**No. 16-545**

IN THE

# Supreme Court of the United States

BANK OF AMERICA CORPORATION, *et al.*,
*Petitioners*,

v.

ELLEN GELBOIM, *et al.*,
*Respondents*.

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

## BRIEF OF FINANCIAL INDUSTRY ASSOCIATIONS AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS


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## INTERESTS OF *AMICI CURIAE*[1]

The Securities Industry and Financial Markets Association ("SIFMA") is the voice of the United States securities industry, representing broker-dealers, banks, and asset managers whose employees provide access to the capital markets. SIFMA's mission is to support and enhance the efficiency and reliability of securities and financial markets. With offices in New York and Washington, D.C., SIFMA is the United States regional member of the Global Financial Markets Association.

Several SIFMA members are petitioners in this case or defendants in other litigation involving financial benchmarks. Other SIFMA members are respondents in this case, plaintiffs in the related cases that are consolidated before the district court, or members of the putative class that respondents seek to represent.

SIFMA considers cooperative data gathering, benchmarking, and standard-setting activities to be core securities industry and financial markets interests and is routinely involved in developing and administering programs that require voluntary member participation to enhance the efficiency, liquidity, transparency, and stability of financial markets.

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[1] The parties in this case received timely notice under Rule 37.2(a) and have consented to the filing of this brief. Pursuant to Supreme Court Rule 37.6, counsel for *amici* represent that this brief was not authored in whole or in part by counsel for a party and that none of the parties or their counsel, nor any other person or entity other than *amici*, their members, or their counsel, made a monetary contribution intended to fund the preparation or submission of this brief.

The Clearing House is a banking association and payments company that is owned by the largest commercial banks and dates back to 1853. The Clearing House Association L.L.C is a nonpartisan organization that engages in research, analysis, advocacy, and litigation focused on financial regulation that supports a safe, sound, and competitive banking system. Its affiliate, The Clearing House Payments Company L.L.C., owns and operates core payments system infrastructure in the United States and is currently working to modernize that infrastructure by building a new, ubiquitous, real-time payment system. The Payments Company is the only private-sector ACH and wire operator in the United States, clearing and settling nearly $2 trillion in U.S. dollar payments each day, representing half of all commercial ACH and wire volume.

As advocates for a strong financial future, Financial Services Roundtable represents 100 integrated financial services companies providing banking, insurance, and investment products and services to the American consumer. Member companies participate through the Chief Executive Officer and other senior executives nominated by the CEO. FSR member companies provide fuel for America's economic engine, accounting directly for $98.4 trillion in managed assets, $1.1 trillion in revenue, and 2.4 million jobs.

*Amici* and broad cross-sections of their members are concerned that the decision of the Second Circuit, which erroneously characterizes the LIBOR benchmark as a price and the collaborative setting of that benchmark as a conspiracy to restrain trade, will undermine benchmarking and other standard-

setting programs by discouraging industry participation and chilling the market innovations and efficiency enhancements those programs achieve.

In this brief, *Amici* seek to highlight the Second Circuit's mischaracterization of the LIBOR index and the practical consequences of the decision for the securities and financial markets and other industries that are served by lawful, procompetitive collaborative activities sponsored by trade associations and other industry collaborations.

## SUMMARY OF ARGUMENT

Two aspects of the Second Circuit's decision raise serious concerns for the securities and financial industries and other industries that rely on collaboratively-set benchmarks and other benchmarking and standard-setting programs.

First, the Second Circuit mischaracterized alleged manipulation of the LIBOR benchmark as price fixing, treating it as a *per se* violation of the antitrust laws, failing to recognize that the LIBOR-setting process was independent of the competition in markets in which the benchmark was used and had no competition-reducing effects.

Second, the Second Circuit's ruling erroneously suggests that a plaintiff can sufficiently plead an antitrust conspiracy claim against every entity that participated in a procompetitive and efficiency-enhancing benchmark-or standard-setting process based solely on allegations that some participants did not abide by the benchmark- or standard-setting rules and guidelines.

The antitrust laws—and the concomitant burdens of extensive discovery, treble damages remedies, and joint and several liability they entail—should not be expanded or applied in such a way that chills industry participation in efficiency-enhancing benchmarking and other standard-setting programs frequently sponsored by trade associations such as SIFMA and industry collaborations such as those led by The Clearing House.

Like LIBOR, the benchmarking and standard-setting programs that *Amici* sponsor are necessarily collaborative, and industry participation in them is independent of the competition in the markets in which the benchmarks or standards may be used. Such programs also necessarily involve agreements on the rules and protocols that govern participation which, in part, are designed to ensure that the programs serve their procompetitive objectives. In holding that manipulation of LIBOR is a *per se* antitrust violation despite the fact that the LIBOR setting process was collaborative and independent of competition, and in holding that mere participation in the LIBOR-setting process allows an inference of participation in an illegal conspiracy, the Second Circuit's ruling poses a substantial risk of discouraging such industry participation and undermining the competitive benefits it achieves. Review by this Court, therefore, is warranted.

## ARGUMENT

### I. Noncompetitive Benchmarks Should Not Be Treated As Prices Under the Antitrust Laws.

Participation in noncompetitive standard-setting agreements and other benchmarking collaborations that are independent of the competition that occurs in the markets in which they may be used and that have no competition-reducing effects should not give rise to antitrust liability. Where, as here, there is no alleged injury arising from anticompetitive conduct, there is no basis for antitrust liability.

#### A. LIBOR is the product of a voluntary, cooperative, and noncompetitive process.

It is critical to understand how LIBOR works and how it fits into the markets for LIBOR-related financial instruments. We explain this process through a simple variable rate bond transaction. A variable rate bond is a transaction in which Party A pays a fixed amount of money and, in return, Party B agrees to make payments based on a floating interest rate to Party A on the notional value of the bond on specified dates for a specified time period.

A variable bond investor has a plethora of competitive choices as it considers bonds with a variable rate tied to LIBOR or one of many other benchmarks, as well as bonds that pay a fixed rate. Of course, there are bonds issued by thousands of different corporations, as well as federal, state and local government bonds and bonds issued by foreign entities. This multi-trillion dollar bond market presents nearly endless variety for the purchaser of

a bond, such as the respondents who allegedly purchased bonds issued by General Electric and Israel. Bonds available in the market differ along many dimensions, including the issuer, whether it is insured, whether it is taxable, the maturity date, the currency, whether it is callable, and the many different aspects of its fixed or variable interest rate. Sellers and buyers of bonds, therefore, make decisions on which bonds to buy or sell based on a number of different dimensions.

This is the essence of competition: entities seeking to raise capital through the issuance of bonds or entities seeking to resell bonds in the secondary market present bond buyers with a nearly infinite array of options. Respondents do not contend that the alleged conspiracy reduced this competition in any way. Given the enormous number of participants in the global bond market, such a conspiracy would be facially implausible.

Because one of the parties to a variable rate bond has agreed to make payments based on a floating rate, these bonds, like many other financial instruments, require a benchmark by which that floating rate will be measured. LIBOR, the benchmark at issue in this case, is the most common benchmark used to measure floating interest rates. There is good reason. Prior to the use of LIBOR as an interest rate benchmark, banks used other benchmarks, such as those propagated by central banks, including the Federal Reserve "Prime" rate or Treasury notes. Jacob Gyntelberg & Philip Woolridge, *Interbank Rate Fixings During the Recent Turmoil*, BIS Q. Rev., Mar. 2008, at 59-60. During the 1970s, economic instability caused concern about the stability and predictability of a central bank

benchmark for interest rates. *Id.* at 60. Financial institutions created LIBOR to make this process more efficient by providing a uniform benchmark, which market participants could opt to use for different types of financial products. See Milson C. Yu, *Libor Integrity and Holistic Domestic Enforcement*, 98 Cornell L. Rev. 1271, 1277 (2013); see also Gyntelberg & Woolridge, *supra*, at 60. This standard-setting innovation enhanced liquidity and transparency, to the benefit of investors.

The LIBOR benchmark makes competition in the markets more efficient. It allows an investor to easily consider the options described above in making a choice as to which bond to buy. Before the Second Circuit, respondents acknowledged the benefits of benchmark rates. See Appellants' Br. 7 ("[H]onest benchmark rates facilitate price discovery, allowing lenders and borrowers to avoid the cost of researching borrowing costs themselves. Moreover, moving daily indexes like LIBOR allow parties to enter into floating-rate transactions without having to conduct seriatim negotiations over whether rates have changed.").

LIBOR, which is in essence a noncompetitive and standardized contract term, is not itself a product that was bought, sold, or traded. Simply put, the manner in which LIBOR is set is not an activity that involves buying, selling, or any competition at all. Under competition, for example, a low price could be offered to produce higher sales volume for the firm offering the lower price. But that concept has no application to the LIBOR-setting process where each panel bank makes a single submission which is then equally-weighted against all other submissions to calculate the rate. Whether that bank's single

submission is high, medium, or low has no effect on the bank's competitive position in the marketplace for the purchase and sale of bonds, where a bank may make multiple offerings to compete for investors and where, for example, a bond paying LIBOR +2% will be more attractive than a bond paying LIBOR +1% (with all other things being equal). Thus, competition occurs when a bank or other firm offers favorable interest rates on actual financial products, not in the setting of LIBOR. Regardless of the rate at which LIBOR is set, for any given day and tenor, there is still only one LIBOR.

### B. Respondents did not allege a restraint of trade or an antitrust injury.

Because LIBOR is not a price or otherwise a product of competition, respondents have failed to allege that its manipulation constitutes a restraint of trade or that they have suffered an antitrust injury.

The District Court correctly found that there was no price fixing conspiracy because the LIBOR setting process was meant to be cooperative, not competitive. Pet. App. 77a. Where there is no competition, there is no antitrust violation. "The aim and result of every price-fixing agreement, if effective, is the elimination of one form of competition." *United States v. Trenton Potteries Co.*, 273 U.S. 392, 397 (1927).

Nor did respondents allege that they suffered antitrust injury. Respondents fail to allege that the purported manipulation of LIBOR had any competition-reducing effects in the downstream markets in which LIBOR was used. Antitrust injury is "injury of the type the antitrust laws were intended to prevent and that flows from that which

makes defendants' acts unlawful. The injury should reflect the *anticompetitive* effect either of the violation or of anticompetitive acts made possible by the violation." *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 489 (1977) (emphasis added).

As discussed above, competition occurs in the purchase and sale of financial products, and this competition was unaffected by any alleged inaccuracy in the LIBOR benchmark. Each defendant remained entirely free to price its financial products in whatever way it wished and there was no reduction in the number of firms competing to sell such products. To the extent that respondents allege any injury, it is not antitrust injury. See *Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209, 225 (1993) (antitrust laws do not "purport to afford remedies for all torts committed by or against persons engaged in interstate commerce") (citations omitted).

### C. At a minimum, manipulation of LIBOR cannot be treated as price fixing.

Even if respondents' allegations of LIBOR manipulation were cognizable under the antitrust laws, the Second Circuit erred by treating these allegations as sounding in price fixing, a *per se* violation.

This Court ordinarily judges restraints on trade under the rule of reason. "Under this rule, the factfinder weighs all of the circumstances of a case in deciding whether a restrictive practice should be prohibited as imposing an unreasonable restraint on competition." *Continental T. V., Inc. v. GTE*

*Sylvania Inc.*, 433 U.S. 36, 49 (1977). The *per se* rule is a narrow exception, "confined to restraints * * * that would always or almost always tend to restrict competition and decrease output." *Leegin Creative Leather Prods., Inc. v. PSKS, Inc.*, 551 U.S. 877, 886 (2007) (internal quotation marks omitted). "[T]he *per se* rule is appropriate only after courts have had considerable experience with the type of restraint at issue, and only if courts can predict with confidence that it would be invalidated in all or almost all instances under the rule of reason." *Id.* at 886-87 (internal citation omitted).

To avoid scrutiny of their claims under the rule of reason, respondents characterized their allegations as horizontal price-fixing. The Second Circuit agreed, holding that the "fixing of a component of price" (*i.e.*, any fact that might influence the amount paid under a contract) constitutes price fixing. Pet. App. 15a; see also Pet. App. 26a (recognizing "an antitrust claim based on the influence that a conspiracy exerts on the starting point for prices").

This holding is an unprecedented expansion of *per se* liability under the antitrust laws. Respondents have not alleged any collusion in the market for financial products. There is, for example, no complaint that petitioners acted improperly because they entered into financial transactions using LIBOR-based formulae. See Appellants' Br. 7 (discussing the benefits of using LIBOR indices). The only allegation is that petitioners "colluded to depress LIBOR" and thus reduce rates of return.

The contrast with *Socony-Vacuum Oil*, on which the Second Circuit relied heavily, is instructive. In that case, oil refiners allegedly entered into buying

programs that collusively raised the "spot price" of gasoline, which in turn raised the retail price. *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 166-68 (1940); see *id.* at 216 ("[T]here were buying programs of distress gasoline which had as their direct purpose and aim the raising and maintenance of spot market prices and of prices to jobbers and consumers * * * ."). Like other price-fixing cases discussed by this Court, *Socony-Vacuum Oil* actually involved agreement to manipulate a price, preventing price competition that would have otherwise occurred. The refiners did not, allegedly, falsely report the spot price—they actually engaged in collusive transactions to manipulate the spot price. And the effect on the price of contracts drawing on the spot price was obvious and uncontroversial.

In this case, respondents do not allege that petitioners actually engaged in collusive transactions to manipulate the prices at which banks could (or did) actually borrow funds. See Pet. App. 4a. Instead, respondents merely allege that the banks falsely reported the estimates that may have been used to set LIBOR. As the Second Circuit acknowledged (but found immaterial), "LIBOR is not itself a price, as it is not itself bought or sold by anyone." Pet. App. 15a.

Breaking the rules for how estimates of borrowing costs should have been reported in the LIBOR-setting process, or falsely reporting those borrowing costs, could be actionable under some circumstances as a tort, but it should not constitute price fixing where, as here, LIBOR is something that is not bought or sold at any price. Nor is any potential effect of alleged LIBOR manipulation on

the ultimate "price" of various complex, competitively negotiated financial instruments sufficiently obvious to warrant invoking the *per se* rule and foregoing actual analysis of any such effect. Courts lack sufficient experience with the effect of a benchmark rate such as LIBOR to "predict with confidence" that there is an anticompetitive effect "in all or almost all instances." *Leegin*, 551 U.S. at 886-87.

Extending antitrust liability for price fixing to a situation where no price has been fixed threatens broad harm to collaborative standards in the securities and financial markets. Like the LIBOR benchmark-setting process involved in this case, other programs were never intended to be competitive, and the benchmarks, market guidelines, and contract structures they produce are not set through competition. Rather, such programs are developed and administered wholly independent of the competition that occurs in the financial markets in which the benchmarks or guideline may be used.

Accordingly, the Second Circuit's extraordinary expansion of *per se* antitrust liability warrants review by this Court.

## II. The Second Circuit Expanded Potential Antitrust Liability for Standard-Setting Programs By Holding that Mere Participation in Setting a Benchmark Was Sufficient to Infer Participation in an Antitrust Conspiracy.

Separately, this Court should review the Second Circuit's holding that respondents adequately alleged facts supporting an inference that every bank that participated in the setting of LIBOR

participated in the alleged conspiracy. Pet. App. 34a. In essence, respondents alleged that petitioners and other banks all agreed to break the BBA's rules and falsely suppress their borrowing costs based nearly entirely on the mere fact that all of them voluntarily participated in the BBA's LIBOR-setting program.

*Twombly* requires more, and to hold otherwise would chill participation in non-competitive standard-setting, benchmarking, and other collaborations that the antitrust laws recognize as vital to keeping markets transparent, efficient, and competitive. Plaintiffs must, and in this case failed to, plead "enough facts to state a claim to relief that is plausible on its face." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007). *Twombly* requires pleading facts showing the who, what, when, and where of the alleged conspiracy. *Id.* at 564 n.10.

Respondents assert that there should be a cognizable *inference* of a conspiracy involving all of the participants in the LIBOR-setting process on two grounds. First, respondents allege that ongoing government investigations and settlement agreements related to some petitioners and defendant below are adequate to sufficiently plead their sweeping antitrust conspiracy claim as to all participants in the LIBOR-setting process. This does not satisfy *Twombly*. See *Twombly v. Bell Atl. Corp.*, 425 F.3d 99, 118 n.14 (2d Cir. 2005) (holding that congressional investigation is not sufficient to plead an antitrust claim because "[a]n allegation that someone has made a similar allegation does not, without more, add anything to the complaint's allegations of fact"), *rev'd on other grounds*, 550 U.S. 544. This principle is particularly apt where, as

here, none of the six panel banks' regulatory settlements included allegations of a conspiracy among *any*, let alone *all*, petitioners to suppress the LIBOR index.

Second, respondents allege that the weak economic market in 2008 gave all petitioners an incentive to break the BBA's rules and misreport their expected borrowing costs "to portray themselves as economically healthier than they actually were" and "pay lower interest rates on USD LIBOR-based financial instruments that Defendants sold to investors." OTC Compl. ¶5. But this alleged motive is not sufficient to sustain the inference that a market participant entered into an unlawful agreement. The alleged motive is fully consistent with independent, unilateral conduct. Any bank that, as alleged, underreported its expected borrowing costs to signal its economic health was doing nothing more than serving its own independent self-interest. Conduct equally consistent with a defendant's unilateral and independent self-interest does not give rise to a cognizable inference of conspiracy. As the District Court opined, any alleged misreporting of LIBOR tenors was financially rational for the contributor panel banks to independently pursue. And even if a panel bank was motivated to underreport its borrowing costs to appear financially healthier, it would not have needed to modify LIBOR itself or collude with any other bank merely to alter its own LIBOR submissions. Accordingly, the alleged "collusion * * * would not have allowed [the defendants] to do anything that they could not have done otherwise." Pet. App. 72a.

It thus seems clear that the only basis upon which respondents sued all of the banks that served on the USD LIBOR panel is the mere fact that they all participated in the BBA's LIBOR-setting process. But mere participation in trade association activity or other collaborative activity is not a sufficient predicate for alleging an antitrust violation. *Twombly*, 550 U.S. at 567 n.12. *Amici* and other organizations involved in standard-setting processes have a substantial interest in ensuring that these well-settled antitrust conspiracy pleading requirements are not rendered meaningless by sustaining respondents' antitrust claims under the facts alleged in this case.

## III. The Combination of Expanded Price-Fixing and Conspiracy Liability Will Chill Efficiency-Enhancing Benchmarks and Other Standard-Setting Agreements.

This Court has cautioned that courts should be cognizant of the chilling effect that potential antitrust liability can have on permissible, procompetitive conduct. See *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 594 (1986) ("[M]istaken inferences in cases such as this one are especially costly, because they chill the very conduct the antitrust laws are designed to protect."); *Verizon Commc'ns Inc. v. Law Office of Curtis V. Trinko, LLP*, 540 U.S. 398, 414 (2004) (same); *Monsanto Co. v. Spray-Rite Serv. Corp.*, 465 U.S. 752, 763 (1984) ("Permitting an agreement [in violation of Section 1] to be inferred merely from the existence of complaints * * * could deter or penalize perfectly legitimate conduct."). Expanding the parameters of potential antitrust liability may chill benign and procompetitive conduct. See *Twombly*, 550 U.S. at

554 (rejecting a Section 1 complaint which alleged conduct "consistent with conspiracy, but just as much in line with a wide swath of rational and competitive business strategy unilaterally prompted by common perceptions of the market").

Such caution is particularly apt here. Benchmark and other standard-setting agreements and voluntary information-reporting across many different industries are widely recognized as procompetitive with significant benefits to consumers. See, *e.g.*, *Maple Flooring Mfrs. Ass'n v. United States*, 268 U.S. 563, 584 (1925) (in finding no evidence of an agreement to restrain trade by a manufacturing group: "[p]ersons who * * * report market prices[] are not engaged in unlawful conspiracies in restraint of trade merely because the ultimate result of their efforts may be to stabilize prices or limit production through a better understanding of economic laws and a more general ability to conform to them" because "the Sherman Law neither repeals economic laws nor prohibits the gathering and dissemination of information"). Such benchmarking and standard-setting programs in financial markets are critical components of stable, transparent, liquid, and efficient markets. As respondents acknowledge, such processes "serve legitimate purposes by improving market transparency and efficient pricing" and "facilitate price discovery." Appellants' Br. 7.

An expansion of antitrust liability to standard-setting agreements or other benchmarking exercises would undoubtedly chill industry participation in the development of such standards.

Industry groups and their volunteer members must make numerous decisions about how to structure and administer standardized benchmarks or other contractual terms, any one of which could materially change the resulting standard or benchmark and give a litigant a reason to assert that it was somehow inaccurate. These decisions include which institutions should be included in the benchmark setting panel, when information will be collected from those institutions, how it will be compiled by the administrator, and how the benchmark will be calculated. Reaching agreement on these questions and others is inherent in developing a benchmark. But any litigant could argue that the agreed choice of those rules had the effect of moving the benchmark up or down and adverse to the litigant's financial interest. Absent some harm to some competitive process, industry participants should not be subject to antitrust liability based on claims that a cooperatively-set benchmark was inaccurately reported because of some alleged flaw in, or departure from, the agreed-upon standard-setting process. At a minimum, an antitrust plaintiff asserting such a claim should be forced to satisfy the rule of reason and demonstrate injury from a restraint on competition in the underlying markets that those standard-setting programs serve.

Nor should the law permit litigants to prosecute antitrust conspiracy claims based solely on the fact that an industry member participated in a cooperative standard-setting program in which some other participants allegedly broke the standard-setting rules. Sustaining the conspiracy claims in this case would expose those involved in such

processes to the threat of treble damages and joint and several liability in the absence of any alleged facts sufficient to show that a particular participant was a party to an illegal agreement.

The Second Circuit's expansion of the scope of antitrust liability could significantly undermine the efficiency-enhancing aspects of cooperative benchmark and other standard-setting programs, such as those in which *Amici* are involved, by discouraging the essential voluntary involvement of market participants. Review by this Court is warranted.

## CONCLUSION

The petition for writ of certiorari should be granted, and the judgment of the Second Circuit should be reversed.

December 9, 2016 Respectfully submitted,

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