.*, 851 F.2d 69, 71 (2d Cir. 1988). That presumption may be overcome only in "highly unusual circumstances." *Houbigant*, 627 F.3d at 499 (quoting *Hageman*, 851 F.2d at 71).[6]

In response to the court of appeals' order dismissing petitioners' and Schwab's appeals, the district court withdrew its own order permitting the exchange plaintiffs and OTC plaintiffs to appeal under Rule 54(b). Pet. App. 222a. The district court similarly denied petitioners' request that it enter an appealable judgment under Rule 54(b). J.A. 294.

Noting a circuit split over whether and when an order dismissing an action that has been consolidated

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[6] The Second Circuit subsequently denied reconsideration. Pet. App. 4a.

with others is appealable, petitioners sought review in this Court. This Court granted certiorari. *See* 134 S. Ct. 2876 (June 30, 2014) (mem.).

SUMMARY OF ARGUMENT

An order dismissing a civil action in its entirety is a final decision immediately appealable under 28 U.S.C. § 1291, even if the action has been consolidated with others for pretrial purposes.

1. Section 1291 requires the courts of appeals to exercise jurisdiction over "all final decisions" from U.S. district courts unless an appeal may be had directly to the Supreme Court. That mandatory language requires the courts of appeals to exercise jurisdiction, providing losing parties with a right to appeal adverse judgments.

In this case, petitioners' entire complaint was dismissed with prejudice. That dismissal plainly constitutes a "final decision" within the meaning of Section 1291. It ended all litigation on the merits of petitioners' sole claim for relief. The district court thus correctly recognized that because it had dismissed petitioners' complaint "in [its] entirety," they were entitled "to appeal as of right . . . ." Pet. App. 220a.

Unquestionably, had petitioners' action not been consolidated under the MDL statute, 28 U.S.C. § 1407, their right to appeal would be intact. The mere fact of consolidation—which Section 1407 limits to pretrial purposes only—does not change that result. No matter what happens in the remainder of the MDL litigation, petitioners' civil action has been

permanently extinguished. That "decision" is "final." Moreover, Section 1407 does not contemplate that consolidated actions merge. To the contrary, the statute provides that the civil actions are transferred for coordinated or consolidated pretrial proceedings, and that upon the completion of those proceedings, the actions are then remanded back to the transferring jurisdictions. *See* 28 U.S.C. § 1407(a). The temporary coexistence during Section 1407 pretrial proceedings is a far cry from joinder or any other process that would merge petitioners' action with others.

Indeed, this Court has long held that "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, or make those who are parties in one suit parties in another." *Johnson v. Manhattan Railway*, 289 U.S. 479, 496-97 (1933) (footnote omitted). In subsequently adopting the federal rules of civil procedure, this Court did not depart from the substance of that holding. Moreover, this Court has never stated or even suggested the opposite, *i.e.*, that consolidation merges civil actions so that a judgment disposing entirely of one plaintiff's action would not be appealable because another consolidated action remains pending.

2. The facts of this case illustrate that adhering to the plain meaning of Section 1291 enhances judicial efficiency. The Second Circuit's ruling leaves petitioners in an indefinite stasis. They may neither participate in the ongoing district court proceedings nor appeal. But there is no reason for delay. The

district court's ruling on the remaining claims will not inform the court of appeals' disposition of petitioners' appeal.

There is also a significant prospect that the plaintiffs with claims pending in the district court will proceed to discovery. But petitioners will be excluded from that process, notwithstanding that the facts to be developed include matters—such as the nature of respondents' collusive agreements, transactions, and communications over a period of years—that are important to petitioners' claims. If petitioners later prevail on their delayed appeal, they will have to replicate the massive discovery and trial preparation effort from which they are presently excluded. Not only is it highly likely that petitioners' efforts would be prejudiced by prior discovery rulings over which they have no control, but it is also clear that—no matter the result—the parties will have to expend massive amounts of time and resources to duplicate a process that had already been carried out.

The ruling below also creates the serious prospect that consolidated litigation will give rise to duplicative appeals. When the pretrial MDL proceedings conclude, the underlying complaints that have not been dismissed will return to their originating courts, located in diverse circuits. When those originating courts later finally resolve those civil actions, the subsequent appeals—including appeals from the district court's antitrust ruling—will occur in those circuits. The result is that multiple courts of appeals will be required to decide the identical legal questions, multiplying effort, expense, drain on judicial resources,

and the risk of conflicting rulings—precisely the results the MDL statute was designed to avoid.

The Second Circuit's rule also forces litigants to guess whether an adverse judgment is an immediately appealable final decision. The Second Circuit recognizes a presumption against appeals until all consolidated actions are fully resolved, and states that the presumption may be overcome in unspecified "highly unusual circumstances." Whether a case will qualify as "highly unusual" is so subjective that panels inevitably will disagree about the appealability of factually similar cases. When parties cannot tell whether a judgment against them is appealable, they will inevitably appeal for fear of otherwise losing their opportunity to do so. Appellate courts, in turn, will be compelled to adjudicate the issue of appellate jurisdiction—a process that is wasteful and unproductive.

Recognizing an immediate right of appeal solves all of these problems. It ensures that petitioners' antitrust claims will be resolved promptly, providing them either with finality or with an opportunity to participate in the consolidated discovery process. Furthermore, recognizing the appealability of the district court's judgment will provide a clear date from which a notice of appeal must be filed, and will further facilitate the orderly resolution of appeals raising identical questions of law.

Against those considerations is: nothing. The ordinary purpose of the final judgment rule is to prevent piecemeal appeals. But there is nothing piecemeal about a plaintiff appealing the dismissal of

her entire complaint. To the extent that other plaintiffs with surviving claims have also raised claims that were dismissed (*e.g.*, the antitrust claims in this MDL), they may ask for leave to appeal those decisions under Federal Rule of Civil Procedure 54(b)—relief that the district court has already proven willing to grant. The experience of circuits that permit appeals in these circumstances proves that immediate appeals accelerate the orderly resolution of complex cases without adverse side effects on courts' ability to manage their dockets.

Moreover, a clear rule permitting immediate appeals from every decision dismissing a civil action in its entirety would not impair courts' ability to control their dockets. Courts have a variety of mechanisms including setting briefing schedules, appointing lead counsel, and holding cases in abeyance to decide them together, which permit them to ensure that cases are resolved fairly. None of that would change if petitioners and similarly situated parties were permitted to appeal from decisions dismissing their complaints.

3. In opposing certiorari, respondents argued that petitioners themselves must resort to Rule 54(b) if they wish to bring an immediate appeal. But that rule, by its terms, does not apply to petitioners' claim. Rule 54(b) permits the district court to enter a partial final judgment in a single civil action involving multiple claims or parties, thus facilitating early appeals from partial judgments on the merits. Petitioners, however, brought only a single action

raising a single claim, which was dismissed in its entirety. Rule 54(b) therefore does not apply.

This Court has previously explained that the purpose of Rule 54(b) is to facilitate appeals in an era in which joinder of claims and parties has become substantially easier. But the rule was never intended to alter the processing of multiple civil actions that have been consolidated—as opposed to multiple claims or parties joined. Nor was the rule intended to apply when, as here, the district court dismisses a plaintiff's entire complaint.

Indeed, a broader application of Rule 54(b) would exceed the rulemaking power through which the rule was adopted.[7] Plaintiffs had the statutory right to appeal the dismissal of an entire complaint long before Rule 54(b) was adopted, and the rule never sought to change that. Although Congress subsequently granted this Court the power to adopt additional rules that would alter the definition of finality, Rule 54(b) was not an exercise of that authority. Indeed, the fact that this Court could alter the definition of finality by rule—after having the opportunity to receive comments—counsels against adopting an interpretation of Rule 54(b) that applies beyond the single multi-claim and/or multi-party civil action denoted by the rule's plain language for the purpose of

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[7] As discussed in detail *infra*, the Rules Enabling Act, as it existed when the Rules were adopted and also when Rule 54(b) was amended, did not permit the creation of rules that expand or contract jurisdiction granted by statute.

restricting appellate rights when actions have been consolidated.

ARGUMENT

When a civil action is dismissed in its entirety, the order of dismissal constitutes a final decision immediately appealable under 28 U.S.C. § 1291, even if the civil action has been consolidated with other civil actions for pretrial purposes.

I. The District Court's Decision Dismissing Petitioners' Action In Its Entirety Is A Final Decision Subject To Immediate Appeal.

1. Petitioners filed a complaint alleging that respondents violated the antitrust laws by colluding to manipulate the LIBOR rate. That complaint commenced a civil action, which by statute was consolidated "for pretrial purposes only" with other plaintiffs' civil actions against the same defendants arising from the same core facts. Pet. App. 11a. The district court dismissed petitioners' complaint on the merits pursuant to Federal Rule of Civil Procedure 12(b)(6). *See id*. 156a, 220a. That decision terminated petitioners' civil action. In the words of Rule 58(b)(1)(C), the order "denie[d] all relief," requiring the district court clerk to "promptly prepare, sign, and enter the judgment." Fed. R. Civ. P. 58(b)(1). Petitioners moved for leave to amend their complaint, but, consistent with its intention to dismiss petitioners' antitrust claims "with prejudice," *In re LIBOR-Based Fin. Instruments Antitrust Litig.*, No. 11-md-2262(NRB), 2013 WL 1947367, at *1 n.1 (S.D.N.Y. May 3, 2013), the district court denied that

motion. *See In re LIBOR-Based Fin. Instruments Antitrust Litig.*, 962 F. Supp. 2d 606, 624-28 (S.D.N.Y. 2013).

Under 28 U.S.C. § 1291, which provides that "[t]he courts of appeals . . . shall have jurisdiction of appeals from all final decisions of the district courts," the district court's judgment dismissing petitioners' complaint was a "final decision" because it "end[ed] the litigation on the merits and le[ft] nothing for the court to do but execute the judgment." *Ray Haluch Gravel Co. v. Cent. Pension Fund of Int'l Union of Operating Eng'rs*, 134 S. Ct. 773, 779 (2014) (citation omitted); *see also Coopers & Lybrand v. Livesay*, 437 U.S. 463, 467 (1978). The phrase "all final decisions" has a settled meaning under this Court's precedents, necessarily including all judgments on the merits that "terminate an action . . . ." *Cohen v. Beneficial Indus. Loan Corp.*, 337 U.S. 541, 545 (1949); *Mohawk Indus., Inc. v. Carpenter*, 558 U.S. 100, 106 (2009).[8]

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[8] This Court has also recognized a "small class of collateral rulings that, although they do not end the litigation, are appropriately deemed final." *Mohawk*, 558 U.S. at 106 (internal quotation marks omitted). That exception is not relevant here because this case does not involve a collateral order. Moreover, the collateral order doctrine is a one-way ratchet: it expands the concept of finality to facilitate faster appeals. But this Court has never adopted a restrictive notion of finality that stifles appellate review after a trial court disposes of an entire civil action—and it has never taken the position that courts may deem a particular judgment final, or not, as a matter of judicial discretion.

The mandatory and sweeping language of the statute, *i.e.*, that the courts "shall" have jurisdiction over "all" final decisions, does not contemplate judicial discretion to decline jurisdiction over a final decision. *See Lexecon Inc. v. Milberg Weiss Bershad Hynes & Lerach*, 523 U.S. 26, 35 (1998) ("[T]he mandatory 'shall' . . . normally creates an obligation impervious to judicial discretion.").[9] And this Court has repeatedly emphasized that "federal courts have a strict duty to exercise the jurisdiction that is conferred upon them by Congress." *Quackenbush v. Allstate Ins. Co.*, 517 U.S. 706, 716 (1996); *Moses H. Cone Mem. Hosp. v. Mercury Const. Corp.*, 460 U.S. 1, 15 (1983) ("[T]he federal courts have a virtually unflagging obligation . . . to exercise the jurisdiction given them.") (internal quotation marks omitted). Petitioners were therefore entitled to appeal from the district court's decision as "a matter of right." *Heckler v. Edwards*, 465 U.S. 870, 876 (1984); *see also Devlin v. Scardelletti*, 536 U.S. 1, 14 (2002) (the "right to appeal from an action that finally disposes of one's rights has a statutory basis" in Section 1291); Fed. R. App. P. 4 (heading refers to "Appeal as of Right").

The district court agreed. In its order dated October 17, 2013, the court explained that "[t]he

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[9] *See also Lopez v. Davis*, 531 U.S. 230, 241, (2001) (noting Congress's "use of a mandatory 'shall' . . . to impose discretionless obligations"); Black's Law Dictionary 1375 (6th ed. 1990) ("As used in statutes . . . this word is generally imperative or mandatory.").

March 29, 2013 decision, *inter alia*, dismissed the Sherman Act, section 1, claims advanced in each complaint . . . ." Pet. App. 219a. In the district court's view, petitioners—who had only brought an antitrust claim—were "in a position to appeal as of right because their complaint[] w[as] dismissed in [its] entirety." *Id*. 220a. The court even went so far as to grant Rule 54(b) judgments to parties that had brought other (non-dismissed) claims alongside their antitrust claims, so that they could join petitioners' appeal on the antitrust issue. *Id*. 221a (concluding that there was "no just reason for delay[ing]" the other parties' appeals in light of petitioners' appeal as of right).

2. If petitioners' lawsuit had never been consolidated with others, it is obvious that the order dismissing their complaint would have constituted a final decision subject to immediate appeal. The question is therefore whether the fact of consolidation dictates a different result. The answer is "no" because consolidation—and especially limited consolidation for pretrial purposes under Section 1407—does not merge multiple civil actions into a single one. Consequently, it does not render a "decision" terminating one of those actions any less complete or any less "final."

Petitioners' action was consolidated with related actions pursuant to the MDL statute. 28 U.S.C. § 1407. The statute provides that "[w]hen 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." *Id*. § 1407(a). It

further provides that "[e]ach 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." *Id*.

The language of the statute makes it plain that civil actions retain their separate status in the MDL, though they proceed in parallel through pretrial proceedings and the district court regularly issues rulings that apply to the suits in common. The statute provides that the individual actions are transferred for consolidated "pretrial proceedings" only, never stating or even suggesting that the actions merge into a new, unified action during those proceedings. Once pretrial proceedings conclude, the statute further requires the actions to be individually remanded to their home jurisdictions. Thus, Congress expressly contemplated that although civil actions may be swept into multidistrict pretrial proceedings, the actions maintain their individuality, and will be returned as such to the transferring district court for trial unless terminated beforehand.

In *Lexecon*, this Court held that this remand requirement was mandatory, thus barring the transferee district court from transferring a consolidated action to itself for trial. *See* 523 U.S. at 40-41. The Court explained that:

> Section 1407(a) speaks not in terms of imbuing transferred actions with some new and distinctive venue character, but simply in terms of "civil actions" or "actions." It says that such an action, not

> its acquired personality, must be terminated before the Panel is excused from ordering remand. The language is straightforward, and with a straightforward application ready to hand, statutory interpretation has no business getting metaphysical.

Id. at 37.[10] Congress unequivocally spoke in terms of "civil actions," "actions," and "[e]ach" one of them,

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[10] Several courts of appeals recognize that civil actions subject to MDL proceedings retain their separate and individual character, and recognize jurisdiction over immediate appeals when such individual civil actions are terminated. *See, e.g., Brown v. United States*, 976 F.2d 1104, 1107 (7th Cir. 1992) ("Since the consolidation [under Section 1407] was for pretrial proceedings only, the [plaintiff's] case retains its separate identity."); *United States ex rel. Hampton v. Columbia/HCA Healthcare Corp.*, 318 F.3d 214, 216-17 (D.C. Cir. 2003) (appeal permitted where civil action consolidated only to the extent permitted by Section 1407 because it "retained its separate status and the order dismissing it was a final judgment, appealable without the need for a Rule 54(b) certification"). Even the Ninth Circuit, which applies a categorical rule barring immediate appeal in consolidated cases absent a Rule 54(b) judgment, *see Huene v. United States*, 743 F.2d 703 (9th Cir. 1984) (adopting categorical rule barring immediate appeal) *and Lasalle v. Streich Lang PA*, 121 F.3d 716 (Table), 1997 WL 453702, at *1 (9th Cir. June 30, 1997) (applying *Huene* to case consolidated with others in MDL proceedings), recognizes that, "[w]ithin the context of MDL proceedings, individual cases that are consolidated or coordinated for pretrial purposes remain fundamentally separate actions, intended to resume their independent status once the pretrial stage of litigation is over," *In re Korean Air Lines Co., Ltd.*, 642 F.3d 685, 700 (9th Cir. 2011), and, moreover, that

viewed as an individual unit. *See id.* Thus, under Section 1407(a), "[e]ach action" must either be terminated prior to the conclusion of pretrial proceedings, thereby obviating remand, or remanded if not terminated. *See id.*

The Second Circuit's rule—which effectively holds that consolidation merges the various civil actions in the MDL so that appeals in one must await the resolution of the others—thus conflicts with the plain statutory language as well as this Court's reasoning in *Lexecon*, and should be reversed.

Finally, the statutory trigger for consolidation is also instructive. Under Section 1407, actions may be consolidated if they "involv[e] one or more common questions of fact . . . ." 28 U.S.C. § 1407(a). The statute tellingly does not permit consolidation when actions involve only common legal questions. Indeed, the legal theories underlying the various consolidated actions may be wide-ranging—as they are in this MDL. And when, as here, a consolidated action is dismissed pretrial on purely legal grounds, there is no reason to believe that the legal issues in that appeal will necessarily overlap with issues in pending consolidated actions, and therefore no reason to

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"considerations that animate the restrictions placed on a transferee court's exercise of jurisdiction over its MDL docket—including the principle that individual cases remain separate actions despite being coordinated or consolidated for pretrial purposes—do not dissipate because a particular case was filed in the MDL's home district." *Id*. at 700 n.13.

question the finality, or appealability, of that legal judgment.

3. Although this case was not consolidated pursuant to Federal Rule of Civil Procedure 42(a), the precedents interpreting that rule and its statutory predecessors likewise support the conclusion that consolidated actions retain their separate identities. Prior to the adoption of the Federal Rules of Civil Procedure, this Court construed the then-existing consolidation statute, 28 U.S.C. § 734, in *Johnson v. Manhattan Railway*, 289 U.S. 479 (1933). The Court there recognized that "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, or make those who are parties in one suit parties in another." *Id*. at 496-97.[11]

That holding is consistent with the Court's earlier decision in *Mutual Life Insurance Co. of New York v. Hillmon*, 145 U.S. 285 (1892), in which the Court construed Section 921 of the Revised Statutes, the predecessor to the statute construed in *Johnson*:

> [A]lthough the defendants might lawfully be compelled, at the discretion of the court, to try the cases together, the causes

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[11] For this reason, the Court held that a challenge to the appointment of a receiver in one case by a party in a separate case consolidated with the first was a collateral rather than direct attack, and thus could prevail only if the appointing judicial officer lacked the power to make the appointment. *Johnson*, 289 U.S. at 495-96.

> of action remained distinct, and required separate verdicts and judgments; and no defendant could be deprived, without its consent, of any right material to its defense, whether by way of challenge of jurors or of objection to evidence, to which it would have been entitled if the cases had been tried separately.

Hillmon, 145 U.S. at 293.[12]

Following adoption of the Rules of Civil Procedure in 1938, intra-district consolidation has been governed by Rule 42(a), which originally provided that courts had the power to order the consolidation of "actions of a like nature or involving a common question of law or fact." The term "consolidation" was not further defined, and thus neither the text nor the history of Rule 42 suggests any desire to depart from *Johnson* and *Hillmon*. Indeed, the original advisory committee note to Rule 42 clarified that the rule "continues the substance of U.S.C., Title 28, § 734," the statute construed in *Johnson*, except to the degree that the two differed expressly. Report of the Advisory Comm. on Rules for Civil Procedure 104 (1937), *available at* http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Reports/CV04-1937.pdf.

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[12] The Court therefore held that three defendants sued in three consolidated cases each were still entitled to three peremptory challenges, and that the trial court's allowance of only three peremptory challenges to defendants as a group was reversible error. *Hillmon*, 145 U.S. at 293-94.

The drafting history of Rule 42 supports the conclusion that it maintained the settled rule that consolidation does not mean merger. The Advisory Committee's preliminary draft of the rule would have empowered a court to "order all such actions consolidated in a single action, if they might originally have been joined in a single action under these rules." Gaylord A. Virden, *Consolidation Under Rule 42 of the Federal Rules of Civil Procedure*, 141 F.R.D. 169, 175 (1992) (italics omitted). This language, which would have abrogated *Johnson*, was deliberately omitted from the final version of the rule, in favor of language that never suggested merger into a "single action." This drafting history is compelling evidence that Rule 42(a) consolidation was not intended to merge separate civil actions into one. *Cf. I.N.S. v. Cardoza-Fonseca*, 480 U.S. 421, 442-43 (1987) ("Few principles of statutory construction are more compelling than the proposition that Congress does not intend *sub silentio* to enact statutory language that it has earlier discarded in favor of other language.").[13]

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[13] In addition to striking proposed language that would have effected a merger of civil actions through consolidation, the final version of Rule 42 removed earlier proposed language that would have provided for splitting a civil action into two or more civil actions. In the final version of the Rules, the action-splitting function instead was addressed in Rule 21. *See* Virden, *supra*, at 179-81. This provides further evidence that consolidation was always intended to be a separate mechanism, with different purposes, than both merger and separation.

The structure of the Federal Rules likewise indicates that Rule 42(a) consolidation does not merge civil actions. In particular, Rule 20 provides for the permissive joinder of parties if two conditions are met. First, the claims must arise "out of the same transaction, occurrence, or series of transactions or occurrences." Fed. R. Civ. P. 20(a)(1)(A). Second, a "question of law or fact common to all" of them will arise in the action. *Id*. 20(a)(1)(B). If these conditions are met, then the plaintiffs may join "in one action." *Id*. 20(a)(1). The "same transaction" requirement differs from the requirements of Rule 42, which permits consolidation if "actions before the court involve a common question of law or fact." Fed. R. Civ. P. 42(a). Permitting parties to merge multiple cases into a single action via consolidation would therefore permit them to circumvent the "same transaction" requirement of Rule 20.

In other circumstances, the Federal Rules of Civil Procedure refer to an "action" in ways that only make sense if consolidated actions retain their separate character. For example, Rule 4(m) permits a defendant to secure dismissal of an action if service of process was not timely made. In consolidated litigation involving multiple complaints against the same defendant, the defendant can pursue the defense against those complaints that were not properly served, without also having to show that there was no service of the other consolidated complaints. Another example: plaintiffs may dismiss "an action" without a court order by securing "a stipulation of dismissal signed by all parties who have appeared." Fed. R. Civ. P. 41(a)(1)(A)(ii). The plaintiff can obtain such a

dismissal with signatures from all parties appearing in the plaintiff's own action; she need not additionally secure the signatures of parties in all other actions subject to a consolidation order. A final example: a federal court must dismiss "the action" if it finds that it lacks subject-matter jurisdiction. *See* Fed. R. Civ. P. 12(h)(3). But when civil actions are consolidated, that determination must be made for each separate civil action, and not for the litigation as a whole.

This Court has seldom opined on the nature and effect of consolidation under Rule 42(a)—but its few opinions in this area have been consistent with *Johnson* and *Hillmon*. In *Butler v. Dexter*, 425 U.S. 262 (1976) (per curiam), the Court held that it lacked appellate jurisdiction to review the ruling of a three-judge district court because the plaintiff's case did not raise the unconstitutionality of a state statute. In so holding, the Court considered the fact that the case had been "consolidated in the District Court with several other cases, at least some of which did bring into question the constitutionality of a state statute." *Id*. at 267 n.12. That did not alter the outcome, however, because "[e]ach case before this Court . . . must be considered separately to determine whether or not this Court has jurisdiction to consider its merits." *Id*. This conclusion is consistent with *Johnson*'s holding that consolidation does not merge individual cases into one case, and *Hillmon*'s holding that consolidated actions remain distinct.

More recently, in *Shady Grove Orthopedic Associates, P.A. v. Allstate Insurance Co.*, 559 U.S. 393, 408 (2010) (plurality opinion), the Court explained

that Rule 42(a) consolidation "neither change[s] plaintiffs' separate entitlements to relief nor abridge[s] defendants' rights; [it] alter[s] only how the claims are processed." The plurality further explained that class actions under Rule 23 are a "species" of joinder under Rule 18—but did not group Rule 42 with those rules, again reaffirming that consolidation does not merge actions into a single case. *See id.*; *see also Sprint Commc'ns Co., L.P. v. APCC Servs., Inc.*, 554 U.S. 269, 291 (2008) (listing Rule 42(a) consolidation as one method "by which multiple similarly situated parties get similar claims resolved at one time and in one federal forum," but not stating or suggesting that Rule 42(a) consolidation merges separate civil actions into one).

Some circuit courts have questioned whether *Johnson* requires the conclusion that consolidated actions retain their separate identities in all cases. *See, e.g.*, *Schnabel v. Lui*, 302 F.3d 1023, 1035-36 (9th Cir. 2002); *Sandwiches, Inc. v. Wendy's Int'l, Inc.*, 822 F.2d 707, 710 (7th Cir. 1987); *Ringwald v. Harris*, 675 F.2d 768, 770 (5th Cir. 1982). For the reasons explained above, these courts are incorrect; indeed, the Seventh Circuit acknowledged that its conclusion was "not ideal," and "appears to make jurisdiction turn on an irrelevancy"—in that case, whether the plaintiff chose to consolidate two related cases or not. *See Sandwiches*, 822 F.2d at 710. Moreover, consistent with the plain statutory language as interpreted in *Lexecon*, actions consolidated for pretrial purposes under Section 1407(a) clearly do retain their separate identity, such that a decision dismissing one of the consolidated actions is properly regarded as a final

judgment falling within the traditional core of "final decisions" appealable under Section 1291. *See Brown v. United States*, 976 F.2d 1104, 1107 (7th Cir. 1992).

II. This Case Illustrates Why Immediate Appeal Is Desirable.

This case demonstrates why an immediate appeal is not only required by the applicable statute and rules, but desirable as well. Allowing petitioners to appeal now will promote judicial economy by preventing both a significant potential duplication of efforts by the parties and the judiciary, and a delay in the overall resolution of the LIBOR litigation.

1. Congress enacted Section 1407 in order to promote "coordinated or consolidated pretrial proceedings" in cases that share "common questions of fact." 28 U.S.C. § 1407(a).[14] The statute yields some of its greatest benefits during discovery, which often is expensive and time-consuming.

In this case, the Judicial Panel on Multidistrict Litigation correctly concluded that a significant common core of factual information underlies all of the LIBOR cases. *See In re Libor-Based Fin. Instruments Antitrust Litig.*, 802 F. Supp. 2d 1380 (J.P.M.L. 2011). Petitioners' antitrust claim arises from respondents' alleged contract, combination, or conspiracy in

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[14] In contrast with Section 1407(a), subsection (h), which applies only to antitrust litigation commenced by state attorneys general *parens patriae*, provides for consolidation "for both pretrial purposes and for trial."

unreasonable restraint of trade, in violation of 15 U.S.C. § 1. Other plaintiffs have brought additional claims, including for violations of the Commodity Exchange Act, 7 U.S.C. § 1 *et seq*., for aiding and abetting such violations, and for various state law violations.

The factual information germane to all of these claims encompasses the actions of sixteen banks over a period of years, at least from 2007 until 2010. Discovery will include the various transactions and communications of each of those institutions internally, between and among themselves, and with third parties, such as the BBA, regulators, transactional intermediaries, and market reporting entities. Economic data, such as prevailing interest rates and facts peculiar to each bank's financial condition during the relevant period,[15] will also need to be developed by many plaintiffs, since such data may bear directly upon the artificiality of the LIBOR rates submitted by each bank each day and the measure of damages for various claims. These matters are extensive and highly complex. Discovery and factual development will undoubtedly be expensive and challenging.

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[15] Since each bank's daily LIBOR submission is supposed to reflect the rate at which that bank could borrow unsecured funds overnight, the quoted rate would be expected to reflect, among other factors, the relative risk of lending money to the quoting bank as opposed to another bank in a different financial condition.

But while other parties, with other claims, proceed to discovery, petitioners and their antitrust claim remain on the sidelines. Indeed, it appears that none of the antitrust claims in the LIBOR MDL can survive the district court's antitrust dismissal rationale, as defendants explained in their letter to the district court. *See supra* at 7; J.A. 304. If petitioners' appeal is delayed, but ultimately successful, then the entire discovery and trial preparation effort will need to be repeated for petitioners' antitrust claim. This duplication would conflict with the interests of the litigants and the public in "the just, speedy, and inexpensive determination of every action and proceeding," Fed. R. Civ. P. 1, with discovery principles reflected in Federal Rule of Civil Procedure 26(b)(2)(C), which directs courts to prevent unreasonably duplicative, burdensome, or expensive discovery,[16] and with the purpose of coordination under Section 1407, which is to eliminate "multiplied

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[16] *See*, *e.g.*, *Tank Connection, LLC v. Haight*, No. 13-cv-1392-JTM-TJJ, 2014 WL 3361760, at*3 (D. Kan. July 9, 2014) ("Plaintiff should not be compelled at this time to produce information . . . that may be duplicative of information Defendant Haight has already turned over to the Receiver."); *In Re: C. R. Bard, Inc., Pelvic Repair Sys. Prod. Liability Litig.*, MDL No. 2187, 2014 U.S. Dist. LEXIS 89147, at *466 (S.D.W.Va. June 30, 2014) (in part limiting "the scope of the deposition to matters that are not cumulative, duplicative, [or] available through other sources . . ."); *Helget v. City of Hays*, No. 13-2228-KHV/KGG, 2014 U.S. Dist. LEXIS 86095, at *25 (D. Kan. June 25, 2014) ("[T]he Court does not want to impose unnecessarily costly or unreasonably duplicative discovery on Defendant City.").

delay, confusion, conflict, inordinate expense and inefficiency." *In re Plumbing Fixtures Cases*, 298 F. Supp. 484, 495 (J.P.M.L. 1968). An immediate appeal, by contrast, preserves the potential that any antitrust discovery can be coordinated with discovery on other claims, thereby saving costs and effort for all parties.

In addition to injecting uncertainty and expense into the discovery process, delaying petitioners' appeal will disrupt the orderly resolution of the LIBOR litigation. The LIBOR MDL encompasses not only actions filed in the Southern District of New York, but also actions transferred there from district courts in California, Illinois, Iowa, Kansas, Massachusetts, Minnesota, New Jersey, New York, Ohio, Pennsylvania, Texas, Virginia, and Wisconsin. *See* J.A. 29, 56-58, 66, 68, 84, 88, 92, 109, 123, 139, 154-55 (transfer orders at MDL docket entries 1, 248, 253, 261, 263, 291, 308, 368, 378, 380, 390, 437, 475, 512, 561, 566). Any complaints that avoid dismissal will be remanded to their home districts after pretrial procedures. When that happens, the inevitable post-trial appeals will be heard by as many as ten different circuits.[17] That will undermine "one of the objectives of the final judgment rule," which is to "ensure only a single appeal" relating to each issue. *U.S. ex rel. Hampton v. Columbia/HCA Healthcare Corp.*, 318 F.3d 214, 217 (D.C. Cir. 2003); *see also Utah v. Am. Pipe & Constr. Co.*, 316 F. Supp. 837, 839 (C.D. Cal.

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[17] The First, Second, Third, Fourth, Fifth, Sixth, Seventh, Eighth, Ninth, and Tenth Circuits.

1970) (explaining that denying immediate appeals in this case would undermine "[o]ne of the purposes of § 1407," which is "to eliminate the potential for conflicting contemporaneous pretrial rulings by coordinate district and appellate courts in multidistrict related civil actions") (internal quotation marks and footnote omitted). Indeed, it is possible that all ten circuits will be considering the appeals at the same time, without the benefit of rulings from each other, since the rationale of the Second Circuit is that no dismissal is appealable until a final judgment is entered disposing of all claims and all parties in *all* of the cases in the MDL proceeding. Even if the appeals are staggered, there will likely be overlap between them, as well as the potential for conflicting adjudications.

Disallowing an immediate appeal in an MDL also creates the potential for confusion and the undue loss of appellate rights. The timely filing of a notice of appeal is "mandatory and jurisdictional." *Browder v. Director, Dep't. of Corr.*, 434 U.S. 257, 264 (1978) (quotation marks and citation omitted). Under the Second Circuit's rule, it is unclear whether petitioners are permitted to appeal once the pretrial proceedings in all of the consolidated actions conclude, or whether they must wait until all of the actions are litigated to final judgment in their home jurisdictions. The latter possibility is daunting indeed, as petitioners would have to monitor all of the dockets after the consolidated actions are remanded to ensure that they file their notice of appeal in a timely manner—after the last consolidated action concludes. And the choice

between the two possibilities is not dictated by any statute, rule, or precedent.

2. The fact that these practical concerns exist at all discredits the Second Circuit's rule, and counsels in favor of a clear rule permitting immediate appeals. This Court's precedents recognize that when the potential loss of appellate rights is at stake, "litigants ought to be able to apply a clear test" to determine the manner in which their appeal must be perfected. *Heckler*, 465 U.S. at 876. The Second Circuit's case-by-case approach is anything but clear. That court holds that there is a "strong presumption" that adverse decisions in consolidated cases are not final, which can be overcome only in "highly unusual circumstances." But the court of appeals has never explained what those circumstances are. Consequently, whether a decision is appealable or not is subject to the whims of a particular panel—and different panels facing comparable facts have reached opposing conclusions. *Compare Kamerman v. Steinberg*, 891 F.2d 424, 429-30 (2d Cir. 1989) (finding "highly unusual circumstances" when the action at issue was the only one presenting derivative (shareholder) claims, when the district court had decided all such claims in the defendant's favor, and when the district court had intended its judgment to be final) *with* Pet. App. 2a (finding no jurisdiction because the district court's order "did not dispose of all claims in the consolidated action," even though petitioners' complaints were "dismissed in their entirety," Pet. App. 219a, and the district court thus believed that petitioners were "in a position to appeal

as of right" *id*. 220a). The ambiguity inherent in this standard thus threatens appellate rights and ensures wasteful litigation in a way that a categorical rule would not.

The Second Circuit's rule thus guarantees confusion and waste because in order to ensure that the right to appeal is not inadvertently waived by delay, every rational losing party will immediately file a protective notice of appeal. This, in turn, will force the courts of appeals to adjudicate the issue of appellate jurisdiction, needlessly consuming party and judicial resources. Describing the practical problems that arose from a prior version of Rule 54(b), this Court explained that it was "inherently difficult to determine" when particular claims were appealable. *Sears, Roebuck & Co. v. Mackey*, 351 U.S. 427, 434 (1956). "The result was that the jurisdictional time for taking an appeal from a final decision . . . in some instances expired earlier than was foreseen by the losing party. It thus became prudent to take immediate appeals in all cases of doubtful appealability and the volume of appellate proceedings was undesirably increased." *Id*.[18] A clear, categorical

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[18] *See Hageman*, 851 F.2d at 71 ("[W]e recognize that it is desirable to provide litigants with the clearest possible guidance concerning when a judgment is final so that premature appeals are avoided and opportunities to file timely notices of appeal are preserved."); *Huene v. United States*, 743 F.2d 703, 704 (9th Cir. 1984) ("[I]t is essential that the point at which a judgment is final be crystal clear because appellate rights depend upon it. The opportunity to appeal could be lost by a mistaken belief that the

rule permitting appeals from all decisions dismissing a complaint on the merits addresses this problem.

Against these considerations, there is no sound argument for not recognizing petitioners' right to an immediate appeal. The general policy underlying the final judgment rule—a preference against allowing piecemeal appeals in a single action—does not apply here because petitioners' entire action has been dismissed. The district court decided that petitioners had failed to state an antitrust injury as a matter of law. That decision effectively ended all of the antitrust litigation in the MDL, and there has never been any suggestion that further pretrial developments relating to the non-antitrust claims that remain in some of the cases will be germane to the resolution of the purely legal issues presented by petitioners' appeal. Thus, it makes no sense to hold up petitioners' appeal while the remaining actions in the MDL proceed.

2. Experience bears out the contention that permitting immediate appeals accelerates the progress of litigation and settlement. As explained in the Petition for a Writ of Certiorari, the majority of circuits would have permitted petitioners' appeal. The

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judgment is not final and a consequent failure to file timely a notice of appeal. On the other hand, uncertainty as to the finality of the judgment could lead to the premature filing of a notice of appeal with the consequent waste of time and resources."); *Spraytex, Inc. v. DJS&T*, 96 F.3d 1377, 1382 (Fed. Cir. 1996) (criticizing case-by-case approach because it may cause the premature filing of appeals).

First and Sixth Circuits employ categorical rules that the dismissal of a consolidated action is always appealable. Six additional circuits hold that when cases are consolidated only for pretrial purposes, they retain their separate identity such that a judgment of dismissal is appealable. In some instances, these approaches have been employed for decades with no apparent ill effects.

One instructive example is *In re: Katrina Canal Breaches Litigation*, 345 F. App'x. 1 (5th Cir. 2009). In that case, a class action lawsuit by Louisiana residents against the U.S. Army Corps of Engineers was consolidated with dozens of lawsuits against a host of defendants. The actions were not consolidated for all purposes, but rather solely for purposes of convenience and judicial economy. *See id.* at 4. In 2008, the district court dismissed the case against the Corps for failure to exhaust administrative remedies, and the plaintiffs appealed. *Id.* at 3-4. On June 30, 2009, the Fifth Circuit determined that it had jurisdiction because the cases were not consolidated for all purposes, and it affirmed. *See id.* at 4. The remaining consolidated cases were not finally resolved in the district court until June 24, 2014. Had the Fifth Circuit reversed, the plaintiffs and the Corps could have participated in the ensuing five years of district court proceedings. If the Second Circuit's rule had applied, however, the plaintiffs would have had to wait six years for their right to appeal, and the United States would have had to wait that long for its appellate victory.

Similarly, in *Evans v. Akers*, 534 F.3d 65, 69 (1st Cir. 2008), two ERISA class action lawsuits pursuing conflicting theories of liability were consolidated in Massachusetts. In the first action, *Evans*, the district court denied the motion for class certification and dismissed the action on December 6, 2006, *see Evans v. Akers*, 466 F. Supp. 2d 371, 378 (D. Mass. 2006); the plaintiffs appealed on January 3, 2007, obtaining a reversal on July 18, 2008, *see Evans*, 534 F.3d at 65. The second action, *Bunch v. W.R. Grace & Co.*, was certified as a class action on March 1, 2007. *See* 534 F.3d at 69 n.3. On cross motions for summary judgment, the *Bunch* plaintiffs' claim was terminated on January 30, 2008. *Id*. An appeal in *Bunch* was docketed on April 2, 2008, and the district court's judgment was affirmed on January 29, 2009. *See* 555 F.3d 1 (1st Cir. 2009). By that time, *Evans* had already been remanded, and had reached a settlement. Had the *Evans* plaintiffs been required to wait until the district court resolved *Bunch* before appealing, the case would have been delayed by at least a year.

And in *DaSilva v. Esmor Correctional Services, Inc.*, 167 F. App'x 303, 305 (3d Cir. 2006), detainees in a New Jersey prison brought three separate actions—*Brown* (a class action), *DaSilva* (a multi-party action), and *Jama* (another multi-party action)—alleging abusive and inhumane conditions at the facility. The cases were consolidated for discovery purposes. *Brown* settled, and the court ordered that notice should be mailed to class members on May 1, 1999, with an opt-out deadline of June 1, 1999. *See id.* at 306. The class included plaintiffs in the *DaSilva* and *Jama* actions. After notices proved difficult to deliver, the opt-out

deadline was extended several times, ultimately to July 23, 2003. *See id.* While some of the *Jama* plaintiffs opted out of the *Brown* settlement, none of the *DaSilva* plaintiffs did—their action was therefore dismissed. *Id*. The district court subsequently approved the *Brown* settlement in 2005. *See id.* at 307 n.3. While the *Jama* action was pending in the district court, the defendant appealed the extension of the opt-out deadline, and the *DaSilva* plaintiffs appealed the dismissal of their class claim. The Third Circuit held that it had jurisdiction, and that the consolidation of the actions did not render the judgment non-final. *See id*. A contrary rule would have put the *Jama* plaintiffs through the expense of a trial without knowing whether their opt-outs were valid, and it would have put the *Brown* settlement into a state of limbo pending the outcome of that trial, denying relief to the parties in the interim, thus directly contradicting the judicial policy favoring settlement, which seeks to resolve without delay the conflicting claims of the parties.

As these examples illustrate, the wisdom of the majority of circuits should govern here. A clear rule permitting appeals from consolidated actions that are dismissed facilitates finality and the orderly administration of justice.

III. Rule 54(b) Does Not Diminish Petitioners' Appeal Rights.

Respondents argue to the contrary that petitioners should not pursue an appeal as of right, but should instead request that the district court enter a partial final judgment under Federal Rule of Civil Procedure 54(b). *See* BIO 10. But Rule 54(b), by its terms, does

not apply to petitioners' action. Moreover, subjecting petitioners' appeal to Rule 54(b) would not serve the purpose of the rule, which is to speed—not delay—appeals.

1. The text of Rule 54(b) resolves this argument. It provides:

> Judgment on Multiple Claims or Involving Multiple Parties. When *an action* presents more than one claim for relief . . . 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.

Fed. R. Civ. P. 54(b) (emphasis added). Thus, by its terms, Rule 54(b) applies only to a single action—not to multiple separate actions consolidated only for pretrial purposes. Had petitioners' complaint alleged multiple grounds for relief, some of which had not been dismissed, then petitioners agree that they would have to pursue a Rule 54(b) judgment in order to appeal. But petitioners' complaint raised only a single claim for relief, and was dismissed "in [its] entirety." Pet. App. 220a. Consequently, Rule 54(b) is inapplicable.

Context confirms that the rule drafters meant what they said when they used the singular "action." This Court reviewed the history of Rule 54(b)'s adoption in *Sears, Roebuck & Co. v. Mackey*, 351 U.S. 427 (1956), observing that the motivation for its adoption came from the simultaneous adoption of a liberal rule of permissive joinder, permitting multiple claims in a single civil action:

> With the Federal Rules of Civil Procedure, there came an increased opportunity for the liberal joinder of claims in multiple claims actions. This, in turn, demonstrated a need for relaxing the restrictions upon what should be treated as a judicial unit for purposes of appellate jurisdiction. Sound judicial administration did not require relaxation of the standard of finality in the disposition of the individual adjudicated claims for the purpose of their appealability. It did, however, demonstrate that, at least in multiple claims actions, some final decisions, on less than all of the claims, should be appealable without waiting for a final decision on *all* of the claims. Largely to meet this need, in 1939, Rule 54(b) was promulgated in its original form through joint action of Congress and this Court.

Id. at 432-33 (footnote omitted). *See also Dickinson v. Petroleum Conversion Corp.*, 338 U.S. 507, 511-12 (1950) (explaining that Rule 54(b) was intended to deal

with difficulties arising from the joinder of disparate claims).[19]

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[19] The conclusion that Rule 54(b) applies to singular civil actions does not appear to be the subject of much dispute in the courts of appeals. *See, e.g., Robert Bosch, LLC v. Pylon Mfg. Corp.*, 719 F.3d 1305, 1331 n.1 (Fed. Cir. 2013) (Rule 54(b) "applies to multiple claims in a single action"); *U.S. Citizens Ass'n v. Sebelius*, 705 F.3d 588, 596 (6th Cir. 2013) (noting district court's recognition "'that Rule 54(b) is intended to strike a balance between the undesireability [sic] of more than one appeal in a single action and the need for making review available in multiple-party or multiple-claim situations at a time that best serves the needs of the litigants.") (internal quotation marks omitted); *Brooks v. Dist. Hosp. Partners, L.P.*, 606 F.3d 800, 806 (D.C. Cir. 2010) ("If appellants' claims were actually severed under Rule 21 and then dismissed, that would have meant *all* the claims in a *single civil action* were dismissed. A Rule 54(b) certification therefore would have been both inapplicable and unnecessary since the dismissal, standing alone, would have constituted an appealable final judgment."); *Vander Zee v. Reno*, 73 F.3d 1365, 1368 n.5 (5th Cir. 1996) ("The government suggests in its brief that this Court lacks jurisdiction to hear this appeal because the district court failed to certify a final judgment pursuant to Fed. R. Civ. P. 54(b). However, Rule 54(b) certification is required only when the district court directs the entry of a final judgment with respect to less than all of the parties or claims presented in a single action. When the district court severed the claims against the individual defendants and the United States from the original action, it created two separate actions. The district court then entered a judgment dismissing all of the claims before us today. Therefore, no Rule 54(b) certification was required to render the judgment final and appealable.") (citation omitted).

Rule 54(b) has also never been understood to apply when a district court's decision dismisses a complaint in its entirety. This Court said as much:

> The amended rule does not apply to a single claim action nor to a multiple claims action in which all of the claims have been finally decided. It is limited expressly to multiple claims 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.

351 U.S. at 435.[20] *See also Liberty Mut. Ins. Co. v. Wetzel*, 424 U.S. 737, 742-43 (1976) (holding that Rule 54(b) does not apply where the "complaint advanced a single legal theory which was applied to only one set of facts"). Indeed, "'final judgments' are at the core of matters appealable under § 1291," *Sullivan v. Finkelstein*, 496 U.S. 617, 628 (1990), and Rule 54(b) did not purport to change that.

All of this makes sense, because the purpose of Rule 54(b) was to accelerate appeals in actions involving multiple claims—not to delay them in

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[20] *Sears* was decided before the 1961 amendment to Rule 54(b), which added language to clarify that the Rule applies not only to multiple claim cases, but also to multiple party cases. *See Liberty Mut.*, 424 U.S. at 744 n.3 ("Rule [54(b)] was amended to insure that orders finally disposing of some but not all of the parties could be appealed pursuant to its provisions."); *see also* Fed. R. Civ. P. 54(b), advisory committee note (1961). The amendment did not make Rule 54(b) applicable to the complete termination of a civil action.

actions involving a single claim. Respondents' proposed rule would turn the purpose of Rule 54(b) on its head.

2. Indeed, Rule 54(b) cannot be read so broadly. In *Sibbach v. Wilson*, 312 U.S. 1, 10 (1941), this Court established that the delegation of rulemaking power under the Rules Enabling Act, now codified at 28 U.S.C. § 2072, does not authorize the expansion or contraction of jurisdiction conferred by statute. *See also Willy v. Coastal Corp*., 503 U.S. 131, 135 (1992); *Snyder v. Harris*, 394 U.S. 332, 337-38 (1969). The Rules of Civil Procedure must be construed consistently with the limitations of the rulemaking power conferred by the Rules Enabling Act, or, if such a construction is not available, not applied at all. *See Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co.*, 559 U.S. 393, 423 (2010) (Stevens, J., concurring in part and concurring in the judgment) ("[W]hen such a 'saving' construction is not possible and the rule would violate the Enabling Act, federal courts cannot apply the rule."). Accordingly, any construction and application of the Rules that has the effect of directly limiting the appellate jurisdiction conferred by Section 1291 is by definition legal error.

Prior to the adoption of the Second Circuit's rule in *Hageman*, and similar rules in other circuits, it was always clear that a plaintiff had the right under Section 1291 (or its predecessor) to appeal a district court decision that terminated his or her action by dismissing all of the plaintiff's claims against all defendants, leaving nothing more for the district court to do. *See Catlin v. United States*, 324 U.S. 229, 236

(1945) (had motion to dismiss entire action been granted, "clearly there would have been an end of the litigation and appeal would lie within Section 128 [Section 1291's predecessor]."). Plaintiffs' right to appeal such a final judgment long predated adoption of the Rules. *See Sears*, 351 U.S. at 432 n.3 ("In cases involving multiple parties where the alleged liability was joint, a judgment was . . . appealable [if] it terminated the action as to all the defendants.") (citing *Hohorst v. Hamburg-American Packet Co.*, 148 U.S. 262 (1893)). Further, as noted above, prior to the adoption of the Rules, this Court had held in *Johnson*, 289 U.S. at 496-97, that consolidation does not merge separate cases into one; and this Court thus permitted appeals from judgments that disposed of one or more but not all cases subject to a consolidation order. *See, e.g.*, *United States v. River Rouge Improvement Co.*, 269 U.S. 411, 413-14 (1926); *Withenbury v. United States*, 72 U.S. 819, 821-22 (1866).

Thus, when the Rules were adopted, it was well established that the predecessor to Section 1291 granted appellate jurisdiction over district court orders terminating a plaintiff's entire civil action. No construction of the Federal Rules that would justify abridging petitioners' appeal rights is therefore consistent with the Rules Enabling Act, and therefore no such construction is permissible.

Nothing in the language or history of Rules 42(a) and 54(b) purported to contract Section 1291 appellate jurisdiction over the complete termination of a civil action by requiring a Rule 54(b) judgment when the terminated action has been consolidated with other

civil actions still pending, nor can they, under *Sibbach*, be interpreted to have that effect. *Cf. Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 620 (1997) ("[O]f overriding importance, courts must be mindful that [Rule 23] as now composed sets the requirements they are bound to enforce. Federal Rules take effect after an extensive deliberative process involving many reviewers . . . . The text of a rule thus proposed and reviewed limits judicial inventiveness.").[21]

Finally, the application of Rule 54 is unnecessary to achieve what respondents describe as its principal virtue: flexibility. This is because even a categorical rule regarding finality will not undermine courts' ability to control their dockets. Courts have a variety of mechanisms to ensure orderly adjudication. Indeed,

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[21] In 1990, Congress added a new subsection to Section 2072, authorizing the Court, through the rulemaking procedure, to "define when a ruling of a district court is final for the purposes of appeal under section 1291 . . . ." 28 U.S.C. § 2072(c). This new provision may provide the Court with the authority to expand or contract Section 1291 jurisdiction of the courts of appeals by adopting rules that define finality. Assuming Section 2072 creates that power, it did not exist when Rules 42 and 54 were adopted and when Rule 54(b) was amended; nor has rulemaking authority conveyed in the new subsection been invoked by the Court since its enactment in 1990. Accordingly, Rules 42(a) and 54(b) must, like all Rules adopted prior to the 1990 enactment of Section 2072(c), be interpreted consistently with this Court's holding in *Sibbach*, 312 U.S. at 10, that the delegation of rulemaking power under the Rules Enabling Act did not authorize the expansion or contraction of jurisdiction conferred by statute.

"[i]n discretionary matters going to the phasing, timing, and coordination of the cases, the power of the MDL court is at its peak." *In re Korean Air Lines Co., Ltd.*, 642 F.3d 685, 700 (9th Cir. 2011). District courts may set briefing and discovery schedules; they may designate lead counsel to ensure an orderly presentation of claims, or they may hold some cases in abeyance while proceeding with others. *See id*. And if a court concludes that separate civil actions raise closely related issues, it will often (for that very reason) decide all the motions to dismiss them together, thus facilitating a simultaneous appeal. Like the district courts, courts of appeals also have mechanisms to control their dockets. If unusual circumstances warrant, they can stay an appeal until parallel litigation concludes in the district court. *See, e.g.*, *In re Food Lion, Inc., Fair Labor Standards Act Effective Scheduling Litig*., 73 F.3d 528, 533 (4th Cir. 1996).

CONCLUSION

The judgment of the Second Circuit should be reversed.

Respectfully submitted,

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