No. 16-545

In the Supreme Court of the United States

BANK OF AMERICA CORPORATION, ET AL., PETITIONERS

v.

ELLEN GELBOIM, ET AL.

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

BRIEF IN OPPOSITION FOR THE NATIONAL CREDIT UNION ADMINISTRATION BOARD AS LIQUIDATING AGENT

MICHAEL J. MCKENNA
General Counsel
ALAN R. BURCH
Associate Counsel
National Credit Union Administration
Alexandria, VA 22314-3428

IAN HEATH GERSHENGORN
Acting Solicitor General
Counsel of Record
BRENT C. SNYDER
Deputy Assistant Attorney General
KRISTEN C. LIMARZI
JAMES J. FREDRICKS
STEVEN J. MINTZ
Attorneys

Department of Justice
Washington, D.C. 20530-0001
SupremeCtBriefs@usdoj.gov
(202) 514-2217

QUESTIONS PRESENTED

1. Whether respondents' allegations that they paid higher prices because of a conspiracy among competing banks to manipulate a benchmark interest rate sufficed to allege antitrust injury and a violation of Section 1 of the Sherman Act, 15 U.S.C. 1.

2. Whether respondents sufficiently alleged that the banks' conduct stemmed from an agreement rather than from independent decisionmaking.

TABLE OF CONTENTS

Page

Opinions below ... 1
Jurisdiction ... 1
Statement ... 2
Argument ... 7
Conclusion ... 16

TABLE OF AUTHORITIES

Cases:

Ashcroft v. *Iqbal*, 556 U.S. 662 (2009) ... 13
Bassett v. *NCAA*, 528 F.3d 426 (6th Cir. 2008) ... 11
Bell Atlantic Corp. v. *Twombly*, 550 U.S. 544 (2007) ... 6, 11, 12, 13
Brotherhood of Locomotive Firemen v. *Bangor & Aroostook R.R.*, 389 U.S. 327 (1967) ... 7
Brunswick v. *Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477 (1977) ... 4
Catalano, Inc. v. *Target Sales, Inc.*, 446 U.S. 643 (1980) ... 4
Forsyth v. *Humana, Inc.*, 114 F.3d 1467 (9th Cir.), aff'd on other grounds, 525 U.S. 299 (1999) ... 9
Gelboim v. *Bank of Am. Corp.*, 135 S. Ct. 897 (2015) ... 2
Hamilton-Brown Shoe Co. v. *Wolf Bros. & Co.*, 240 U.S. 251 (1916) ... 7
McDonald v. *Johnson & Johnson*, 722 F.2d 1370 (8th Cir. 1983), cert. denied, 469 U.S. 870 (1984) ... 11
Musicial Instruments & Equip. Antitrust Litig., *In re,* 798 F.3d 1186 (9th Cir. 2015) ... 14
Novell, Inc. v. *Microsoft Corp.*, 731 F.3d 1064 (10th Cir. 2013), cert. denied, 134 S. Ct. 1947 (2014) ... 11
NYNEX Corp. v. *Discon, Inc.*, 525 U.S. 128 (1998) ... 9

Cases—Continued: Page

Rambus Inc. v. *FTC*, 522 F.3d 456 (D.C. Cir. 2008), cert. denied, 555 U.S. 1171 (2009) 9

SD3, LLC v. *Black & Decker (U.S.) Inc.*, 801 F.3d 412 (4th Cir. 2015), cert. denied, 136 S. Ct. 2485 (2016) 14, 15

Schachar v. *American Acad. of Opthalmology, Inc.*, 870 F.2d 397 (7th Cir. 1989) 10

Schuylkill Energy Res., Inc. v. *Pennsylvania Power & Light Co.*, 113 F.3d 405 (3d Cir.), cert. denied, 522 U.S. 977 (1997) 10

Travel Agent Comm'n Antitrust Litig., *In re,* 583 F.3d 896 (6th Cir. 2009), cert. denied, 562 U.S 1134 (2011) 14

Turner v. *Johnson & Johnson*, 809 F.2d 90 (1st Cir. 1986) 11

United States v. *Socony-Vacuum Oil Co.*, 310 U.S. 150 (1940) 4, 5

Virginia Military Inst. v. *United States,* 508 U.S. 946 (1993) 7

Visa Inc. v. *Osborn*, 137 S. Ct. 289 (2016) 15

Statute:

Sherman Act:

§ 1, 15 U.S.C. 1 .... 3, 11

§ 2, 15 U.S.C. 2 11

In the Supreme Court of the United States

No. 16-545

BANK OF AMERICA CORPORATION, ET AL., PETITIONERS

v.

ELLEN GELBOIM, ET AL.

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

BRIEF IN OPPOSITION FOR THE NATIONAL CREDIT UNION ADMINISTRATION BOARD AS LIQUIDATING AGENT

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-39a) is reported at 823 F.3d 759. The opinion of the district court (Pet. App. 41a-169a) is reported at 935 F. Supp. 2d 666.

JURISDICTION

The judgment of the court of appeals was entered on May 23, 2016. On August 8, 2016, Justice Ginsburg extended the time within which to file a petition for a writ of certiorari to and including September 20, 2016. On September 13, 2016, Justice Ginsburg further extended the time to October 20, 2016, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

This case arises out of ongoing multidistrict litigation based on allegations that major banks violated federal and state law by conspiring to manipulate the London Interbank Offer Rate (LIBOR), a widely used benchmark interest rate. This Court considered an unrelated question arising out of the same litigation in *Gelboim* v. *Bank of Am. Corp.*, 135 S. Ct. 897 (2015).[1]

1. LIBOR is a daily benchmark interest rate published by Thompson Reuters on behalf of the British Bankers' Association (BBA). Pet. App. 2a-5a. This case concerns the U.S. dollar LIBOR, which is calculated using reports from 16 BBA member banks on the rate at which they could borrow funds "by asking for and then accepting inter-bank offers in a reasonable market size just prior to 11 a.m." *Id.* at 4a. Thompson Reuters compiles the banks' submissions and publishes LIBOR, which is the average of the eight submissions remaining after the four highest and four lowest are discarded. *Id.* at 5a. BBA rules require the banks to exercise independent judgment in making their submissions and to keep the submissions confidential until LIBOR is published. *Ibid.*

"LIBOR is a reference point in determining interest rates for financial instruments in the United States and globally." *Gelboim*, 135 S. Ct. at 903.

---

[1] This brief is filed on behalf of the National Credit Union Administration Board, which is a respondent in its capacity as Liquidating Agent of U.S. Central Federal Credit Union, Western Corporate Federal Credit Union, Members United Corporate Federal Credit Union, Southwest Corporate Federal Credit Union, and Constitution Corporate Federal Credit Union. 13-3565 Docket entry No. 346 (2d Cir. May 20, 2015). The United States is not otherwise a party to this litigation.

LIBOR is widely used because it allows parties "to enter into floating-rate transactions without extensive negotiations of terms." Pet. App. 5a; see *id.* at 3a-4a.

2. Petitioners are banks that contributed to setting LIBOR. Pet. App. 2a. Respondents are purchasers of financial instruments affected by LIBOR. *Id.* at 8a-9a. Respondents filed numerous complaints alleging, as relevant here, that petitioners had violated Section 1 of the Sherman Act, 15 U.S.C. 1, by conspiring to suppress LIBOR through artificially low interest-rate submissions. Pet. App. 6a. Respondents alleged that a lower LIBOR increased petitioners' profits in LIBOR-linked transactions. *Ibid.* The complaints relied on facts uncovered in investigations by the Department of Justice and by other agencies, which revealed both direct and circumstantial evidence of LIBOR manipulation. *Id.* at 6a-7a, 51a-52a.

The district court granted in part and denied in part petitioners' motions to dismiss. Pet. App. 41a-169a. As relevant here, the court dismissed respondents' Sherman Act claims because it held that respondents had failed adequately to allege antitrust injury. *Id.* at 60a-80a. The court concluded that respondents had failed to allege that their asserted financial injuries were attributable to a harm to competition because "the process of setting LIBOR was never intended to be competitive" and was always a "cooperative endeavor." *Id.* at 66a.

3. The court of appeals reversed and remanded for further proceedings. Pet. App. 1a-39a.

a. The court of appeals first held that respondents' complaints stated an antitrust violation. Pet. App. 15a-16a. Although the district court had dismissed the suit solely for lack of antitrust injury, the court of

appeals explained that the merits and antitrust-injury issues are closely related, and the court addressed them both in the interest of judicial economy. *Id.* at 14a. The court concluded that, by alleging that petitioners had agreed to manipulate LIBOR, respondents had adequately stated a horizontal price-fixing claim because "LIBOR forms a component of the returns from various LIBOR-denominated financial instruments." *Id.* at 15a. The court reasoned that petitioners are horizontal competitors with respect to those instruments and that "the fixing of a component of price violates the antitrust laws." *Ibid.* (citing *Catalano, Inc.* v. *Target Sales, Inc.*, 446 U.S. 643, 648 (1980) (per curiam), and *United States* v. *Socony-Vacuum Oil Co.*, 310 U.S. 150, 222 (1940)). The court further stated that "[h]orizontal price-fixing conspiracies among competitors are unlawful *per se*," without the need for examination under the rule of reason. *Id.* at 16a.

b. The court of appeals next held that respondents had adequately alleged antitrust injury. Pet. App. 18a-28a. To satisfy the antitrust-injury requirement, a private plaintiff must plead an "injury of the type the antitrust laws were intended to prevent and that flows from that which makes [the] defendants' acts unlawful." *Id.* at 18a (quoting *Brunswick* v. *Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 489 (1977)). The court held that respondents had satisfied that test by alleging that petitioners' conduct had caused them to pay higher prices (or to earn lower returns) in LIBOR-linked transactions. *Id.* at 18a-23a.

The court of appeals rejected the district court's conclusion that the cooperative nature of the LIBOR process precluded a finding of antitrust injury, stating

that "[t]he machinery employed by a combination for price-fixing is immaterial." Pet. App. 23a (quoting *Socony-Vacuum Oil*, 310 U.S. 223). The court also disagreed with the district court's suggestion that respondents were required to plead a "harm to competition" beyond their allegation that petitioners' alleged price fixing had caused respondents to pay higher prices (or earn lower returns). *Id.* at 24a-28a. The court stated that, because "*proof* of harm to competition is not a prerequisite to recovery" when a plaintiff alleges a per se antitrust violation, "it follows that *allegations* pleading harm to competition are not required to withstand a motion to dismiss." *Id.* at 24a.

c. The court of appeals remanded for consideration of another necessary element of a private plaintiff's antitrust standing: whether respondents are "efficient enforcers of the antitrust laws." Pet. App. 17a. The court explained that the inquiry turns on four factors:

> (1) whether the violation was a direct or remote cause of the injury; (2) whether there is an identifiable class of other persons whose self-interest would normally lead them to sue for the violation; (3) whether the injury was speculative; and (4) whether there is a risk that other plaintiffs would be entitled to recover duplicative damages or that damages would be difficult to apportion among possible victims of the antitrust injury.

Ibid.

Although the court of appeals did not decide the efficient-enforcer question, it stated that the issue warranted "close attention" on remand because "there are features of this case that make it like no other, and potentially bear upon whether the aims of the anti-

trust laws are most efficiently advanced * * * through these suits." Pet. App. 29a.[2] For example, the court stated that some respondents had traded in LIBOR-linked instruments but had not dealt directly with petitioners. *Id.* at 30a-31a. The court added that, because of the widespread use of LIBOR and the complexity of LIBOR-linked transactions, determining damages could present "unusual challenges." *Id.* at 33a. The court further observed that the wrongdoing alleged in the complaints is the subject of "government and regulatory investigations and suits," which could raise questions about "duplicate recovery and damage apportionment." *Id.* at 33a-34a.

d. Finally, the court of appeals rejected petitioners' alternative argument that respondents had not adequately alleged a conspiracy under *Bell Atlantic Corp.* v. *Twombly*, 550 U.S. 544 (2007). Pet. App. 34a-38a. The court recognized that, because parallel conduct by competitors does not itself violate the antitrust laws, an antitrust plaintiff cannot rest on mere allegations of parallelism, but must also plead "enough factual matter (taken as true) to suggest that an agreement was made." *Id.* at 36a (citation omitted). The court observed that "[c]lose cases abound on this issue, but this is not one of them." *Ibid.* The court explained that respondents' complaints "contain numerous allegations that clear the bar of plausibility" in suggesting that petitioners had agreed to manipulate LIBOR. *Ibid.*

---

[2] Judge Lynch did not join this section of the opinion because he concluded that it was "preferable to allow the district court to address the question first." Pet. App. 28a n.17.

ARGUMENT

The court of appeals remanded this case for further proceedings, emphasizing the "narrow scope" of its decision, Pet. App. 38a, and the important legal and factual questions that remain to be resolved in the district court—including whether respondents' complaints must be dismissed for lack of antitrust standing. The court's interlocutory decision neither conflicts with any decision of another court of appeals nor otherwise warrants this Court's review. The petition for a writ of certiorari therefore should be denied.

1. Under this Court's longstanding practice, the interlocutory posture of this case "of itself alone furnishe[s] sufficient ground for the denial" of the petition. *Hamilton-Brown Shoe Co.* v. *Wolf Bros. & Co.*, 240 U.S. 251, 258 (1916); see, *e.g.*, *Brotherhood of Locomotive Firemen* v. *Bangor & Aroostook R.R.*, 389 U.S. 327, 328 (1967) (per curiam). To avoid the inefficiency of piecemeal review and focus its scarce resources on outcome-determinative questions, the Court "generally await[s] final judgment in the lower courts before exercising [its] certiorari jurisdiction." *Virginia Military Inst.* v. *United States*, 508 U.S. 946 (1993) (Scalia, J., respecting the denial of petition for certiorari).

This Court's usual reasons for avoiding interlocutory review apply with particular force here. The court of appeals remanded for further consideration of petitioners' motions to dismiss for lack of antitrust standing. Pet. App. 17a. In so doing, the court stated that the question "require[s] close attention," *id.* at 29a, and it identified a number of grounds on which the district court might conclude that respondents lack antitrust standing, *id.* at 30a-34a. If the district court

dismisses respondents' complaints on those grounds, the questions on which petitioners seek certiorari may have no effect on further proceedings in this case—let alone on petitioners' ultimate liability.

Even if the district court denies petitioners' motions to dismiss, petitioners may prevail on other factual or legal grounds, some of which the court of appeals identified. See Pet. App. 38a-39a. And no matter which party prevails on remand, this Court would benefit from deferring any review in this unusual case until it can consider all of the relevant antitrust issues together, rather than piecemeal.

2. Even apart from the present interlocutory posture of the case, the questions petitioners seek to raise do not warrant this Court's review.

a. Petitioners contend (Pet. 13-22) that the court of appeals erred in holding that respondents had adequately alleged a violation of the Sherman Act. Petitioners do not deny that price-fixing agreements among competitors are per se violations of the antitrust laws. They also do not appear to dispute that respondents adequately alleged that petitioners are horizontal competitors in the markets for LIBOR-linked financial instruments and that manipulating LIBOR resulted in petitioners charging higher prices (or paying lower returns). Petitioners argue, however, that the court of appeals departed from decisions of this Court and other courts of appeals by holding that a conspiracy among competitors to increase their prices by manipulating a benchmark interest rate should be treated as horizontal price fixing under the Sherman Act.

None of the decisions on which petitioners rely involved facts like those present here. Indeed, none of

those decisions involved *any* alleged collusion among horizontal competitors. Petitioners focus primarily (Pet. 18-20) on *NYNEX Corp.* v. *Discon, Inc.*, 525 U.S. 128 (1998). In that case, a supplier of services to a local telephone company alleged that the company had "switched its purchases [to a different supplier] as part of an attempt to defraud local telephone services customers by hoodwinking regulators." *Id.* at 131-132. This Court held that the per se rule against *group* boycotts does not apply "where a *single* buyer favors one seller over another," even if that buyer acts "for an improper reason." *Id.* at 133 (emphasis added). The Court emphasized that the case did not involve any "agreement[] among direct competitors." *Id.* at 135.

Petitioners also rely (Pet. 20-21) on *Rambus Inc.* v. *FTC*, 522 F.3d 456 (D.C. Cir. 2008), cert. denied, 555 U.S. 1171 (2009). In that case, a technology company deceived a standard-setting organization by concealing the fact that it held patents covering technologies that the organization incorporated into its standards. *Id.* at 463-464. Relying on *NYNEX*, the D.C. Circuit held that such conduct was insufficient to establish anticompetitive harm because "an otherwise lawful monopolist's use of deception simply to obtain higher prices normally has no particular tendency to exclude rivals and thus to diminish competition." *Id.* at 464. Like *NYNEX*, however, *Rambus* did not involve collusion among competitors. And the other circuit-court decisions on which petitioners rely (Pet. 21 n.6) are distinguishable on similar grounds.[3]

---

[3] See *Forsyth* v. *Humana, Inc.*, 114 F.3d 1467, 1477-1478 (9th Cir. 1997) (holding that plaintiffs failed to establish antitrust injury from a kickback scheme that caused an insurer's customers to pay

Petitioners thus do not identify any other decision applying the antitrust laws to collusion of the sort alleged here. That failure reflects the fact that this case has a number of "features that make it like no other." Pet. App. 29a; see *id.* at 39a. The absence of other decisions applying the federal antitrust laws to similar conduct counsels strongly against this Court's review.

b. Petitioners also contend (Pet. 22-25) that the court of appeals erroneously departed from decisions of this Court and other courts of appeals in holding that respondents had adequately alleged antitrust injury. But that argument is derivative of petitioners' argument on the merits. Petitioners do not appear to dispute that plaintiffs who pay higher prices because of horizontal price fixing suffer antitrust injury. Instead, as petitioners acknowledge (Pet. 23), their contention that the court of appeals erred in finding antitrust injury rests primarily on the premise that the court was "mistaken" to hold "that respondents had properly pleaded a violation of Section 1." And, as with their underlying argument on the merits, petitioners' assertion of a circuit conflict on antitrust

higher rates but did not involve any agreement among competitors), aff'd on other grounds, 525 U.S. 299 (1999); *Schuylkill Energy Res., Inc.* v. *Pennsylvania Power & Light Co.*, 113 F.3d 405, 414 (3d Cir.) (holding that a claim that a utility maintained "an artificially high rate base" was "not within the purview of the antitrust laws" because the utility's rates were set by state regulators), cert. denied, 522 U.S. 977 (1997); *Schachar* v. *American Acad. of Opthalmology, Inc.*, 870 F.2d 397, 399-400 (7th Cir. 1989) (rejecting an antitrust claim based on a professional association's press release because the release did not restrict the members' conduct and therefore allowed for "uncoordinated individual action").

injury (Pet. 24-25) relies on decisions addressing very different facts.[4]

c. Finally, petitioners contend (Pet. 25-32) that the court of appeals departed from *Bell Atlantic Corp.* v. *Twombly*, 550 U.S. 544 (2007), and from the decisions of other circuits in holding that respondents had adequately alleged an agreement. That is incorrect.

Section 1 of the Sherman Act "does not prohibit all unreasonable restraints of trade . . . but only restraints effected by a contract, combination, or conspiracy." *Twombly*, 550 U.S. at 553 (brackets and citation omitted). In *Twombly*, this Court observed that, "[w]ithout more, parallel conduct does not suggest conspiracy." *Id.* at 556-557. The Court therefore held that "an allegation of parallel conduct and a bare assertion of conspiracy will not suffice" to plead a violation of Section 1. *Id.* at 556. Instead, the "allegations of parallel conduct * * * must be placed in a context that raises a suggestion of a preceding agreement, not

---

[4] See *Novell, Inc.* v. *Microsoft Corp.*, 731 F.3d 1064, 1076 (10th Cir. 2013) (rejecting a claim that Microsoft violated Section 2 of the Sherman Act, 15 U.S.C. 2, through its "*unilateral* decisions about with whom it w[ould] deal") (emphasis added), cert. denied, 134 S. Ct. 1947 (2014); *Bassett* v. *NCAA*, 528 F.3d 426, 434, 435 n.1 (6th Cir. 2008) (holding that a coach who challenged the NCAA's enforcement of its rules had not adequately alleged antitrust injury because his complaint "contain[ed] no allegations of the effect of NCAA's enforcement * * * on the coaching market," and adding that the plaintiff "ha[d] not alleged a conspiracy between NCAA's member institutions"); *McDonald* v. *Johnson & Johnson*, 722 F.2d 1370, 1373 (8th Cir. 1983) (rejecting for lack of antitrust standing a claim based on an allegedly deceptive stock-purchase agreement because "the antitrust laws were not designed to provide stockholders, who may have been defrauded in the sale of their stock, a remedy"), cert. denied, 469 U.S. 870 (1984); see also *Turner* v. *Johnson & Johnson*, 809 F.2d 90, 102 (1st Cir. 1986) (similar).

merely parallel conduct that could just as well be independent action." *Id.* at 557. The Court explained that "further factual enhancement" or "a context that raises a suggestion of a preceding agreement" can push a complaint across the line from speculative to plausible. *Id.* at 557; see *id.* at 556-557 & n.4.

The court of appeals' decision in this case is consistent with *Twombly*. The court noted repeatedly that a "complaint alleging merely parallel conduct is not sustainable." Pet. App. 36a (citation omitted); see *id.* at 35a-36a. The court explained, however, that respondents' complaints do not rest on mere allegations of parallel LIBOR submissions, but rather "contain numerous allegations that clear the bar of plausibility" in suggesting a preceding agreement. *Id.* at 36a. The complaint identified "a high number of interfirm communications," including communications suggesting that one bank had "knowledge of other banks' confidential individual submissions in advance." *Id.* at 37a; see *id.* at 37a n.19. Respondents also alleged that one bank's submissions had perfectly predicted each day's LIBOR over the span of ten months —a result exceedingly unlikely to occur absent coordination. *Id.* at 38a n.20. And the complaints added other indicia of conspiracy, including a bank employee's statements that "it's just amazing how Libor fixing can make you that much money" and that "[i]t's a cartel now in London." *Id.* at 7a n.5 (brackets, emphasis, and citation omitted).

The complaints at issue here are thus quite different from the one this Court found deficient in *Twombly*. There, the plaintiffs relied exclusively on "the [defendants'] parallel behavior" and "the suggestions raised by this conduct when viewed in light of

common economic experience." 550 U.S. at 565. This Court found the alleged parallel conduct insufficient to establish a plausible inference of agreement because, under the circumstances of that case, parallel conduct "was not only compatible with, but indeed was more likely explained by, lawful, unchoreographed free-market behavior." *Ashcroft* v. *Iqbal*, 556 U.S. 662, 680 (2009). Here, in contrast, "[t]he parallelism is accompanied by plus factors plausibly suggesting a conspiracy, to say nothing of the economic evidence in the complaints * * * further supporting an inference of conspiracy." Pet. App. 37a-38a.

Petitioners assert (Pet. 27-28) that the court of appeals erred in stating that "at the motion-to-dismiss stage, [respondents] must only put forth sufficient factual matter to plausibly suggest an inference of conspiracy, *even if* the facts are susceptible to an equally likely interpretation." Pet. App. 38a. Contrary to petitioners' contention, *Twombly* does not require dismissal of a Section 1 complaint if the allegations raise a plausible inference of conspiracy but also an equally plausible inference of independent conduct. In fact, the Court in *Twombly* was careful to distinguish its plausibility requirement from the sort of more-likely-than-not standard that petitioners advocate. The Court cautioned, for example, that "[a]sking for plausible grounds to infer an agreement does not impose a probability requirement at the pleading stage." 550 U.S. at 556; accord *Iqbal*, 556 U.S. at 678 ("The plausibility standard is not akin to a 'probability requirement,' but it asks for more than a sheer possibility that a defendant has acted unlawfully.") (quoting *Twombly*, 550 U.S. at 556).

Contrary to petitioners' contention (Pet. 29-31), the court of appeals' application of the standards for pleading concerted action under the antitrust laws is consistent with the decisions of other circuits. The three decisions on which petitioners rely held that the relevant portions of the complaints at issue did not satisfy the *Twombly* standard. *SD3, LLC* v. *Black & Decker (U.S.) Inc.*, 801 F.3d 412, 437-438 (4th Cir. 2015), cert. denied, 136 S. Ct. 2485 (2016); *In re Musical Instruments & Equip. Antitrust Litig.*, 798 F.3d 1186, 1198 (9th Cir. 2015); *In re Travel Agent Comm'n Antitrust Litig.*, 583 F.3d 896, 904-911 (6th Cir. 2009), cert. denied, 562 U.S 1134 (2011). The courts reached that conclusion, however, because those complaints contained only "bare assertions of conspiracy and parallel conduct" or otherwise failed to plead facts plausibly suggesting a conspiracy. *Travel Agent Comm'n*, 583 F.3d at 905.[5]

Thus, while petitioners identify decisions holding *other* factual allegations insufficient to satisfy the *Twombly* standard, petitioners identify no reason to believe that any circuit would find respondents' allegations of concerted action to be inadequate. Indeed, the Fourth Circuit decision on which petitioners chiefly rely (Pet. 29-30) *rejected* the suggestion that courts applying *Twombly* must "weigh[] the competing inferences that can be drawn from the complaint" in order to determine "whether a lawful alternative explana-

---

[5] See *SD3*, 801 F.3d at 437 (explaining that the complaint "identifie[d] no fact other than [parallel conduct] * * * to establish the alleged illegal agreements"); *Musical Instruments*, 798 F.3d at 1198 (holding that the complaint did not "plausibly suggest[]" an agreement because it indicated that "each [defendant] adopted [the challenged] policies as in its own interest").

tion appears more likely" than an agreement. *SD3*, 801 F.3d at 425 (brackets and citation omitted). The Fourth Circuit explained that "*Twombly*'s requirement to plead something 'more' than parallel conduct does not impose a probability standard at the motion-to-dismiss stage." *Ibid.*

There is thus no circuit split on the question whether *Twombly* requires dismissal when a complaint raises a plausible inference of an agreement but also an equally plausible inference of independent parallel conduct. But even if such a conflict existed, it would not be implicated here. The court of appeals' statement about "equally likely" inferences was a response to petitioners' argument that the banks' "'pack' behavior described in the complaints is equally consistent with parallelism." Pet. App. 38a. The court below did not suggest, however, that when *all* of the facts alleged in the complaints are considered, an inference of mere parallelism is "equally likely." To the contrary, the court emphasized that "this is not one of" the "[c]lose cases * * * on this issue" because the allegations strongly support an inference of conspiracy. *Id.* at 36a.[6]

---

[6] As petitioners note (Pet. 31-32), this Court granted writs of certiorari in *Visa Inc.* v. *Osborn*, 137 S. Ct. 289 (2016), to review a question about the application of *Twombly*. But the Court has since dismissed the writs as improvidently granted. *Ibid.* And in any event, the question presented in *Visa* focused on the application of *Twombly* to allegations that "members of a business association" had engaged in concerted action by "agree[ing] to adhere to the association's rules." *Ibid.* That question is not implicated here.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

IAN HEATH GERSHENGORN
Acting Solicitor General
BRENT C. SNYDER
Deputy Assistant Attorney General
KRISTEN C. LIMARZI
JAMES J. FREDRICKS
STEVEN J. MINTZ
Attorneys

MICHAEL J. MCKENNA
General Counsel
ALAN R. BURCH
Associate Counsel
National Credit Union Administration

DECEMBER 2016