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Supreme Court, U.S.
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No. 16-____

IN THE
Supreme Court of the United States

S.G.E. MANAGEMENT, L.L.C., ET AL.,
Petitioners,

v.

JUAN R. TORRES, ET AL.,
Respondents.

**On Petition For A Writ Of Certiorari
To United States Court Of Appeals
For The Fifth Circuit**

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

A plaintiff seeking to certify a class action under Rule 23(b)(3) has the burden to “affirmatively demonstrate” that “common questions predominate over individual ones.” *Comcast Corp. v. Behrend*, 133 S. Ct. 1426, 1432 (2013). So a plaintiff in a RICO-fraud case must show that the issue of reliance is common to the entire class, not individualized—that virtually all class members relied on the allegedly false statement, and that different people would not react differently.

In this RICO-fraud class action, however, the Fifth Circuit did not require the plaintiff to demonstrate reliance *at all*—let alone that reliance is common to the entire class. Instead, the Fifth Circuit established a rebuttable presumption that a RICO fraud class action should be certified, unless the defendant shows that reliance is individualized, rather than common.

In doing so, the Fifth Circuit split with other circuits on not one but two bodies of law—RICO and Rule 23—presenting two issues worthy of review:

1. Must a RICO fraud plaintiff prove reliance, in order to establish causation—as this Court held in *Bridge v. Phoenix Bond & Indemnity Co.*, 553 U.S. 639, 658 (2008), and as the Second, Ninth, Tenth, and Eleventh Circuits have since reaffirmed? Or is reliance no longer required—as the Fourth Circuit and now the Fifth Circuit have held?

2. To certify a RICO fraud class action, must the plaintiff show that reliance is a common issue because virtually *all* class members would have relied—as the Second, Ninth, and Tenth Circuits have all held? Or is it sufficient to show merely that it “follows logically” that *some* class members would have relied—as the Fifth Circuit has now held?

PARTIES TO THE PROCEEDING

The following petitioners were defendants–appellants in the Fifth Circuit:

SGE Management, LLC; Stream Gas & Electric, Ltd.; Stream SPE GP, LLC; Stream SPE, Ltd.; Ignite Holdings, Ltd.; SGE Energy Management, Ltd.; SGE IP Holdco, LLC; SGE Georgia Holdco, LLC; SGE Serviceco, LLC; SGE Consultants, LLC; Stream Georgia Gas SPE, LLC; Stream Texas Serviceco, LLC; SGE Ignite GP Holdco, LLC; SGE Texas Holdco, LLC; SGE North America Serviceco, LLC; PointHigh Partners, LP; PointHigh Management Company, LLC; Chris Domhoff; Rob Snyder; Pierre Koshakji; Douglas Witt; Steve Florez; Michael Tacker; Darryl Smith; Trey Dyer; Donny Anderson; Steve Fisher; Randy Hedge; Brian Lucia; Logan Stout; Presley Swagerty; Mark Dean; La Dohn Dean; A.E. “Trey” Dyer III; Sally Kay Dyer; Dyer Energy, Inc.; Diane Fisher; Kingdom Brokerage, Inc; Fisher Energy, LLC; Susan Fisher; Mark Florez; The Randy Hedge Companies, Inc.; Murlle, LLC; Robert L. Ledbetter; Greg McCord; Heather McCord; Rose Energy Group, Inc.; Timothy W. Rose Shannon Rose; LHS, Inc.; Haley Stout; Property Line Management, LLC; Property Line LP; Swagerty Management, LLC; Swagerty Energy, Ltd.; Swagerty Enterprises, LP; Swagerty Enterprises, Inc.; Swagerty, Inc.; Swagerty Power, Ltd.; Jeannie E. Swagerty; Sachse, Inc.; Terry Yancey; Paul Thies.

RULE 29.6 STATEMENT

Pursuant to this Court's Rule 29.6, undersigned counsel states that:

1. Petitioners Stream SPE GP, LLC; Stream SPE, Ltd.; Ignite Holdings, Ltd.; SGE IP Holdco, LLC; Stream Georgia Gas SPE, LLC; and SGE North America Serviceco, LLC are all wholly owned subsidiaries of Stream Gas & Electric, Ltd., which is a limited partnership controlled by its general partner, SGE Management, LLC, which is, in turn, a 99-percent-owned subsidiary of PointHigh Partners, LP.

2. The following petitioners do not have parent companies, nor do any publicly held companies own 10 percent or more of their stock: SGE Energy Management, Ltd.; SGE Georgia Holdco, LLC; SGE Serviceco, LLC; SGE Consultants, LLC; Stream Texas Serviceco, LLC; SGE Ignite GP Holdco, LLC; SGE Texas Holdco, LLC; PointHigh Partners, LP; PointHigh Management Company, LLC; Dyer Energy, Inc.; Kingdom Brokerage, Inc.; Fisher Energy, LLC; The Randy Hedge Companies, Inc.; Murlle, LLC; Rose Energy Group, Inc.; LHS, Inc.; Property Line Management, LLC; Property Line, LP; Swagerty Management, LLC; Swagerty Energy, Ltd.; Swagerty Enterprises, LP; Swagerty Enterprises, Inc.; Swagerty, Inc.; Swagerty Power, Ltd.; Sachse, Inc.

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PETITION FOR A WRIT OF CERTIORARI

Petitioners (collectively, “Stream Energy”) respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit.

OPINIONS BELOW

The en banc judgment of the U.S. Court of Appeals for the Fifth Circuit (Pet. App. 1a–49a) is reported at 838 F.3d 629. The superseded panel opinion of the court of appeals (Pet. App. 50a–98a) is reported at 805 F.3d 145. The district court’s certification order (Pet. App. 99a–121a) is unreported, but available at 2014 WL 129793. The order of the court of appeals denying rehearing (Pet. App. 122a–124a) is unreported.

JURISDICTION

The U.S. Court of Appeals for the Fifth Circuit entered its judgment on September 30, 2016. A timely petition for rehearing was denied on November 29, 2016. Justice Thomas extended the time within which to file a petition for a writ of certiorari to and including April 28, 2017. *See* No. 16A788. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Relevant provisions of the Racketeer Influenced and Corrupt Organizations Act (“RICO”) and Federal Rule of Civil Procedure 23 are reprinted at Pet. App. 125a–126a.

INTRODUCTION

This case lies at the intersection of two circuit splits on RICO and Rule 23. The Respondents allege that Petitioners made misrepresentations about their business. They filed a RICO action predicated on mail and wire fraud, and moved for class certification. But they never presented a shred of evidence that *anyone* in the proposed class *relied* on those alleged misrepresentations—let alone evidence to prove reliance on a class-wide basis. The Fifth Circuit nevertheless certified the case as a class action. In so doing, the Fifth Circuit deepened one circuit split, and created another.

First, the Fifth Circuit held that a plaintiff need not show reliance to prevail in a RICO-fraud action. That holding is irreconcilable with this Court’s decision in *Bridge v. Phoenix Indemnity & Bond Co.*, 553 U.S. 639, 646 (2009). *Bridge* held that “first-party reliance” is not an element of a civil RICO-fraud claim. But it noted that, “[o]f course, a misrepresentation can cause harm only if a recipient of the misrepresentation relies on it,” and that “none of this is to say that a RICO plaintiff . . . can prevail without showing that *someone* relied.” *Id.* at 656, 658–59 & n.6.

The Fifth Circuit flouted that ruling, holding instead that “no reliance requirement exists for civil causes of action under RICO for victims of mail fraud.” Pet App. 11a (quoting *St. Germain v. Howard*, 556 F.3d 261, 263 (5th Cir. 2009)). That decision solidified a 4-2 split among the courts of appeals over how to interpret *Bridge*. Four courts of appeals—the Second, Ninth, Tenth, and Eleventh Circuits—have stayed true to *Bridge*, requiring plaintiffs to show either first- or third-party reliance in order to prove causation in

a RICO suit predicated on fraud, while the Fourth Circuit and now the Fifth Circuit take the opposite view.¹

Second, the Fifth Circuit went on to create a new circuit split over the certification of RICO-fraud class actions under Rule 23(b). It held that the putative class did not need to demonstrate reliance on a class-wide basis. Instead, the class needs to show only that reliance by *some* class members “follows logically from the nature of the scheme” alleged. Pet. App. 20a. This rebuttable presumption relieves the plaintiffs of their burden to establish class-wide reliance, and shifts that burden to defendants to show through affirmative evidence that there was no class-wide reliance. Pet. App. 24a–25a.

Put simply, then, the Fifth Circuit no longer asks whether *all* reasonable class members would have relied—as required to ensure that the issue of reliance is common to all members. Rather, the Fifth Circuit now asks whether it “follows logically” that *some* members would have relied. No circuit court has ever before blessed that dramatic expansion of Rule 23(b), and indeed three courts of appeals—the Second, Ninth, and Tenth Circuits—have rejected the Fifth Circuit’s approach.

¹ The en banc majority cited decisions from other circuits that it said “have adopted similar definitions of proximate causation under RICO.” Pet. App. 1a. But other than the Fourth Circuit’s decision in *Biggs v. Eaglewood Mortg., LLC*, 353 F. App’x 864, 867 (4th Cir. 2009), none of those cases holds that no reliance is necessary to prove proximate causation. Instead, they merely acknowledge that reliance is not itself an element of a RICO cause of action, and that *first-party* reliance is not necessarily essential. See *Wallace v. Midwest Fin. & Mortg. Servs., Inc.*, 714 F.3d 414, 419–20 (6th Cir. 2013); *BCS Servs., Inc. v. Heartwood 88, LLC*, 637 F.3d 750, 759 (7th Cir. 2011); *In re Neurontin Mktg. & Sales Practices Litig.*, 712 F.3d 21, 37 (1st Cir. 2013).

In sum, the decision below misinterprets RICO by misreading *Bridge*, and it invents a burden-shifting inference incompatible with Rule 23(b). The Fifth Circuit’s analysis wrongly asks whether any class member *could* have relied, when it should ask whether every class member *did* rely. And it imposes a class-wide inference of reliance based not on a showing of causation, but on the business structure at issue. If left unchecked, the decision below will fundamentally distort both RICO and Rule 23(b), and leave defendants vulnerable to the worst form of class-action abuse. This Court should intervene.

STATEMENT

1.a. Stream Energy is one of the largest retail energy providers in Texas. It sells natural gas and electricity in deregulated energy markets across the country through a direct-selling model. Since 2005, through a sales force of independent associates (“IAs”), Stream Energy has generated billions of dollars in energy sales to more than one million customers across seven states.

Stream Energy’s popular multi-level marketing program is widely successful and has been broadly mimicked by many competitors across deregulated energy-service markets. The direct-selling methodology pioneered by Stream Energy and adopted by its copycat competitors now accounts for the majority of the millions of customers who left the legacy utility companies within the deregulated energy markets throughout the northeastern United States.

While some energy companies might pay celebrity endorsers millions of dollars to advertise their product, Stream Energy has invented a different approach. Under the mantra of “be my friend, give me your busi-

ness, and save,” Stream Energy rewards its own customers in their role as IAs for promoting electricity and natural gas service to their friends and family. Much as other blue chip companies such as Avon and Tupperware have relied on multi-level marketing to drive their sales, Stream Energy offers its customers the chance to become marketing partners.

Individuals join Stream Energy’s direct selling organization by paying a \$329 fee to become an IA, and from there can enroll residential and commercial customers for electric or gas service. IAs receive commissions based on monthly energy sales to their customers. Additionally, IAs can recruit their own sales force of downline IAs, and earn additional compensation for sales made by their recruits.

The most devoted and successful IAs have reaped enormous financial rewards for their efforts. Most have pursued the IA program on a part-time basis, making a few hundred dollars per year to provide additional income for their families. Others join the IA program not to sell energy, but rather to gain access to the unique training and networking opportunities that Stream Energy provides to its IAs. To some IAs, the Stream IA program is an educational alternative to a business degree program.

b. For a variety of individualized reasons, not every IA succeeds at making money. Respondents here, two former IAs, filed suit under RICO against Stream Energy, its corporate partners, subsidiaries, officers, and several other IAs. 18 U.S.C. § 1962(c), (d). Their core complaint is that Stream Energy resembles a pyramid scheme in which IAs cannot recoup the fees they pay. These allegations distort the facts: Stream Energy sells a real—indeed, *essential*—product. It does not practice inventory loading or the other

hallmarks of an illegal scheme, the energy market is not saturated, and even those IAs who have joined the program recently can earn significant income.

Nevertheless, claiming mail and wire fraud as the predicate RICO acts, Respondents sought to certify a class of all current and former IAs who had failed to recoup their fees—a class of over 230,000 individuals. Respondents made no attempt to demonstrate that anyone had relied on Petitioners’ alleged misrepresentations, arguing instead that such a showing was unnecessary under *Bridge*.

2. The district court rejected Respondents’ argument that they need not show reliance in order to prove proximate causation. But the court nevertheless certified the class under a different legal theory. The court found that it could *presume* class-wide reliance based on an inference that no rational person would knowingly become an IA but for relying on some misrepresentation, and this was sufficient to meet Federal Rule of Civil Procedure 23(b)(3)’s predominance requirement. Pet. App. 116a.

3. A divided Fifth Circuit panel reversed the district court’s class-certification order. First, recognizing the circuit conflict, Pet. App. 70a–72a, the panel rejected the district court’s stated rationale—that a presumption of class-wide reliance could be inferred from the alleged conduct—as “unsupported by our precedents or by the precedents in other circuits.” Pet. App. 68a. Such an inference was appropriate only where “there was no evidence . . . to suggest any other rational explanation for the plaintiffs’ behavior other than that they were duped.” Pet. App. 72a. That is not the case with Stream Energy’s organization because “there are many reasons why someone would choose to join or not join.” Pet. App. 73a.

Notably, the panel majority and the dissent agreed that reliance was still necessary in order to show causation under *Bridge*. The majority observed that “[a]lthough *Bridge* dispenses with first party reliance, ‘none of this is to say that a RICO plaintiff who alleges injury by reason of a pattern of mail fraud can prevail without showing that someone relied on the defendant’s misrepresentations.’” Pet. App. 60a (quoting *Bridge*, 553 U.S. at 658). Similarly, Judge Wiener noted in dissent that “plaintiffs ‘must establish at least third-party reliance in order to prove causation.’” Pet. App. 81a (Wiener, J., dissenting) (quoting *Bridge*, 553 U.S. at 659).

4.a. The Fifth Circuit granted review en banc, vacated the panel decision, and issued a judgement affirming the district court’s class-certification order for two alternative reasons.

First, the court held—contrary to the district court, the panel majority, and the panel dissent—that “in cases predicated on mail or wire fraud, reliance is not necessary.” Pet. App. 11a. Instead, the Fifth Circuit (misreading *Bridge*) held that a plaintiff can prove causation so long as he or she is a “foreseeable victim” of a fraudulent enterprise. Pet. App. 12a.

Applying that rule to this case, the majority reasoned that “pyramid schemes are per se mail fraud” because the very legitimacy of the enterprise is a misrepresentation, and they will, by design, ultimately collapse. Pet. App. 14a, 16a. As a result, under the Fifth Circuit’s view, “one who participates in a pyramid scheme can be harmed ‘by reason of the fraud regardless of whether he or she relied on a misrepresentation about the scheme.’” Pet. App. 16a (emphasis added) (quoting 18 U.S.C. § 1964(c)).

Thus, the court held, it makes no difference whether any plaintiff knew about the alleged fraud, or relied on any representation about Stream Energy. It is enough to show that their injuries were “a ‘foreseeable and natural consequence’ of the allegedly unlawful pyramid scheme” to sustain their claim. Pet. App. 6a.

Second, in an alternative holding, the Fifth Circuit held that, notwithstanding that reliance was wholly unnecessary, the district court could nonetheless infer class-wide reliance based on Steam Energy’s “implicit representation that it is a legal multi-level marketing program.” Pet. App. 23a. Respondents’ allegations provided enough circumstantial evidence, the court said, to presume class-wide reliance and satisfy Rule 23(b)(3).

A class-wide presumption of reliance could be inferred, the court wrote, because it “follows logically from the nature of the scheme.” Pet. App. 20a. That is, the majority opinion reasoned that, as a matter of logical inference, “individuals do not knowingly join pyramid schemes because (1) pyramid schemes are inherently deceptive and operate only by concealing their fraudulent nature; and (2) knowingly joining a pyramid scheme requires the individual to choose to become either a victim or a fraudster.” Pet. App. 23a.

Although acknowledging a circuit conflict, Pet. App. 24a & n.62, the court rejected out of hand the notion that it had applied an incorrect, expansive test for presuming reliance for an entire class, or that significant numbers of IAs might have joined the organization regardless of whether it was an illegal pyramid scheme. Instead, it placed the burden on Stream Energy to produce evidence that class members had *not*

relied on any misrepresentation, rebutting the inference of reliance in order to defeat class certification. Pet. App. 24a–25a. Because Stream Energy could not bear its burden to *disprove* reliance among the class members, the court held that certification was proper. Pet. App. 25a–26a.

b. Five judges would have reversed the class certification order. The three dissenting opinions explained that the class-certification order cannot stand because individualized issues of reliance and knowledge precluded class certification. *See* Pet. App. 30a–44a (Jolly, J., dissenting, joined by Jones, Clement, and Owen, J.J.); Pet. App. 44a–46a (Jones, J., dissenting, joined by Clement, J.); Pet. App. 46a–49a (Haynes, J., dissenting).

Judge Jolly’s principal dissent, as well as dissenting opinions by Judge Jones and Judge Haynes, laid out in detail how “[t]he majority opinion dilutes both RICO’s causation requirement and Rule 23’s predominance requirement to the point that they have little relevance.” Pet. App. 44a (Jolly, J., dissenting). After discussing the en banc majority’s failure to properly apply *Bridge*, Pet. App. 31a & n.1 (Jolly, J., dissenting), the dissenting opinions proceeded to explain in detail how the majority had erred under Rule 23(b)(3)’s predominance requirement in presuming class-wide reliance. Individualized issues precluded class certification because, as Judge Jolly wrote, “[i]t is impossible rationally to presume that, out of 200,000-plus investors, a significant number of the class were not aware of the precise character of their investment.” Pet. App. 44a (Jolly, J., dissenting).

Judge Haynes elaborated that this class-wide presumption of reliance, inferred merely from the allega-

tions, “allows the plaintiffs to skirt their burden of establishing ‘that the questions of law or fact common to class members predominate.’” Pet. App. 47a (Haynes, J., dissenting) (quoting Fed. R. Civ. P. 23(b)(3)). She noted that “[w]ith over 200,000 plaintiffs in this case, there are numerous and disparate motivations behind each plaintiff’s decision to participate in [Stream Energy’s] multi-level marketing program, many of which weaken or sever any chain of causation.” Pet. App. 47a (Haynes, J., dissenting). Some plaintiffs “could have been fully aware of the questions surrounding [Stream Energy’s] legality, but nevertheless decided to participate for the simple reason of making a profit.” Pet. App. 47a (Haynes, J., dissenting). Others “could have joined [Stream Energy’s] program for the sole purpose of selling (or learning the business of selling) energy.” Pet. App. 48a (Haynes, J., dissenting). Still others “may have joined [Stream Energy] solely to take advantage of [Stream Energy’s] training courses or networking opportunities, while others could have participated without any intention of making a profit in order to help out a friend or family member who was already a part of the program.” Pet. App. 48a (Haynes, J., dissenting). As to these individuals, “it would be impossible for [Stream Energy] to have caused any alleged injury, because no injury exists: these plaintiffs obtained exactly what they were hoping to receive by participating in [Stream Energy’s] program.” Pet. App. 48a (Haynes, J., dissenting). The en banc majority never disputed that assessment.

The dissenting opinions further noted the circuit conflicts over this issue. Citing cases from the Second, Ninth, and Tenth Circuits, both Judge Jolly’s and Judge Haynes’s dissenting opinions explained that other circuits had allowed for an inference of reliance

to support class certification only in exceedingly narrow circumstances: where no rational person would have chosen to engage with the RICO enterprise unless he or she had relied on the misrepresentation. That situation is essentially limited to “something-for-nothing” transactions, where a class member agrees to pay money but receives nothing that any rational class member would value in return. Pet. App. 42a (Jolly, J., dissenting); Pet. App. 48a (Haynes, J., dissenting).

REASONS FOR GRANTING THE PETITION

The district court below certified a class of over 230,000 individuals based on little more than a naked allegation that the named plaintiffs were misled. It did so without a shred of common evidence that class members had relied on any of Stream Energy’s representations. Although Stream Energy explained why reliance was necessary—and could not simply be presumed—the en banc court affirmed the district court’s certification order. It concluded that reliance was unnecessary and, at any rate, could be inferred without common evidence based on the scheme alleged.

The Fifth Circuit reached this two-part conclusion based on its faulty understanding of *Bridge v. Phoenix Bond & Indemnity Co.*, 553 U.S. 639, 658 (2008): that “[proving] that the Defendants operated a fraudulent pyramid scheme will also suffice to show under *Bridge* that the fraud caused the Plaintiffs’ injuries.” Pet. App. 19a.

That is exactly wrong. This Court’s unanimous opinion could not have been clearer: “Of course, a misrepresentation can cause harm only if a recipient of the misrepresentation relies on it.” *Bridge*, 553 U.S. at 656 & n.6. It reiterated that “*none of this is to say that a RICO plaintiff . . . can prevail without showing*

that *someone* relied,” and suggested that “a RICO plaintiff alleging injury by reason of a pattern of mail fraud *must establish at least third-party reliance* in order to prove causation.” *Id.* at 658–59 (emphases added). With its blatant misreading of this Court’s precedent, the Fifth Circuit joined the Fourth Circuit in a 4-2 circuit conflict with the Second, Ninth, Tenth, and Eleventh Circuits, each of which has adhered to the limitation this Court set out in *Bridge*.

The Fifth Circuit further erred in holding that district courts may presume class-wide reliance whenever an inference of reliance “follows logically” from the nature of the alleged misrepresentation. Pet. App. 20a. In other words, plaintiffs need not show that *all* reasonable class members would have relied—it is now sufficient to show that *some* class members would have relied, even if others might not have. That holding not only conflicts with the standards of three other courts of appeals, but also violates this Court’s Rule 23(b) precedents by eliminating plaintiffs’ burden to show that common questions predominate for the class. *Comcast Corp. v. Behrend*, 133 S. Ct. 1426, 1432–33 (2013). It effects a fundamental burden shift upon the defendant that upends Rule 23’s well-settled operation.

If the decision below is allowed to stand, scores of defendants are certain to face more putative class actions alleging faulty RICO enterprises predicated on fraud, demanding automatic class certification without any common evidence of reliance, with the goal of extracting an easy settlement. At the same time, these circuit conflicts will endure, and courts will continue to apply incompatible standards to RICO class actions, leading to inconsistent outcomes. This Court should intervene.

I. CERTIORARI IS NECESSARY TO ADDRESS THE FIFTH CIRCUIT'S MISINTERPRETATION OF RICO.

Respondents never attempted to present common evidence that putative class members relied on Stream Energy's representations. Citing *Bridge*, they said evidence of reliance was unnecessary. And though both the district court and Fifth Circuit panel unanimously rejected that argument, the en banc majority ultimately adopted it.

The Fifth Circuit's en banc majority did not even attempt to adhere to this Court's opinion. The unanimous opinion in *Bridge* stated *five times* that "none of this is to say a RICO plaintiff . . . can prevail without showing that someone relied on the defendant's misrepresentation." *Bridge*, 553 U.S. at 656–58 ("[P]laintiff's loss must be a foreseeable result of someone's reliance on the misrepresentation."); *id.* at 656 n.6 ("Of course, a misrepresentation can cause harm only if a recipient of the misrepresentation relies on it."); *id.* at 658 ("In most cases, the plaintiff will not be able to establish even but-for causation if no one relied on the misrepresentation."); *id.* at 659 (plaintiffs "must establish at least third-party reliance in order to prove causation").

By disregarding that language, the Fifth Circuit held that a district court could certify a RICO-fraud class action *even if* the plaintiffs never present any evidence that anyone relied on the alleged misrepresentations—let alone evidence of class-wide reliance. All that is necessary is that the putative class members were the foreseeable victims of the alleged scheme, regardless of whether they joined with full knowledge of the alleged fraud or whether they ever saw any al-

leged misrepresentation. That decision is a clear deviation from this Court's precedent and warrants review.

A. The Fifth Circuit Disregarded This Court's Holding in *Bridge*.

1. *Bridge* addressed “whether first-party reliance is an element of a civil RICO claim predicated on mail fraud.” 553 U.S. at 646. This Court ruled unanimously it was not: “[A] plaintiff asserting a RICO claim predicated on mail fraud need not show . . . that it relied on the defendant's alleged misrepresentations.” *Id.* at 661. Instead, it held that showing that a third party relied on the defendant's misrepresentations sufficed to plausibly allege RICO causation. *Ibid.*

But this Court's opinion in *Bridge* clearly set out that it was not eliminating reliance altogether: “Of course, a misrepresentation can cause harm only if a recipient of the misrepresentation relies on it.” *Id.* at 656 n.6. It wrote that “none of this is to say a RICO plaintiff . . . can prevail without showing that someone relied on the defendant's misrepresentation.” *Id.* at 658. Citing the Restatement (Second) of Torts, the opinion reiterated that “the plaintiff's loss must be a foreseeable result of *someone's* reliance on the misrepresentation.” *Id.* at 656 (citing Restatement (Second) of Torts § 548A (1976)).

This Court's holding that some form of reliance remains necessary in order to prove a RICO claim predicated on fraud follows from plaintiffs' need to prove the element of causation. Without some form of reliance on the alleged misrepresentations by either the plaintiff or a third party, a plaintiff cannot show that his or her injury was caused “by reason of” the RICO violation. 18 U.S.C. § 1964(c). That is, if a plaintiff

would have behaved in the exact same way regardless of whether he (or any third party) ever saw the alleged misrepresentation, then that misrepresentation cannot be a but-for—let alone proximate—cause of the plaintiff’s injury. 18 U.S.C. § 1964(c). This Court requires both. *Bridge*, 553 U.S. at 654; *Holmes v. Sec. Inv’r Prot. Corp.*, 503 U.S. 258, 267–69 (1992).

2. The Fifth Circuit’s en banc decision wholly ignored RICO’s statutory text and this Court’s straightforward holding, and instead expanded the scope of RICO liability to anyone foreseeably harmed by an alleged enterprise. Thus, under the Fifth Circuit’s holding, plaintiffs need not prove reliance because “[t]hose who lose money in a pyramid scheme necessarily do so ‘by reason of the fraud.’” Pet. App. 17a. In the Fifth Circuit, they can still maintain a RICO suit.

B. The Opinion below Deepened a Split, Now 4-2, on Whether Reliance Is Necessary to Prove Causation under RICO.

1. The Fifth Circuit’s en banc decision also deepened an existing split over this Court’s *Bridge* decision. The Second Circuit has expressly rejected the notion that reliance is unnecessary to show causation under RICO. In *Sergeants Benevolent Ass’n Health & Welfare Fund v. Sanofi-Aventis U.S. LLP*, the court explained that “plaintiffs’ theory of injury in most RICO mail-fraud cases will . . . depend on establishing that someone—whether the plaintiffs themselves or third parties—relied on the defendant’s misrepresentation.” 806 F.3d 71, 87 (2d Cir. 2015). The reason is simple: “if the person who was allegedly deceived by the misrepresentation (plaintiff or not) would have acted in the same way regardless of the misrepresentation, then the misrepresentation *cannot be a but-for, much less proximate, cause* of the plaintiffs’ injury.”

Ibid. (emphasis added). See also *In re U.S. Foodservice Inc. Pricing Litig.*, 729 F.3d 108, 119 (2d Cir. 2013).

The Ninth, Tenth, and Eleventh Circuits are in accord. The Ninth Circuit, applying *Bridge*, has ruled that “[a]lthough proximate cause, not reliance, is the essential element of statutory standing under RICO, proving reliance is necessary where it is integral to Plaintiffs’ theory of causation.” *Hoffman v. Zenith Ins. Co.*, 487 F. App’x 365, 365 (9th Cir. 2012).

Similarly, in *CGC Holding Co. v. Broad & Cassel*, the Tenth Circuit explained that “in cases arising from fraud, a plaintiff’s ability to show a causal connection between defendants’ misrepresentation and his or her injury will be *predicated on plaintiff’s alleged reliance on that misrepresentation.*” 773 F.3d 1076, 1089 (10th Cir. 2014) (emphasis added). Like other courts, it tied this reasoning to the element of causation: “Put simply, causation is often lacking where plaintiffs cannot prove that they relied on defendants’ alleged misconduct.” *Ibid.*

Finally, the Eleventh Circuit has held unequivocally that *Bridge* did not eliminate the requirement that *someone* must have relied on the alleged misrepresentation in order for that misrepresentation to have proximately caused the plaintiffs’ injury. *Bridge*, the court wrote, “was clear that its holding dismissing the need for first-party reliance on the fraud *did not mean* that a party can prevail without showing that someone had relied on the fraud.” *Ray*

v. Spirit Airlines, Inc., 836 F.3d 1340, 1350 (11th Cir. 2016) (emphasis added).²

2. In contrast, the Fourth Circuit, like the Fifth Circuit, has read *Bridge* to eliminate any need to consider reliance in a RICO-fraud suit. The court in *Biggs v. Eaglewood Mortgage, LLC*, failed to adhere to this Court’s limited holding in *Bridge*: “[U]sing the mail in furtherance of a scheme to defraud is a predicate act of racketeering under RICO, even if there is no reliance on the misrepresentation,” the court wrote. 353 F. App’x 864, 867 (4th Cir. 2009) (“If the defendant has engaged in a pattern of such behavior, he will be liable under RICO, without anyone actually relying on a fraudulent misrepresentation.”). In a clear break from other circuits, the Fourth Circuit agreed “that *Bridge*’s holding eliminates the requirement that a plaintiff prove reliance in order to prove a violation of RICO predicated on mail fraud.” *Ibid.*

That is irreconcilable with this Court’s unanimous holding. Certiorari is necessary in order resolve this impasse over *Bridge*’s import.

II. CERTIORARI IS NECESSARY TO RESOLVE THE SPLIT OVER WHEN CLASS-WIDE RELIANCE CAN BE INFERRED, AND A CLASS ACTION CERTIFIED, UNDER RULE 23.

The Fifth Circuit’s deepening of an existing circuit split over *Bridge* is worthy of review on its own. But

² A variety of district courts across multiple circuits have adopted this same view of *Bridge*. See, e.g., *Coleman v. Commonwealth Land Title Ins. Co.*, 2016 WL 4705454, at *9 (E.D. Pa. Aug. 17, 2016) (“[S]ome form of reliance, whether first- or third-party, is necessary to establish causation.”). See also *In re Well-Point, Inc. Out-of-Network UCR Rates Litig.*, 903 F. Supp. 2d 880, 915 (C.D. Cal. 2012); *Brake Parts, Inc. v. Lewis*, 2010 WL 3470198, at *6 (E.D. Ky. Aug. 31, 2010).

the court's second, alternative holding also created a new circuit conflict over this Court's class-certification precedents. The court held that district courts may presume class-wide reliance when it "follows logically" from the plaintiffs' allegations. Pet. App. 20a.

That holding too is legal error. This Court's class-action decisions "have made clear that plaintiffs wishing to proceed through a class action must actually *prove*—not simply plead—that their proposed class satisfies each requirement of Rule 23." *Halliburton Co. v. Erica P. John Fund, Inc.*, 134 S. Ct. 2398, 2412 (2014). And the Fifth Circuit cannot justify its holding by relying on inapt precedents from this Court.

The decision is also inconsistent with the precedents of at least three other courts of appeals, all of which have applied a more circumspect standard. Namely, they have held that such an inference is appropriate only when class members' behavior "cannot be explained in any way other than reliance upon the defendant's conduct." *CGC Holding*, 773 F.3d at 1090.

These other circuits will not certify a RICO-fraud class action unless the plaintiff demonstrates that all reasonable class members would have relied. Under the new Fifth Circuit standard, by contrast, it is sufficient merely if it "follows logically" that *some* class members would have relied.

In sum, the Fifth Circuit's standard, if allowed to stand, would significantly dilute the standards for class certification and create inconsistent outcomes across federal courts. Certiorari is necessary to resolve this circuit conflict over when, if ever, plaintiffs can satisfy their burden under Rule 23(b) by employing a class-wide presumption of reliance, rather than through common evidence.

A. The Opinion below Undermines This Court's Class-Certification Precedents.

1. This Court has repeatedly reversed lower-court attempts to implement improper shortcuts that relieve plaintiffs of their Rule 23 burdens. The rule “imposes stringent requirements for certification that in practice exclude most claims.” *Am. Express Co. v. Italian Colors Rest.*, 133 S. Ct. 2304, 2310 (2013). In addition to the requirements contained in Rule 23(a), a plaintiff seeking class certification “must . . . satisfy through evidentiary proof at least one of the provisions of Rule 23(b),” among which is the requirement that “questions of law or fact common to class members predominate over any questions affecting only individual members.” *Comcast*, 133 S. Ct. at 1432; Fed. R. Civ. P. 23(b)(3).

Although Rule 23(b)(3) speaks of “questions of law or fact,” “[w]hat matters to class certification . . . is not the raising of common “questions” . . . but rather the capacity of a classwide proceeding to generate common answers apt to drive the resolution of the litigation.” *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 350 (2011) (quoting Richard A. Nagareda, *Class Certification in the Age of Aggregate Proof*, 84 N.Y.U. L. Rev. 97, 132 (1999)).

As Stream Energy explained in the district court and the court of appeals, there are wide variations in IA’s motivations and reasons for joining Stream Energy. These variations preclude inferring for all class members that their injuries were caused “by reason of” the allegedly fraudulent enterprise. 18 U.S.C. § 1964(c). And because Respondents offered zero other common evidence to answer this question, it is not “capable of classwide resolution . . . in one stroke.” *Wal-Mart*, 564 U.S. at 350.

The Fifth Circuit circumvented that limitation by employing an expansive inference that reliance by at least some class members “follows logically” from Respondents’ allegations, and thus could be presumed for all 230,000 class members. Without it, Respondents could not have complied with Rule 23(b)(3). But that inference is just the sort of “adventuresome innovation” that this Court has rejected as an inappropriate shortcut under Rule 23(b)(3). *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 614 (1997).

In *Wal-Mart*, for example, the Court rejected “Trial by Formula”: the use of statistical sampling and averaging to establish Rule 23(a)(2) commonality among a huge number of class plaintiffs in a gender-discrimination suit. 564 U.S. at 367. *Comcast* reversed class certification based on faulty analyses as improper under Rule 23(b)(3) because the plaintiffs’ statistical model fell “far short of establishing that damages are capable of measurement on a classwide basis.” 133 S. Ct. at 1433. As this Court has explained, “[t]hose decisions have made clear that plaintiffs wishing to proceed through a class action must actually *prove*—not simply plead—that their proposed class satisfies each requirement of Rule 23.” *Halliburton*, 134 S. Ct. at 2412.

2. The Fifth Circuit’s “logically follows” inference suffers the same flaw as the lower court rulings overturned by *Wal-Mart* and *Comcast*: It allows Respondents to gain a presumption from their pleadings that relieves them of the burden to show reliance by common evidence. Just as the plaintiffs in *Wal-Mart* and *Comcast* attempted to use incomplete or inappropriate evidence to prove a common element of their claims, so too does the Fifth Circuit’s decision err “in placing the burden regarding the appropriateness of

class certification with the defendants, instead of the plaintiffs.” Pet. App. 37a–38a (Jolly, J., dissenting).

This Court has allowed plaintiffs to employ class-wide inferences to satisfy predominance only in limited contexts. In securities law, this Court recognizes the possibility for plaintiffs to invoke the *Basic* presumption of reliance if certain conditions hold. *Halliburton*, 134 S. Ct. at 2407–09. But this Court has never exported the *Basic* assumption to other areas of law. Indeed, the Court has explicitly observed that, without the *Basic* presumption, “the requirement that Rule 10b-5 plaintiffs establish reliance would ordinarily preclude certification of a class action seeking money damages *because individual reliance issues would overwhelm questions common to the class.*” *Amgen Inc. v. Conn. Ret. Plans & Trust Funds*, 133 S. Ct. 1184, 1193 (2013) (emphasis added). Similarly, this Court allowed the use of a “just and reasonable inference” in *Tyson Foods, Inc. v. Bouaphakeo*, only because “the employer failed to keep records [and] its liability was certain.” 136 S. Ct. 1046, 1058 (2016). But there is no substantive basis in RICO to support a similar presumption in this case.

The Rules Enabling Act prevents a class from being “certified on the premise that [the defendant] will not be entitled to litigate its statutory defenses to individual claims.” *Wal-Mart*, 564 U.S. at 367. Reliance on a flawed inference to satisfy predominance—whether derived from an inapposite statistical model or from the subjective inferences a court draws from the allegations—undermines that principle, along with this Court’s holdings in *Wal-Mart* and *Comcast*. That is what the Fifth Circuit did in this case, and certiorari is necessary for this Court to vindicate Rule 23(b).

B. The Opinion below Created a Conflict with Three Circuits over When Class-Wide Reliance Can Be Inferred.

1. The Fifth Circuit held that RICO plaintiffs seeking class certification can employ a class-wide presumption of reliance whenever it “follows logically” from the allegations. But that standard swallows the entirety of Rule 23(b)(3)’s predominance requirement. And at least three other courts of appeals have rejected such a capacious standard. Instead, they permit an inference of reliance only in extremely narrow circumstances: where no rational person would have acted in the manner the putative class members did, absent reliance.

In direct contrast to the Fifth Circuit’s approach, the Second Circuit has held in at least three cases that it follows this narrower standard for inferring reliance. In *Sergeants Benevolent*, the Second Circuit faced plaintiffs seeking to certify a RICO-fraud class action against a drug manufacturer. The court explained that reliance could be inferred only in “certain factual contexts”—where “*each* class member would only have taken the action leading to its injury if it had relied on the defendant’s alleged misrepresentation.” 806 F.3d at 88 (emphasis added). It rejected the proposed inference in that case because, “given the number of factors that enter into doctors’ prescribing decisions, it is simply not reasonable to infer . . . [that all] Ketek prescriptions were written in reliance on the alleged misrepresentations about Ketek’s safety.” *Id.* at 94. See also *UFCW Local 1776 v. Eli Lilly & Co.*, 620 F.3d 121, 135 (2d Cir. 2010) (holding the same).

Similarly, in *McLaughlin v. American Tobacco Co.*, the Second Circuit reversed class certification in a RICO-fraud suit alleging misrepresentations related to light cigarettes. 522 F.3d 215, 225 (2d Cir. 2008). Plaintiffs there could not support a presumption that the entire class had relied on representations that light cigarettes were less deleterious than conventional cigarettes because “*each* plaintiff in this case could have elected to purchase light cigarettes for any number of reasons, including a preference for the taste and a feeling that smoking Lights was ‘cool.’” *Ibid.* (emphasis added).

The Ninth Circuit has applied the same principle, ruling that courts can infer a class-wide presumption of reliance only where reliance is “[t]he *only* logical explanation for [class members’] behavior.” *Pouolos v. Caesars World, Inc.*, 379 F.3d 654, 668 (9th Cir. 2004) (emphasis added). In that case, plaintiffs alleged that the defendants had misrepresented the odds on gambling machines, and they sought to infer from that a common presumption that class members had relied on the misstated odds. *Ibid.* The court rejected the argument, reasoning:

Gamblers do not share a common universe of knowledge and expectations—one motivation does not “fit all.” Some players may be unconcerned with the odds of winning, instead engaging in casual gambling as entertainment or a social activity. Others may have played with absolutely no knowledge or information regarding the odds of winning such that the appearance and labeling of the machines is irrelevant and did nothing to influence their

perceptions. Still others, in the spirit of taking a calculated risk, may have played fully aware of how the machines operate.

Id. at 665–66.

Because reliance was not “[t]he only logical explanation for [class members’] behavior,” the Ninth Circuit ruled that a class-wide presumption of reliance was impermissible. *Id.* at 668. *See also* Pet. App. 48a–49a (Haynes, J., dissenting)

Finally, the Tenth Circuit articulated the same principle in *CGC Holding*, where it permitted an inference of reliance only because “the behavior of plaintiffs and the members of the class *cannot be explained in any way other than reliance* upon the defendant’s conduct.” 773 F.3d at 1081, 1089–90 (emphasis added). The RICO-fraud suit alleged that the defendants had promised to make loans to the plaintiffs in exchange for paying upfront fees, but defendants never had the intent or ability to make good on the promises. *Id.* at 1081. In its opinion, the Tenth Circuit emphasized that “RICO class-action plaintiffs are not entitled to an evidentiary presumption of a factual element of a claim.” *Ibid.* It held that a court could infer reliance only where “*no rational economic actor* would enter into a loan commitment agreement with a party they knew could not or would not fund the loans.” *Ibid.* (emphasis added).

The standard expressed by these courts of appeals is significantly narrower than the one the Fifth Circuit employed, as the dissenting opinions detailed. *See* Pet App. 40a–41a (Jolly, J., dissenting); Pet. App. 48a–49a (Haynes, J., dissenting). Other circuits permit a class-wide presumption of reliance only when

there is no other explanation for class members' behavior. As Judge Jolly noted in dissent, this is generally true only in cases involving "something-for-nothing' transactions"—where plaintiffs pay some consideration and fail to receive anything of value in return. Pet. App. 42a (Jolly, J., dissenting).³

Or, as the Second Circuit put it in *Sergeants Benevolent*, reliance may be inferred on a class-wide basis only in situations involving a "one-dimensional decisionmaking process,' such that the alleged misrepresentation would have been 'essentially determinative' for each plaintiff." 806 F.3d at 88 (quoting Nagareda, 84 N.Y.U. L. Rev. at 121). When "something other" than the alleged misrepresentations can explain a putative class member's decision, a class-wide inference of reliance is not available. *See id.* at 93–94.

Had the Fifth Circuit applied this standard, there is no doubt that it would have reached the opposite ruling. Just as there are a variety of motivations for gambling or smoking, there are myriad reasons why individuals chose to become Stream Energy IAs. And both Petitioners and the dissenting opinions demon-

³ It is for that reason that the en banc majority's reliance on two other circuit cases was misplaced. Pet. App. 20a–22a (citing *U.S. Foodservice*, 729 F.3d 108 (2d Cir. 2013), and *Klay v. Humana Inc.*, 382 F.3d 1241 (11th Cir. 2004)). Those cases involved allegations that the defendant either overcharged plaintiffs for purchases, or refused to pay plaintiffs under contracts. Thus, these cases follow the more narrow standard: No rational actor would willingly pay more than they promised to (or accept less money than they agreed to) under a contract. *U.S. Foodservice*, 729 F.3d at 119 & n.6; *Klay*, 382 F.3d at 1259.

strated that such variations made it impossible to presume reliance for the entire class. *See, e.g.*, Pet. App. 48a–49a (Haynes, J., dissenting).

This is a live controversy among the circuits, and the difference between the Fifth Circuit’s “follows logically” standard and the other circuits’ “only explanation” standard will often be outcome determinative. Certiorari is necessary to resolve this 3-1 split on when a class-wide presumption of reliance can properly be inferred from the allegations to satisfy Rule 23(b)(3)’s predominance requirement.

III. THE QUESTIONS ARE EXTREMELY IMPORTANT AND HIGHLY LIKELY TO RECUR.

Review is warranted to prevent the systematic misinterpretation of this Court’s precedents, and to enforce the exacting requirements of Rule 23.

This case itself is substantial: a certified class of over 230,000 members has been certified, seeking well over \$100 million in trebled damages. Even more, it has laid bare two distinct but related conflicts among the circuit courts of appeals, both relating to the standards for certifying class actions in RICO-fraud. Without this Court’s intervention, these splits will recur and will deepen.

Class-action litigation “greatly increases risks to defendants”: “Faced with even a small chance of a devastating loss, defendants will be pressured into settling questionable claims.” *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 350 (2011). *See also* Fed. R. Civ. P. 23(f) advisory committee’s note to 1998 amendment (class certification “may force a defendant to settle rather than incur the costs of defending a class action and run the risk of potentially ruinous liability”).

These stakes transform the class-certification hearing into the apex of the entire litigation. This is especially true in the RICO context, where the threat of treble damages compounds the consequences of certification. As a result, it is imperative that district courts safeguard defendants' substantive legal rights, and faithfully enforce the requirements of Rule 23, as this Court has instructed.

If the Fifth Circuit's decision is allowed to stand, these issues will repeat themselves, as plaintiffs facing few obstacles will seek to certify RICO-fraud class actions based on nothing more than allegations that defendants operate a fraudulent enterprise. Unburdened by the requirement to show that any class member or third party actually relied on the alleged misrepresentations, plaintiffs will forum shop to the Fifth Circuit, and defendants will be strong-armed into enormous settlements. *See* Pet. App. 46a (Jones, J., dissenting) ("Reckless allegations of undefined illegality, coupled with immense uncertainty as to outcomes, are an affront to the rule of law."). At the same time, as a result of the concomitant settlement pressures, these issues will frequently escape appellate review.

The division among the circuits will also persist without this Court's review. When starkly different standards are applied to RICO-fraud class actions, otherwise identical cases will result in opposite outcomes depending on which federal court decides the case. The need to unify the lower courts on such an important question of federal law is worthy of review.

* * *

Nine years ago, this Court granted review in *Bridge* because the courts of appeals were split over the role of reliance in proving RICO causation. That

division lingers today, notwithstanding *Bridge's* clear guidance. Courts of appeals have ignored this Court's holding, and they have continued to inappropriately innovate with class-certification standards. Only this Court can reconcile these decisions and vindicate defendants' rights under RICO and Rule 23. This case presents an ideal opportunity to do so.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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