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.

CREDIT SUISSE GROUP AG, *et al*.,
Respondents.

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

BRIEF OF MAYOR AND CITY COUNCIL OF BALTIMORE, CITY OF NEW BRITAIN FIREFIGHTERS' AND POLICE BENEFIT FUND, TEXAS COMPETITIVE ELECTRIC HOLDINGS COMPANY, LLC, YALE UNIVERSITY, THE REGENTS OF THE UNIVERSITY OF CALIFORNIA, COUNTY OF SAN MATEO, THE SAN MATEO COUNTY JOINT POWERS FINANCING AUTHORITY, CITY OF RICHMOND, THE RICHMOND JOINT POWERS FINANCING AUTHORITY, SUCCESSOR AGENCY TO THE RICHMOND COMMUNITY REDEVELOPMENT AGENCY, CITY OF RIVERSIDE, THE RIVERSIDE PUBLIC FINANCING AUTHORITY, COUNTY OF SAN DIEGO, EAST BAY MUNICIPAL UTILITY DISTRICT, SAN DIEGO ASSOCIATION OF GOVERNMENTS, COUNTY OF SONOMA, DAVID E. SUNDSTROM, IN HIS OFFICIAL CAPACITY AS TREASURER FOR THE COUNTY OF SONOMA, AND COUNTY OF SACRAMENTO AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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INTEREST OF *AMICI CURIAE*[1]

Amici are plaintiffs—including cities, counties, pension funds, educational institutions, and corporations—that have filed actions concerning the manipulation of the London Interbank Offered Rate ("LIBOR"), currently pending in the United States District Court for the Southern District of New York (*In re LIBOR-Based Financial Instruments Antitrust Litig.*, No. 11-MD-2262). *Amici* Mayor and City Council of Baltimore, Yale University, City of New Britain Firefighters' and Police Benefit Fund, and Texas Competitive Electric Holdings Company LLC purchased LIBOR-based instruments from one or more of the banks that served on the panel that set LIBOR. The district court designated their counsel as interim class counsel for a putative class of persons who purchased LIBOR-based instruments "over the counter" from the panel banks (the OTC plaintiffs). Pet. App. 9a. The OTC plaintiffs, like petitioners, have been consolidated for pretrial purposes with the other LIBOR-related class actions (Pet. App. 11a); *amici* thus have a strong interest in the rules governing appeals in cases subject to the consolidation order.

SUMMARY OF ARGUMENT

The Second Circuit refused to allow petitioners to appeal the dismissal of their action, holding that the right of appeal will not attach until the entire LIBOR consolidated multidistrict proceeding is complete. The

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[1] *Amici* provided petitioners and respondents with timely notice of their intent to file this brief. All parties have consented to the filing of this brief. No counsel for a party has authored this brief in whole or in part, and no person or entity other than *amici* or their counsel made any monetary contribution intended to fund the preparation or submission of this brief.

judicially-crafted doctrine underlying the Second Circuit's decision not only conflicts with Congress's decision to confer appellate jurisdiction over "*all* final decisions of the district courts," 28 U.S.C. § 1291 (emphasis added); *see* Pet. Br. at 16–29, but it forestalls appellate review—potentially for many years—of an unprecedented ruling by the district court on a critical issue of antitrust law: Whether the banks' conspiracy to fix LIBOR, a key component of price in LIBOR-based instruments, caused purchasers and holders of those instruments an antitrust injury.

The district court answered this question in the negative, rejecting decades of precedent in interpreting Section 4 of the Clayton Act. This decision ended all antitrust claims at the pleadings stage in the LIBOR consolidated proceeding, and resulted in the dismissal of petitioners' case in full. *Amici* respectfully submit that the district court's decision was not only incorrect, but departed radically from this Court's cases interpreting the antitrust injury requirement. While the merits of that decision are not under review, the strength of petitioners' appeal underscores "the danger of denying justice by delay" (*Dickinson v. Petroleum Conversion Corp.*, 338 U.S. 507, 511 (1950)) caused by the Second Circuit's rejection of the appeal, one of the key policy considerations supporting early appealability identified by this Court.

The district court's decision was wrong for at least three reasons. *First*, the decision conflicts with decades of this Court's precedent holding that a monetary loss suffered by a consumer due to a price-fixing conspiracy—the harm alleged here—is an actionable antitrust injury under the Clayton Act. *Second*, this Court has repeatedly noted that horizontal price-fixing, a *per se* violation of the antitrust laws, entails an "obvious" and "inherent" risk of anticompetitive impact; nevertheless, the district court improperly concluded that defendants' conduct—pled as

price-fixing—was "not anticompetitive," a holding that turns the *per se* rule on its head. *Third*, the district court rested its decision on its own factual assumptions about the LIBOR rate-setting process—assumptions that were not just contrary to petitioners' allegations but factually incorrect. This was plainly improper at the pleadings stage, before any discovery has taken place.

This case starkly presents the danger of denying justice by delay: about two and a half years have already passed since petitioners filed their original complaint (*see* Jt. App. at 5), a year and a half since the district court dismissed petitioners' amended complaint (*see* Jt. App. at 11–19), and there is no end in sight to the remaining LIBOR proceedings: just last month, the district court lifted the stay on multiple LIBOR individual and putative class actions and requested submissions from the parties on additional motions to dismiss. *See* Jt. App. 297–361. Preventing petitioners from appealing the district court's order leaves them to sit on the sidelines while the remaining LIBOR litigation runs its course, and will require the parties—after reversal—to redo fact discovery and expert analysis to take account of claims that were improperly dismissed. That outcome is inequitable, unjust, and wasteful. For these reasons, *amici* respectfully submit that the Second Circuit's refusal to hear petitioners' appeal should be reversed.

ARGUMENT

I. Decades of Precedent Recognize Consumer Losses From Price-Fixing Constitute Antitrust Injury.

LIBOR is the world's most important benchmark for short-term interest rates. It is also a key component of

price in trillions of dollars of financial instruments, including the floating-interest rate bonds held by petitioners, and the interest-rate swap transactions purchased by many of the *amici*. Respondents are banks who participate in the LIBOR rate-setting process and who, petitioners alleged, conspired to manipulate that benchmark by suppressing LIBOR during the period August 2007 to May 2010. Because the payments received by petitioners on their bonds, and by *amici* on their interest rate swaps, were based on LIBOR, those payments were reduced as well.[2] Pet. App. 29a. For this reason, plaintiffs received less than they were entitled to as a direct result of the banks' conspiracy. *Id.*

It is well-established that consumer losses caused by the fixing of a product's price, such as the losses alleged in the complaints below, constitute an antitrust injury under Section 4 of the Clayton Act. *See, e.g., Chattanooga Foundry & Pipe Works v. City of Atlanta*, 203 U.S. 390, 396 (1906) (holding that purchasers could recover treble damages for collusive overcharges caused by price-fixing cartel); *In re DDAVP Direct Purchaser Antitrust Litig.*, 585 F.3d 677, 688 (2d Cir. 2009) ("In this case, the plaintiffs are purchasers

[2] LIBOR was created to serve as a benchmark for short term interest rates that could be used as a basis for re-setting rates payable on floating rate debt. Although the language has since been removed from its website, the BBA itself described LIBOR as a "unique snapshot of competitive funding costs." *See* BBA website material reproduced at http://www.swap-rates.com/BBALiborrates.html. The district court recognized that "it is precisely because LIBOR was thought to accurately represent prevailing interest rates in that market that it was so widely utilized as a benchmark in financial instruments." Pet. App. 53a.

of the defendants' product who allege being forced to pay supra-competitive prices as a result of the defendants' anticompetitive conduct. Such an injury plainly is 'of the type the antitrust laws were intended to prevent.'" (citing *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 489 (1977)); *Knevelbaard Dairies v. Kraft Foods, Inc.*, 232 F.3d 979, 988 (9th Cir. 2000) ("When horizontal price fixing causes buyers to pay more, or sellers to receive less, than the prices that would prevail in a market free of the unlawful trade restraint, antitrust injury occurs."); 2A PHILIP E. AREEDA & HERBERT HOVENKAMP, ANTITRUST LAW ¶ 391b (3d ed. 2007) (injuries to buyers or sellers from horizontal price fixing present "the easy cases" of antitrust injury).

The district court agreed that the plaintiffs' allegations "might suggest that defendants fixed prices and thereby harmed plaintiffs," Pet. App. 43a, but it nevertheless concluded that the harm plaintiffs suffered did not result from any anticompetitive aspect of the banks' conduct. *Id*. But this gets the law backward. Injuries resulting from the fixing of a product's price are *the most widely recognized* type of antitrust injury: in fact, *no reported case in history* has failed to find an antitrust injury in this situation. The district court's decision was a radical departure from over a century of precedent recognizing that purchasers of price-fixed products have sustained antitrust injury.[3]

[3] Where a consumer suffers a direct loss resulting from a price-fixing conspiracy, plainly the plaintiffs' injury is rooted in a "competition-reducing aspect or effect of the defendant's behavior." *Atlantic Richfield Co. v. USA Petroleum Co.*, 495 U.S. 328, 344 (1990). In conducting a further inquiry into whether that price-fixing occurred in the context of a "cooperative endeavor" as opposed to a "competitive" process, Pet. App. 44a, the district court decision engrafted "artificial limitations on the §4 remedy" that have *never* been previously applied, precisely what this Court has counseled against (*see Blue Shield of Va. v.*

II. The Alleged Conduct Entailed "An Obvious Risk of Anticompetitive Impact."

There is no question that defendants' conspiracy to fix LIBOR, a key component of price, constitutes a *per se* restraint of trade. *See Catalano, Inc. v. Target Sales, Inc.*, 446 U.S. 643, 645-47 (1980) (holding that credit is one component of the overall price paid for a product, that an

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McCready, 457 U.S. 465, 472 (1982) (noting that §4 has "little in the way of restrictive language," reflecting "Congress' expansive remedial purpose," and noting "The Act is comprehensive in its terms and coverage, protecting all who are made victims of the forbidden practices by whomever they may be perpetrated" (quotations omitted))) and contrary to this Court's admonition that "the machinery employed by a combination for price-fixing is immaterial." *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 223 (1940).

Further, even if the submission of LIBOR rates were somehow cooperative, this Court has long held that cooperative association activities can give rise to actionable violations of Section 1 of the Sherman Act in circumstances similar to these. *See, e.g. MCI Telecomms. Corp. v. AT&T Co.*, 512 U.S. 218, 233 (1994)("The Court itself has policed trade associations and rate bureaus under the antitrust laws precisely because the sharing of pricing information can facilitate price fixing"); *Allied Tube & Conduit Corp. v. Indian Head, Inc.*, 486 U.S. 492, 506-509 (1988) ("[P]rivate standard-setting by associations comprising firms with horizontal and vertical business relations is permitted at all under the antitrust laws only on the understanding that it will be conducted in a nonpartisan manner offering procompetitive benefits. . . . [T]he hope of procompetitive benefits depends upon the existence of safeguards sufficient to prevent the standard-setting process from being biased by members with economic interests in restraining competition"); *American Column & Lumber Co. v. United States*, 257 U.S. 377 (1921) (affirming permanent injunction against American Hardwood Manufacturers' Association "Open Competition Plan" because it was used by trade association to control output and price).

agreement to eliminate credit was a form of price fixing, and that "an agreement to fix prices is unlawful *per se*"). The arrangements are *per se* illegal precisely because fixing a component of price "entails an obvious risk of anticompetitive impact." *Catalano*, 446 U.S. at 649; *see also Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752, 768 (1984) ("Certain agreements, such as horizontal price fixing . . . are thought so inherently anticompetitive that each is illegal per se without inquiry into the harm it has actually caused."); *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 218 (1940) ("'Agreements for price maintenance of articles moving in interstate commerce are, without more, unreasonable restraints within the meaning of the Sherman Act because they eliminate competition . . . .'" (quoting *United States v. Trenton Potteries Co.*, 273 U.S. 392 (1927))).

Given over a century's worth of this Court's precedents attesting to the "obvious" and "inherent" risk of anticompetitive impact in this context, petitioners surely pleaded at least a *plausible* antitrust injury against respondents. *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555-56 (2007) (plausibility turns on whether there is "enough to raise a right to relief above the speculative level on the assumption that all the allegations in the complaint are true (even if doubtful in fact)" (footnote omitted) (citations omitted)); *cf. Darush v. Revision LP,* No. 12-10296, 2013 WL 8182502, at *5 (C.D. Cal. July 16, 2013) ("[T]he case will be quite rare in which a *per se* violation ... does not cause competitive injury." (quotation and citation omitted)).

Nevertheless, the district court held the defendants' conduct was not anticompetitive as a matter of law. *See* Pet. App. 43a ("Defendants' Alleged Conduct Was Not Anticompetitive."). But this creates the paradoxical situation that conduct declared not to be anticompetitive as a matter of law is nevertheless a *per se* violation of the

Sherman Act and grounds for criminal prosecution. And in conflict with the district court's decision, at least one defendant—after the motion to dismiss briefing was complete but before the district court issued its decision—agreed to a deferred prosecution agreement with the Department of Justice based on charges of *criminal* price-fixing involving Yen LIBOR.[4]

The district court's decision undermines the *per se* rule by foreclosing private plaintiffs from even commencing discovery despite the existence of an antitrust violation that is *presumptively* anticompetitive and the basis for criminal liability.

As the Third Circuit observed:

> [R]equiring a plaintiff to demonstrate that an injury stemming from a per se violation of the antitrust laws caused an actual, adverse effect on a

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[4] One of the defendants, Royal Bank of Scotland PLC, was charged with "one count of price-fixing" in violation of Section 1 of the Sherman Act for its participation in the conspiracy to manipulate the Yen LIBOR benchmark. Deferred Prosecution Agreement at ¶ 1, *United States v. The Royal Bank of Scotland PLC*, No. 3:13-cr-00074-MPS (D. Conn. 2013), *available at* http://www.justice.gov/iso/opa/resources/28201326133127414481.pdf. In the deferred prosecution agreement, RBS admitted that LIBOR is a component of price and that conspiring to manipulate LIBOR is a restraint of trade. *Id.* at ¶ 81-82. In particular, RBS acknowledged its legal responsibility for the acts charged in the Information, *id.* at ¶2, which alleged that RBS "engaged in a combination and conspiracy in unreasonable restraint of interstate and foreign commerce . . . the substantial terms of which were to fix the price of Yen LIBOR-based derivative products by fixing Yen LIBOR, a key component of the price thereof, on certain occasions." *See* Information at ¶ 2, *United States v. The Royal Bank of Scotland PLC*, No. 3:13-cr-00074-MPS (D. Conn. 2013), *available at* http://www.justice.gov/atr/cases/f296500/296519.pdf.

> relevant market in order to satisfy the antitrust injury requirement comes dangerously close to transforming a per se violation into a case to be judged under the rule of reason. The per se standard is reserved for certain categories of conduct which experience has shown to be "manifestly anticompetitive." *Continental T.V., Inc. v. GTE Sylvania Inc.*, 433 U.S. 36, 39 (1977). That standard, which is based on considerations of "business certainty and litigation efficiency," *Arizona v. Maricopa County Med. Society*, 457 U.S. 332, 344 (1982), allows a court to presume that certain limited classes of conduct have an anticompetitive effect without engaging in the type of involved, market-specific analysis ordinarily necessary to reach such a conclusion. *See Business Electronics Corp. v. Sharp Electronics Corp.*, 485 U.S. 717, 723, 108 S.Ct. 1515, 99 L.Ed.2d 808 (1988) ("Certain categories of agreements, however, have been held to be per se illegal, dispensing with the need for case-by-case evaluation."). *Were we to accept the defendants' construction of the antitrust injury requirement, we would, in substance, be removing the presumption of anticompetitive effect implicit in the per se standard under the guise of the antitrust injury requirement.*

Pace Elecs., Inc. v. Canon Computer Sys., Inc., 213 F.3d 118, 123 (3d Cir. 2000) (emphasis added and footnote omitted). The district court, by holding that defendants conduct "[w]as [n]ot [a]nticompetitive" (Pet. App. 43a), effectively abolished the *per se* presumption.[5]

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[5] In neither *ARCO* nor *Brunswick*, the two cases relied on by the district court, did the court hold that the defendants' conduct was *not* anticompetitive as a matter of law. Rather, in each case the court determined that even if the defendants' conduct were anticompetitive, the particular plaintiffs at issue—competitors, not consumers like the

III. The District Court Improperly Rested Its Conclusion on Factual Assumptions that Discovery Would Have Revealed as False.

The district court's assumptions concerning the LIBOR rate-setting process were also incorrect. Fundamentally, the district court held that because the LIBOR rate-setting process was "never intended to be competitive," but rather was a "cooperative endeavor," any monetary losses caused by defendants' collusion was not actionable. Pet. App. 44a. The district court reached this factual conclusion on its own: it did not hold an evidentiary hearing, listen to the testimony of fact or expert witnesses, or otherwise conduct any fact-finding concerning the LIBOR rate-setting process.[6] Not only is

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petitioners—did not suffer a cognizable injury as a result. *See Atlantic Richfield Co. v. USA Petroleum Co.*, 495 U.S. 328, 334 (1990) (holding that dealers and consumers, not competitors such as the plaintiff, were parties who potentially would suffer antitrust injury); *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 489 (1977) (recognizing that defendant's conduct may have lessened competition in one way—by bringing a "'deep pocket' parent into a market of 'pygmies,'" but noting that the plaintiff's damages stemmed from a different, competition-*increasing* aspect of the defendant's conduct). While framed as a decision on antitrust injury under the Clayton Act, the district court appeared to disagree that an antitrust violation under the Sherman Act had been committed to begin with, which conflicts with countless precedents concerning the *per se* rule.

[6] The district court's decision cited to only two cases in which a claim was dismissed for lack of antitrust injury. Notably, neither of those cases was a horizontal price-fixing case, and neither resolved the antitrust injury issue at the pleadings stage, as opposed to after full development of the factual record through discovery. *See Atlantic Richfield Co. v. USA Petroleum Co.*, 495 U.S. 328 (1990); *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477 (1977).

this improper on a motion to dismiss, but discovery would have shown that the published rules concerning the LIBOR rate-setting process precluded the banks from "cooperating" as to the rates they submitted, and instead required each bank to independently exercise its good faith judgment each day about the interest rate that it would be required to pay. *See* June 26, 2012 Non-Prosecution Agreement between United States Department of Justice and Barclays Bank PLC, Appendix A (Statement of Facts) ¶¶ 2, 6, *available at* http://www.justice.gov/iso/opa/resources/93120127101 73426365941.pdf. Further, as several of the defendants have already *admitted* in their settlements with the Department of Justice, the banks were expressly required to submit rates "without reference to rates contributed by other Contributor Panel banks." *See, e.g., id.* ¶ 6. When, after the district court's decision, the OTC plaintiffs and others attempted to amend their complaints to explain in even greater detail how defendants' conduct reduced competition (including by eliminating the competitive forces that should have driven the panel banks to compete to submit their lowest accurate LIBOR rates), the district court dismissed the new allegations in less than a page, simply as "new ways of packaging previously known facts." Pet. App. 199a.

The district court also ignored the allegations in petitioners' and *amici*'s complaints below that the defendant banks who fixed LIBOR also used LIBOR as part of the price in trillions of dollars of financial instruments sold to customers. The district court never explained how the defendants' failure to compete as to that component of price did not reduce competition, and how plaintiffs' losses, which stemmed directly from that failure to compete, was not a "loss [that] stems from a competition-reducing aspect *or effect* of the defendant's behavior." *ARCO*, 495 U.S. at 344 (emphasis added).

Permitting the banks to avoid liability simply because they fixed prices one way (using an index that has been fixed as a component of price) as opposed to another (fixing the final price directly), undermines this Court's directive that "the machinery employed by a combination for price-fixing is immaterial." *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 223 (1940). It also leaves consumers injured by collusion as to numerous similar benchmarks used to set prices for commodities—ranging from oil to gold to silver—without any remedy under the antitrust laws. This is precisely the type of "artificial limitation[] on the §4 remedy" that this Court has rejected. *Blue Shield of Va. v. McCready*, 457 U.S. 465, 472 (1982).

Finally, the district court placed significance in its belief that, even if defendants had colluded to fix LIBOR, petitioners' harm *could* have been caused through non-collusive means, which the district court believed counseled against a finding of antitrust injury. Pet. App. 47a-52a. *Id*. at 49a ("[T]he harm alleged here could have resulted from normal competitive conduct. Specifically, the injury plaintiffs suffered from defendants' alleged conspiracy to suppress LIBOR is the same as the injury they would have suffered had each defendant decided independently to misrepresent its borrowing costs to the BBA."). However, the harm from *any* antitrust violation could hypothetically occur in the absence of that violation; if that were the test, no price-fixing case would give rise to an antitrust injury, because in each case the same harm "could have" resulted from independent parallel adjustments in prices, the explanation defendants often advance for lockstep economic decisions. The law prohibits horizontal price-fixing even if the defendants "might have" charged the same prices absent collusion, as several courts have observed. *See, e.g., In re Cardizem CD Antitrust Litig.*, 332 F.3d 896, 915 n.19 (6th Cir. 2003) ("[T]he defendants' position, if adopted, risks undermining

a basic premise of antitrust law that, as the district court observed, in many instances, an otherwise legal action—*e.g.*, setting a price—becomes illegal if it is pursuant to an agreement with a competitor. Under the defendants' view, such an action would never cause antitrust injury because a defendant *could* have unilaterally and legally set the same price."); *Virginia Vermiculite, Ltd. v. W.R. Grace & Co.-Connecticut,* 156 F.3d 535, 540 (4th Cir. 1998) (recognizing that defendants are "foreclosed from challenging causation [on a Sherman Act Section 1 claim] simply on the basis that it could have achieved the same result through lawful means").[7]

The district court's approach is not only wrong, but if perpetuated, would immunize a broad array of antitrust conduct from the purview of the Clayton Act's private remedies.

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[7] *See also In re Cardizem CD Antitrust Litig.,* 105 F. Supp. 2d 618, 648, n. 16 (E.D. Mich. 2000) ("To accept Defendants' argument, the Court must also accept the argument that there can never be an antitrust violation if the antitrust defendant can posit an argument that it could have lawfully done the same thing it is accused of doing collusively. . . . There are many things a defendant can do unilaterally without offending the antitrust laws that it cannot do collusively. For example, consider two gas stations that have control over a large geographic market and independently price their gas in such a way that they are within a penny or so of each other. That is not an antitrust violation. However, if the two gas stations, which have a monopoly over gas in the geographic market area, *agree* to fix the price of gasoline, then there is an antitrust violation. The violation would meet the *Brunswick* criteria for antitrust injury because the claimed injury is of the type the antitrust laws were meant to discourage; agreements to fix prices. Also, the plaintiff's injury (having to pay higher, deliberately set prices) is causally related to the defendant's anticompetitive acts. The same analysis applies here.").

The district court dismissed petitioners' action based on a clearly incorrect view of antitrust injury under the Clayton Act. If petitioners' action were not consolidated for pretrial purposes with other LIBOR-related actions, petitioners would right now be seeking correction of this ruling in the Second Circuit. However, under the Second Circuit's rule, petitioners will be held hostage to the proceedings of every other action subject to the consolidation order, so that they cannot pursue an appeal until everyone's case is finished.[8] Then, once the antitrust injury decision is reversed, petitioners will join all parties, including *amici* and defendants, in redoing fact and expert discovery to take account of antitrust claims that never should have been dismissed in the first place. This process will take many years, "denying justice by delay" (*Dickinson*, 338 U.S. at 511) and running directly contrary to the order that courts should construe the federal rules "to secure the just, speedy, and inexpensive determination of every action and proceeding." Fed. R. Civ. P. 1.

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[8] There are currently more than 40 separate cases in the multidistrict litigation, asserting more than a dozen distinct causes of action. Jt. App. 309-11; 304-307; 322-23; 335; 337; 341; 350-54. In all but four of these cases, defendants only recently filed 13 pre-motion letters seeking leave to move to dismiss the complaints. Jt. App. 298, 300-361, 356.

CONCLUSION

For the foregoing reasons, *amici* respectfully request that this Court reverse the judgment of the Second Circuit.

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September 5, 2014