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

REPLY BRIEF FOR THE PETITIONERS

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

RULES

OTHER AUTHORITIES

REPLY BRIEF FOR THE PETITIONERS

The circuits are intractably divided over whether and in what circumstances a party may immediately appeal the dismissal of an action that is consolidated with other suits. This case presents the ideal opportunity to resolve that conflict. Respondents' arguments are unpersuasive or support review.

I. Importance of the Question Presented

Respondents refute their own argument (BIO 12-21) that the Question Presented is unworthy of this Court's review. They admit that twelve circuits apply four irreconcilable rules. *Id.* 13 (citing Pet. 7-11). They then explain why the issue arises frequently: the multidistrict litigation panel "transfers thousands of cases each year for coordinated or consolidated pretrial proceedings," on top of "countless other actions consolidated by district courts." *Id.* 18-19.

The conflict was already important enough in 1990 that this Court granted certiorari to resolve it in *Erickson v. Maine Central R.R.*, 498 U.S. 807 (1990), *cert. dismissed*, 498 U.S. 1018 (1990). Things are worse now, as more courts of appeals have joined the fray. *See* Pet. 7-11. No petition has been filed since *Erickson* was dismissed (*id.*), but only because there are relatively few viable opportunities. The petition generally must come from one of the minority of circuits that forbids an immediate appeal. Any petition from one of the other circuits would have no purpose, because it would be filed after the merits of the appeal were already decided. Also, a petition will be filed only in a case with unusually high stakes, given the cost of seeking review in this Court (with uncertain prospects at both the certiorari stage and

the merits) when the prize only is the opportunity to appeal immediately (with uncertain prospects on the merits of the appeal too). The Court should accordingly take this unique opportunity to resolve the conflict.

The significance of the issue is not diminished by the prospect that some subset of appellants could in the alternative secure appellate review under Federal Rule of Civil Procedure 54(b). *Contra* BIO 14-17. Rule 54(b) is not a *substitute* for an appeal as of right, because "an appeal following a Rule 54(b) order is the exception rather than the rule." 10 Charles A. Wright et al., Federal Practice & Procedure § 2654 (3d ed.). In this very case, after the Second Circuit dismissed the appeal, the district court both revoked its Rule 54(b) certification for the other non-stayed cases and refused to certify its dismissal of petitioners' complaint. Pet. App. 222a; Dkt. No. 551, at 78 (Feb. 25, 2014).

So the question whether a party instead may appeal as a matter of right arises frequently. The Appendix collects fifty cases in which it has arisen – forty since the writ was dismissed in *Erickson*. *See* App. A, *infra*. (The issue has been presented in still more cases. Collecting more than fifty illustrative rulings simply seemed superfluous.)

The recurring question whether an immediate appeal is permissible is important. It occupies the time of the lower courts, then produces irreconcilable outcomes. It also presents important issues regarding "the inconvenience and cost of piecemeal review on the one hand and the danger of denying justice by delay on the other." *Dickinson v. Petroleum Conversion Corp.*,

338 U.S. 507, 511 (1950). In this case, petitioners are forbidden – likely for years – from appealing the dismissal of their complaint as a matter of right. Respondents' contrary position is that district courts must have the discretion to decide when the appeal should occur. BIO 20-21. But they admit that most circuits reject that rule. *Id.* 13. In fact, the essence of the circuit conflict is a dispute over whether Rule 54(b) certification is required. *See Amicus* Br. 2-3. Whichever side is right, the principles at stake are significant, and the conflict therefore requires this Court's attention.

II. This Case As A Vehicle To Decide The Question Presented

This case is an ideal vehicle to illustrate how an immediate appeal makes both appellate and district court litigation more manageable. Respondents argue that an immediate appeal in this case will make the proceedings inefficient. But they fail to substantiate their rhetoric with any detail. *See* BIO 10-12 (citing literally nothing).

In fact, deciding petitioners' appeal now will speed the disposition of all the antitrust claims of all the LIBOR cases, which are on indefinite hold for no good reason. The district court's rationale for dismissing petitioners' complaint – that the manipulation of LIBOR cannot cause *any* plaintiff antitrust injury – applies equally to every possible plaintiff and every antitrust theory. Pet. App. 38a, 199a. For that reason, the court applied that ruling to dismiss every antitrust claim in every complaint that had been filed as of that date, even the stayed cases. Dkt. No. 286

(Mar. 29, 2013). It then permitted the non-stayed plaintiffs to join in petitioners' appeal as of right, finding that "*judicial efficiency would be served*" thereby. Pet. App. 220a (emphasis added).

This case also illustrates the inefficiency of the Second Circuit's rule. Because that court nominally applies a "strong presumption" without categorically barring immediate appeals, petitioners had to appeal the dismissal of their complaint or face the prospect of later being deemed to have appealed too late. *See, e.g.*, *Albert v. Maine Cent. R. Co.*, 898 F.2d 55 (1st Cir. 1990) (appellate ruling underlying the cert. grant in *Erickson*, *supra*). The court of appeals then had to consider the collateral dispute over whether the presumption was overcome. Then the district court had to resolve more collateral litigation over whether to grant Rule 54(b) certification, which it recently denied (Dkt. No. 551, at 78 (Feb. 25, 2014)) but which respondents believe should be repeated yet again (BIO 22). None of that moves the LIBOR litigation an inch closer to resolution.

The inefficiency will grow if the district court does not ultimately dismiss all the complaints, most of which it has not even begun to consider. The Second Circuit's rule forbids any plaintiff from appealing the dismissal of its complaint until the MDL is terminated by the conclusion of all the pre-trial proceedings for every complaint – including all the discovery. *See* 28 U.S.C. § 1407 (MDL consolidation terminates when pre-trial proceedings end). That development of the factual record would not inform this appeal, because it will not address the antitrust issues, which have been dismissed. Pet. App. 18a. The litigation will be

thrown into further disarray when the MDL ends because the cases will then be returned to their courts of origin, *see Lexecon, Inc. v. Milberg Weiss Bershad Hynes & Lerach*, 523 U.S. 26 (1998), producing inefficient appeals to multiple circuits of the identical issue on the identical facts. If petitioners then prevail on their appeal, the merits and damages discovery from all of the many respondents will have to be redone in at least substantial part (and the MDL might have to be reconstituted), both because petitioners will not have participated in the prior round of discovery and because no discovery will have been taken on the facts that relate only to the antitrust claims.

III. Jurisdiction

This Court has jurisdiction because, at the very least, the Second Circuit "passed upon" the Question Presented. *United States v. Williams*, 504 U.S. 36, 41-44 (1992). Indeed, it was the *only* issue the court of appeals decided. The Second Circuit dismissed this appeal because other complaints remain pending in the MDL. Pet. App. 2a. The Order unambiguously is based on the absence of a "final order" under "28 U.S.C. § 1291," whereas "the orders appealed from did not dispose of all claims in the consolidated action." Pet. App. 2a. The Second Circuit then cited two decisions: *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 467 (1978), which holds that an appealable "final order" is one that "ends the litigation on the merits and leaves nothing for the court to do but execute the judgment" (citation omitted); and *Houbigant, Inc. v. IMG Fragrance Brands, LLC*, 627 F.3d 497, 498 (2d

Cir. 2010) (per curiam), which applies a "strong presumption" that the dismissal of one of several consolidated cases is not appealable.[1]

Because the court of appeals "passed" on the Question Presented, it would make no difference if respondents were correct that petitioners supposedly had not separately "pressed" that question, because they "made none of the arguments that they now

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[1] In opposing rehearing below, respondents recognized (at 8) that the Second Circuit's Order was based on "precedent that promotes judicial economy by prohibiting piecemeal appeals in consolidated actions." They then advised the district court that the Second Circuit had dismissed the appeal for one reason: because "piecemeal review of multidistrict litigation is not appropriate." Dkt. No. 533, at 1 (Jan. 21, 2014). Ignoring those representations, respondents now attempt in a throwaway footnote to suggest that the Second Circuit "also appeared to rely on the fact that the district court did not enter judgment as required by Federal Rule of Civil Procedure 58." BIO 23 n.8. That assertion lacks any merit. As discussed in the text, the Second Circuit's Order is unambiguous. It does not mention either Rule 58 or any other point remotely related to whether the district court's judgment is "set out in a separate document [or] noted on the docket." *Id.* Nor could it. The district court expressly provided on its docket that petitioners' complaint was "terminat[ed]." Pet. App. 12a. It then recognized petitioners' right to "appeal as of right because their complaint[] [was] dismissed in [its] entirety." *Id.* 220a. *See also* BIO 6 ("all of the claims . . . were dismissed"). The fact that the clerk forgot to enter the judgment on a separate piece of paper makes no difference: Rule 58 was amended in 2002 precisely to address this recurring scenario. Fed. R. Civ. P. 58(c)(2)(B) (when judgment is not "set out in a separate document," it is deemed entered when "150 days have run from the entry in the civil docket"); *see id.* Adv. Comm. Notes.

present to this Court" (BIO 9) and "never raised below the question that they now seek to present" (*id.* 12). But those statements are false in any event: the Second Circuit dismissed this appeal *sua sponte* before petitioners had the chance to submit *any* arguments (Pet. App. 2a), so petitioners squarely presented the issue to the Second Circuit at the first and *only* opportunity: by seeking rehearing (*see* Pet. 6-7).

Respondents' argument is instead that petitioners did not "press" the court of appeals to grant rehearing en banc to overturn its settled precedent and make the circuit conflict three to three to six rather than three to one to two to six. BIO 21-25. That is not what it means to "press" an issue in the court of appeals for purposes of this Court's jurisdiction. How could it? Parties are not even required to seek rehearing en banc to secure review in this Court (*see* 28 U.S.C. § 1251(1); S. Ct. R. 13) and they regularly do not (*e.g.*, Pet. for Cert., No. 13-7120, *Johnson v. United States* 3 ("No petition for rehearing was sought."), *cert. granted*, 134 S. Ct. 1871 (Apr. 21, 2014)). The circuit conflict is widespread and intractable, so that any en banc proceedings would have just delayed review in this Court.

IV. Mootness

There is no merit to respondents' suggestion that certiorari should be denied because this case could become moot while it is pending here. BIO 26. As respondents advised the Second Circuit, because most "of the cases in the multidistrict litigation have been stayed, and no discovery has taken place," there is "no indication" that they will be decided by the district

court and "remanded to other districts in the near future." Resp. Opp. to C.A. Rhg. 13.

In now arguing the opposite, respondents theorize that the district court's ruling on their presently pending motions to dismiss the non-stayed cases "might yield a final and appealable judgment." BIO 12 (citing nothing). That is simply false, and respondents omit two critical facts: (1) they have not even filed motions to dismiss the roughly forty *stayed* cases in the MDL that must also be decided before the Second Circuit will recognize an appealable judgment; and (2) because thirty-five of those complaints assert claims substantially different from those in the non-stayed cases, they cannot be resolved even indirectly by the motions now before the district court. *See* App. B, *infra*. So even on the assumption that respondents win the pending motions, they will then have to prepare and file new motions to dismiss the distinct claims in the stayed cases, and the plaintiffs will have to respond. The district court will then have to decide those new motions, as well as the losing parties' inevitable follow-on motions for reconsideration.

Respondents' suggestion that this entire process could take place so that the whole MDL will be done in the district court within a year – *i.e.*, before this Court would decide this case during its upcoming Term – is wildly implausible not only substantively (because it assumes the district court will dismiss each and every one of the complaints) but also chronologically. It took nine months to brief and initially resolve respondents' first motions to dismiss the non-stayed cases. Fourteen months later, the district court has not fully resolved the motions to reconsider that ruling. After

six months, it has not decided respondents' motions to dismiss the plaintiffs' amended pleadings. The delay is understandable, given that the pending motions raise intricate issues on multiple theories. When the district court finishes that process and the litigation finally begins over the roughly forty stayed cases, there is no reason to believe the case will move any faster.

Respondents finally assert that petitioners could moot the case themselves by seeking Rule 54(b) certification. BIO 22. There is a simple answer: while the case is pending in this Court, petitioners will not do that. Even if they did, respondents give no reason to believe the district court will reverse its ruling from just four months ago (Dkt. No. 551, at 78 (Feb. 25, 2014)) and grant certification this time. In any event, certification would not itself moot this appeal because the Second Circuit would have to decide respondents' inevitable argument that it lacks appellate jurisdiction because the certification was an abuse of discretion. *See*, *e.g.*, *Wood v. GCC Bend, LLC*, 422 F.3d 873, 883 (9th Cir. 2005) (holding Rule 54(b) certification was unwarranted).

V. The Merits

Respondents complain that the Petition only discusses why this case is an ideal vehicle to resolve the four-way circuit conflict over the Question Presented, not why petitioners should prevail on the merits. BIO 19-20. Put another way, respondents urge this Court to deny review to send the message that although a brief does address every issue the Court's Rules say is important, *see* S. Ct. R. 10, it is

just too concise. That unusual argument answers itself. Respondents also ignore the detailed discussion of the merits in the *amicus* brief.

Substantively, respondents argue that the Second Circuit's rule is correct on the merits because district courts should decide when litigants appeal in consolidated cases. BIO 14-17. As discussed, this is an argument in favor of certiorari: if it is correct, the Court should grant the Petition and affirm, rejecting the contrary rule of the great majority of circuits.

In fact, the Court should grant certiorari and reverse. Although the "authority of trial courts to manage their own dockets cannot be disputed" (BIO 11), it equally cannot be disputed that trial courts do *not* have the authority to manage the dockets of the *courts of appeals*. Instead, Section 1291 gives the losing party the unqualified right to immediately appeal a "final decision." That provision applies here: petitioners did not appeal "the dismissal of their *claims*" (*contra* BIO 7 (emphasis added)); instead, the district court dismissed the *complaint*, which is a separate action within the MDL. *See Johnson v. Manhattan Ry. Co.*, 289 U.S. 479, 496-97 (1933) ("[C]onsolidation . . . does not merge the suits into a single cause . . . ."); *Amicus* Br. 4-5.

By contrast, Rule 54(b) applies only upon the dismissal of a subset of the claims or parties in an "action." Fed. R. Civ. P. 54(b). Here, petitioners' "action" (Fed. R. Civ. P. 2) has been dismissed entirely, so Rule 54(b) does not apply. *See Amicus* Br. 6-7. Further, respondents would turn the Rule's purpose to *speed* appeals, not delay them, on its head. *See* Fed.

R. Civ. P. 54, Adv. Comm. Notes ("Rule 54(b) was originally adopted . . . to avoid the possible injustice of a delay in judgment of a distinctly separate claim to await adjudication of the entire case.").

Respondents' argument also depends on the premise that petitioners' right to appeal turns on a balancing of interests. But the discretionary appeal that can be sought under Rule 54(b) does not limit the unqualified statutory right to appeal conferred by Section 1291. Under the Rules Enabling Act, it could not. 28 U.S.C. § 2072(b). In any event, respondents point to no actual evidence that the longstanding majority rule permitting immediate appeals has produced any inefficiency. As discussed (Part II, *supra*), this case illustrates why in fact an immediate appeal saves judicial resources.

One reason the majority rule works well is courts always have the flexibility to control their dockets. A district court that concludes that consolidated complaints raise closely related issues will often (for that very reason) decide all the motions to dismiss them together. If the cases are decided together, they are then appealed together. And if unusual circumstances warrant, the court of appeals 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

For the foregoing reasons, as well as those set forth in the Petition and the *amicus* brief, certiorari should be granted.

Respectfully submitted,

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