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No. 13-_____

Supreme Court, U.S.
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IN THE
Supreme Court of the United States

US FOODS, INC.,

Petitioner,

v.

CATHOLIC HEALTHCARE WEST *et al.*, CASON, INC.,
AND FRANKIE'S FRANCHISE SYSTEMS INC., ON BEHALF
OF THEMSELVES AND OTHERS SIMILARLY SITUATED,

Respondents.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether contract-expectation damages are a permissible remedy in a civil RICO action based on alleged fraud, and if so, whether such damages are available even where any expectation was created only by the alleged fraudulent conduct.

2. Whether but-for causation in a civil RICO class action may be satisfied by a class-wide presumption of reliance on alleged fraudulent conduct in the absence of any individualized proof that any member of the class actually relied on that conduct.

3. Whether a nationwide class asserting state-law claims under multiple state laws may be certified under Rule 23(b)(3) of the Federal Rules of Civil Procedure in the absence of any showing that the state laws at issue are uniformly interpreted and applied.

PARTIES TO THE PROCEEDING

Petitioner US Foods, Inc. ("US Foods"; formerly known as U.S. Foodservice, Inc.) was a defendant in the district court and the appellant in the court of appeals.

Respondents Catholic Healthcare West, Thomas & King, Inc., Waterbury Hospital, Cason, Inc., and Frankie's Franchise Systems Inc., on behalf of themselves and others allegedly similarly situated, were plaintiffs in the district court and appellees in the court of appeals.

CORPORATE DISCLOSURE STATEMENT

US Foods is a wholly owned subsidiary of USF Holding Corp., which in turn is owned jointly by funds affiliated with the private equity firms Kohlberg, Kravis, Roberts & Co., and Clayton, Dubilier & Rice. No publicly held company has a 10% or greater ownership interest in US Foods, Inc.

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PETITION FOR A WRIT OF CERTIORARI

US Foods respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit in this case.

OPINIONS BELOW

The Second Circuit's opinion (Pet. App. 1a-41a) is reported at 729 F.3d 108. The court's order denying panel rehearing and rehearing *en banc* (Pet. App. 90a-91a) is not reported. The district court's opinion granting class certification (Pet. App. 42a-89a) is not reported.

JURISDICTION

The Second Circuit issued its opinion on August 30, 2013. The court denied US Foods' timely-filed petition for panel rehearing or rehearing *en banc* on October 22, 2013. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS AND RULE INVOLVED

1. 18 U.S.C. § 1964(c) provides in relevant part: "Any person injured in his business or property by reason of a violation of section 1962 of this chapter may sue therefor in any appropriate United States district court and shall recover threefold the damages he sustains and the cost of the suit, including a reasonable attorney's fee"

2. 18 U.S.C. § 1962(c) provides: "It shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt."

3. 18 U.S.C. § 1961(1)(B) provides in relevant part: “As used in this chapter . . . ‘racketeering activity’ means . . . any act which is indictable under any of the following provisions of title 18, United States Code: . . . section 1341 (relating to mail fraud), section 1343 (relating to wire fraud)”

4. Federal Rule of Civil Procedure 23(b) provides in relevant part:

A class action may be maintained if Rule 23(a) is satisfied and if . . . (3) the court finds that the questions of law or fact common to class members pre-dominate over any questions affecting only individual members, and that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy. The matters pertinent to these findings include:

- (A) the class members’ interests in individually controlling the prosecution or defense of separate actions;
- (B) the extent and nature of any litigation concerning the controversy already begun by or against class members;
- (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; and
- (D) the likely difficulties in managing a class action.

STATEMENT

This case raises important issues concerning the damages and causation elements of civil claims brought under the Racketeer Influenced and Corrupt Organizations Act (“RICO”), 18 U.S.C. §§ 1961-68, in the class-action context. In the decision below, the

Second Circuit announced a novel interpretation of RICO's damages requirement that, in conflict with the approaches of numerous other circuits, permits recovery of contract-expectation damages for alleged fraudulent conduct rather than limiting damages to out-of-pocket losses—and does so even where any expectation was created by the RICO violation itself. As to RICO's causation element, the Second Circuit again placed itself in conflict with other circuits by holding that causation may be demonstrated even without any individualized proof that a plaintiff entered into a transaction by reason of the RICO violation. By virtue of both rulings, the Second Circuit avoided the individualized issues that otherwise would have precluded class certification. The decision below also raises a circuit conflict not involving RICO as to whether state-law claims may receive national class-action treatment under Rule 23(b)(3) without inquiry into the relevant state-law differences among the multiple state jurisdictions at issue.

Petitioner US Foods is a food distributor and respondents are institutional purchasers of food. Respondents brought a RICO claim and state-law breach-of-contract claims against US Foods alleging that US Foods had inflated the prices it charged to respondents by misrepresenting the cost component used to calculate final sale prices under the food-distribution contracts to which US Foods was a party. Respondents sought to pursue their claims in a nationwide class action on behalf of some 75,000 class members, despite the fact that their claims arose from thousands of differing food-procurement contracts and millions of individual food purchases, implicating the contract laws of 48 different states and a Native American tribe. The district court certified the class under Rule 23(b)(3), concluding that common issues

predominated as to both the RICO and the state-law claims and that a class action was a superior method for litigating those claims.

On interlocutory appeal, the Second Circuit affirmed the class certification with respect to all claims. The court held that the class could pursue contract-expectation damages, not merely out-of-pocket losses (the ordinary measure of RICO fraud damages), and that no individual class member would be required to show that US Foods' alleged fraud was the cause-in-fact of its claimed RICO injury. Both of these holdings conflict with the decisions of other circuits. As to the contract claims, the Second Circuit concluded that there are no material variations in the multiple state and tribal laws at issue based solely on the finding that each of those jurisdictions has adopted the Uniform Commercial Code ("UCC") in some form. This decision too conflicts with other circuits' requirement of more extensive inquiry into relevant state-law differences.

The decision below warrants this Court's review to resolve these circuit conflicts. It also warrants review because allowing private RICO claimants to seek treble damages based on the damages and causation theories embraced below will have a significant economic impact that is magnified in the class-action context. Certiorari should be granted.

A. The Distribution Agreements

US Foods is the second-largest foodservice distributor in the country. Pet. App. 3a. It purchases food and related products from vendors, and then sells those products—including under its own brand names—to restaurants, hotels, hospitals, cafeterias, and other entities that serve meals. Pet. App. 2a-3a.

Respondents and the absent members of the putative class are institutional customers who purchased products from US Foods between 1998 and 2005. Pet. App. 2a-3a. The Consolidated and Amended Class-Action Complaint alleges RICO and breach-of-contract claims arising out of thousands of varying distribution agreements between US Foods and the members of the putative class. Pet. App. 44a-45a.

US Foods' distribution agreements with its customers, often referred to as "cost-plus" contracts, did not specify total final prices for the goods on offer, but instead provided a methodology for calculating such prices: prices would be calculated by taking the "landed cost" of the product (*i.e.*, the cost of the product when it "landed" at an individual distribution center) and then adding a mark-up or "plus," expressed as a percentage of the "cost." Pet. App. 3a. The contracts provided a number of ways for USF to determine "landed cost," including basing it on an invoice issued to US Foods by a vendor.¹ US Foods' contracts with its vendors permitted it to receive rebates, often called "promotional allowances," when (for instance) it placed an order of a specified minimum amount. Pet. App. 4a. In turn, US Foods' "cost-plus" agreements with its customers permitted US Foods to retain the benefit of these rebates, and thus not to deduct them from the "landed cost" used in setting its customers' prices. Pet. App. 4a. US Foods published its final delivered prices in "order guides," which its customers

¹ In addition, for the large percentage of products sold under US Foods' own brands, US Foods was permitted to set the "landed cost" component of pricing in its own discretion, using price lists, as brand owners typically do. See, *e.g.*, C.A. J.A. 1503; 1546; 1760.

used in making their purchasing decisions. See, *e.g.*, C.A. J.A. A1904.

The “cost-plus” agreements were non-exclusive, did not obligate customers to buy any goods from US Foods, and were terminable without cause. C.A. J.A. A1560, A1735, A2420-21, A2425. Respondents testified that they typically purchased from US Foods when it offered the lowest available prices, and purchased from competitors when those competitors’ prices were lower. C.A. J.A. A2420-21, A2521-22, A1905, A1924-25, A1952-53, A1939 (customers’ statements that they purchased from US Foods based on its prices compared to competitors’ prices or based on its customer service compared to competitors’ customer service). Many of US Foods’ customers (including two of the named plaintiffs) focused on the prices alone and were not even aware of the “cost-plus” contract terms by which those prices had been calculated. C.A. J.A. A1903, A1958-59, A1961.

B. The VASPs

Respondents’ allegations center on US Foods’ calculation of its “landed cost” under the “cost-plus” agreements. Specifically, respondents allege that US Foods created and controlled six companies (called value added service providers, or “VASPs”) whose alleged purpose was to inflate the invoice cost paid by US Foods to its vendors and thus the “landed cost” portion of the “cost-plus” price US Foods charged its customers. Pet. App. 4a. According to respondents, the original food suppliers billed the VASPs for the goods at a cost allegedly negotiated by US Foods, and then the VASPs sold the products to US Foods, issuing new invoices with increased cost figures. Pet. App. 5a. In turn, US Foods allegedly used the VASP invoice prices as the “landed cost” when

computing the overall prices that it published in its order guides and ultimately charged its customers. Pet. App. 5a-6a. Finally, US Foods allegedly received promotional allowances from the VASPs, and thereby retained the value of the VASPs' markups. Pet. App. 6a-7a.²

The "VASP system" was in place by about 1998, well before many of the putative class members' cost-plus contracts had been executed. *E.g.*, C.A. J.A. A1543-52 (respondent Thomas & King, Inc.); *id.* at A1554-A1729 (respondent Waterbury Hospital). Indeed, in deciding whether to enter into a US Foods distribution agreement, customers relied on US Foods' prices for sample "baskets" of goods, which prices had been calculated on the basis of the VASP-issued invoices. C.A. J.A. A3089-90. Respondents allege that they learned of the VASPs in October 2003, when US Foods' parent described them in public regulatory filings. Pet. App. 9a.

C. District Court Proceedings

Three years after public disclosure of the VASPs, the respondents filed federal lawsuits against US Foods and other defendants in Connecticut, California, and Illinois, asserting claims for, *inter alia*,

² Although respondents contend that the VASPs had no legitimate purpose, US Foods put on substantial evidence at the class-certification stage to show that they were in fact legitimate businesses serving legitimate business purposes. Pet. App. 11a. Specifically, US Foods showed that the VASPs provided "(1) quality control services; (2) purchasing; (3) brand and product development; (4) merchandising services; (5) marketing support; and (6) customer service." Pet. App. 51a. Both the district court and the Second Circuit recognized that the legitimacy of the VASPs is an unresolved question of fact. Pet. App. 11a, 50a.

breach of contract and violation of RICO. Pet. App. 9a. The Judicial Panel on Multidistrict Litigation transferred the California and Illinois cases to the District of Connecticut, where respondents filed the Consolidated and Amended Class Action Complaint. Pet. App. 10a.

Respondents' RICO claim is predicated on US Foods' alleged commission of mail and wire fraud, 18 U.S.C. §§ 1341, 1343, by making allegedly false representations concerning the existence of the VASPs and their role in establishing the "landed cost" component of the prices reflected on the invoices it sent to its customers. Pet. App. 14a. The contract claim is likewise predicated on US Foods' alleged practice of overcharging its customers by means of the VASP system. Pet. App. 14a. Respondents moved to certify a nationwide class with respect to both the RICO claim and the contract claims.

D. The Class-Certification Decision

Granting respondents' motion, the district court certified under Rule 23(b)(3) a class comprising:

Any person in the United States who purchased products from USF pursuant to an arrangement that defined a sale price in terms of a cost component plus a markup ("cost-plus contract"), and for which USF used a VASP transaction to calculate the cost component.

Pet. App. 10a-11a. The district court found that all class members could predicate their mail- and wire-fraud claims on an "alleged overriding uniform misrepresentatio[n]"—to wit, "the invoices that [US Foods] sent to its cost-plus customers containing cost-plus prices that were inflated through the use of the VASP enterprise." Pet. App. 64a. The district court

concluded that, even though each invoice accurately reflected the “order guide” price offered to a customer before it chose to purchase, “the invoices each contained a ‘common misrepresentation,’ the cost-plus price derived from the VASP system.” Pet. App. 64a. The district court also found that customers’ reliance on US Foods’ alleged misrepresentations could be established on a class-wide basis by the simple fact of the plaintiffs’ “payment of the allegedly fraudulent invoices.” Pet. App. 67a. And the district court found that individualized issues concerning the calculation of damages would not predominate over class-wide issues because respondents’ damages model “provides for a universal calculation of damages” based on lost contract expectations—in other words, based on the difference between the “landed costs” that US Foods allegedly should have used to calculate the prices that it listed in its order guides (*i.e.*, the costs to the VASPs) and the allegedly VASP-inflated “landed costs” that US Foods actually used. Pet. App. 79a. The court rejected US Foods’ argument that only out-of-pocket losses (as opposed to contract-expectation damages) are recoverable in a civil RICO action based on alleged mail and wire fraud. Pet. App. 78a-79a.

The district court also ruled that individualized questions of law and fact would not predominate even though the contracts (which were not standardized form agreements) were governed by the laws of 48 different states and one Native American tribe, reasoning that all of these jurisdictions have adopted the UCC. Pet. App. 72a-73a. The court did not require respondents (as the parties bearing the burden of proof on their own certification motion) to submit evidence showing that the differences in state law are immaterial; nor did the court perform its own analysis

of varying state interpretations of the UCC. Instead, the court placed the burden *on US Foods* to show that class certification would be *inappropriate*. Pet. App. 73a.

E. The Second Circuit's Decision

US Foods obtained leave to appeal the certification decision under Fed. R. Civ. P. 23(f). Pet. App. 12a. The Second Circuit affirmed. Pet. App. 2a-3a.

As to the RICO claim, the Second Circuit concluded that “the district court did not abuse its discretion in determining that USF’s alleged misrepresentation was uniform and susceptible to generalized proof.” Pet. App. 15a-16a. It reasoned that, “[w]hile each invoice obviously concerned different bills of goods with different mark-ups,” each made “the same fraudulent misrepresentation,” namely that “the cost component of [US Foods’] billing was based on the invoice cost from a legitimate supplier and not from a shell VASP controlled by [US Foods] and established for the purpose of inflating the cost component.” Pet. App. 16a. Because US Foods’ bills did not identify the suppliers of food or the “landed cost,” the court described the allegedly common misrepresentation as an “implicit” one. Pet. App. 19a.

Based on that view, the Second Circuit held that individualized questions of causation did not predominate. Pet. App. 18a. The court reasoned that the allegation that the class members paid the allegedly fraudulent invoices was enough to support a presumption of reliance, and thus causation,³

³ Respondents ground their causation showing on the class members’ reliance on US Foods’ alleged misrepresentations. See Pet. App. 66a-67a & n.21; Pet. App. 18a. While this Court held in *Bridge v. Phoenix Bond & Indemnity Co.*, 553 U.S. 639 (2008),

reasoning that “payment . . . ‘may constitute circumstantial proof of reliance upon a financial representation.’” Pet. App. 18a (quoting *McLaughlin v. Am. Tobacco Co.*, 522 F.3d 215, 225 n.7 (2d Cir. 2008)). The Second Circuit also held that the district court had not abused its discretion in holding that RICO damages could be ascertained on a class-wide basis. Pet. App. 24a. Rejecting US Foods’ argument that “the proper measure of RICO damages here is the difference between the price paid by each plaintiff for the goods it purchased and the market price available when the goods were bought,” the Second Circuit instead found that each member of the plaintiff class was entitled to recover “the difference between the amount . . . paid on fraudulently inflated cost-plus invoices and the amount they should have been billed.” Pet. App. 25a. It thus found that RICO damages predicated on the alleged fraud are not limited to out-of-pocket losses, but instead extend to a lost “protectable interest in th[e] cost-plus contracts,” a figure that could be measured by “the amount of overcharge.” Pet. App. 25a. Respondents admitted that they could not prove out-of-pocket losses—*i.e.*, the difference between what a customer actually paid and the market value of the good—on a class-wide basis. C.A. J.A. A1918, A1967.

As to the contract claims, the Second Circuit ruled that individual questions of law and fact would not predominate because the relevant state and

that a RICO plaintiff need not prove that *it* relied on a fraudulent statement, *id.* at 649, the Court was careful to note that such a plaintiff typically “will not be able to establish even but-for causation if *no one* relied on the misrepresentation,” *id.* at 658 (emphasis added).

tribal laws do not “differ in a material manner that precludes the predominance of common issues.” Pet. App. 33a. The court relied principally on the fact that “all the jurisdictions implicated have adopted the UCC,” disregarding the fact that *application* of the UCC differs from state to state with respect to, *inter alia*, the implied duty of good faith and the relevance and weight of extrinsic evidence in contract interpretation. Pet. App. 34a. The court thus shifted onto *US Foods* the onus of *refuting* the asserted basis for class certification: “In the absence of any showing *by* [*US Foods*] disputing [that the states have adopted the UCC], . . . the district court did not abuse its discretion in determining that variations in state contract law do not preclude certification.” Pet. App. 34a (emphasis added).

REASONS FOR GRANTING THE WRIT

I. THE SECOND CIRCUIT’S DECISION CONFLICTS WITH THE DECISIONS OF OTHER CIRCUITS

The decision below implicates three circuit splits, each of which warrants this Court’s review. Had the Second Circuit applied the tests used by other circuits, it could not have found that class-wide issues would predominate over individualized questions and could not have affirmed the decision to certify the class.

First, with respect to RICO damages, four circuits hold that a civil RICO action predicated on fraudulent conduct permits recovery only of out-of-pocket losses and not contract-expectation damages, and three others allow contract-expectation damages to be recovered but only where the underlying RICO violation did not create the expectation. Here, the

Second Circuit rejected both approaches in permitting the recovery of contract-expectation damages even where the alleged underlying fraud created the supposed expectation.

Second, the decision below deepens a circuit split concerning RICO's but-for causation requirement. The Second Circuit held that generalized, circumstantial evidence is sufficient to prove that an alleged RICO violation caused the injury. Other circuits have held instead that a RICO class action may not proceed absent individualized evidence that any class member was harmed as a result of the alleged RICO violation.

Third, as to the breach-of-contract claim, the Second Circuit departed from decisions by other circuits that require a district court to conduct an "extensive analysis" of state-law variances before certifying a multi-state class under Rule 23(b)(3).

Each of these conflicts, separately and collectively, warrants this Court's review.

A. The Second Circuit's Decision Permitting Contract-Expectation Damages In A Civil RICO Fraud Case Conflicts With Decisions Of The Fifth, Sixth, Eighth, And Ninth Circuits, And Additionally With Decisions of the First, Third, And Seventh Circuits

RICO permits a private party to recover treble damages and attorneys' fees if he can show that he was "injured in his business or property" by a racketeering enterprise. 18 U.S.C. § 1964(c). This Court has admonished, in the context of the Clayton Act's identically-worded injury requirement, that "[t]he phrase 'business or property' . . . retains

restrictive significance.” *Reiter v. Sonotone Corp.*, 442 U.S. 330, 339 (1979). The courts of appeals have divided into three camps in deciding the frequently arising question whether contract-expectation (*i.e.*, “benefit of the bargain”) damages fall within this statutory language in the RICO context.

1. The Fifth, Sixth, Eighth, and Ninth Circuits categorically refuse to permit contract-expectation damages. As the Fifth Circuit held: “Injury to mere expectancy interests or to an ‘intangible property interest’ is not sufficient to confer RICO standing.” *Price v. Pinnacle Brands, Inc.*, 138 F.3d 602, 607 (5th Cir. 1998) (*per curiam*) (footnotes omitted); accord, *Chaset v. Flee/Skybox Int’l, LP*, 300 F.3d 1083, 1087 (9th Cir. 2002) (relying on *Price*, 138 F.3d at 607, as authoritative). The *en banc* Sixth Circuit has similarly held that expectation damages are not available in a RICO fraud case, ruling that “a loss or diminution of benefits the plaintiff expects to receive under a workers’ compensation scheme does not constitute an injury to ‘business or property’ under RICO.” *Jackson v. Sedgwick Claims Mgmt. Servs., Inc.*, 731 F.3d 556, 566 (6th Cir. 2013) (*en banc*). See also *Regions Bank v. J.R. Oil Co., LLC*, 387 F.3d 721, 730 (8th Cir. 2004) (harm to a plaintiff’s “contractual right to repayment . . . is not injury that may support standing to bring RICO claims”).

In both *Price* and *Chaset*, the plaintiffs were purchasers of packages of trading cards that did not contain the valuable “chase” cards that the plaintiffs hoped or expected to obtain. See *Price*, 138 F.3d at 605; *Chaset*, 300 F.3d at 1083. Both courts held that, even if the plaintiffs could establish that the defendants’ business constituted an illegal gambling operation, RICO did not provide a remedy because the

plaintiffs had no RICO-protected property interest in the expected value of the "chase" cards. *Chaset*, 300 F.3d at 1087; *Price*, 138 F.3d at 607. Because any possible recovery would be limited to out-of-pocket losses, and because the plaintiffs could not show that the cards they did receive were worth less than they had paid, they could not maintain a claim under RICO.

2. The First, Third, and Seventh Circuits, in contrast, allow recovery of contract-expectation damages under RICO, but only if the plaintiff can show that the claimed expectation interest pre-dated (and hence was *not* created by) the defendant's RICO violation. See *Liquid Air Corp. v. Rogers*, 834 F.2d 1297, 1310 (7th Cir. 1987); *Wishnefsky v. Carroll*, 44 F. App'x 581, 582 (3d Cir. 2002) ("Where, as here, the only property to which a plaintiff alleges injury is an expectation interest that would not have existed but for the alleged RICO violation, it would defy logic to conclude that the requisite causation exists.") (quoting *Heinold v. Perlstein*, 651 F. Supp. 1410, 1412 (E.D. Pa. 1987)); *Scivally v. Graney*, 1994 WL 140413, at *3 (1st Cir. Apr. 15, 1994) (*per curiam*; panel including Breyer, C.J.) (quoting the same passage of *Heinold*); see also *Heinold*, 651 F. Supp. at 1411 (expectation damages recoverable only where "the conduct constituting the RICO violation interfered with a contract extant at the time of that conduct").

In *Liquid Air*, for example, the Seventh Circuit allowed an award of expectation damages where the defendant (D&R) had a contract to lease compressed gas cylinders from Liquid Air, D&R terminated the agreement but retained possession of more than 3,000 of the cylinders, and D&R then conspired with a disloyal Liquid Air employee to submit falsified

documents suggesting that D&R had returned all of the cylinders. 834 F.2d at 1300. The court permitted Liquid Air to pursue RICO damages for the rental and cylinder-replacement fees it would have been due under the parties' contract, rejecting D&R's argument that recovery under RICO should be limited to the replacement value of the converted cylinders. *Id.* at 1309. The Court explained that "[t]o restrict damages to the fair market value of the cylinders would deprive Liquid Air of its rights under the contract and would not compensate it for its losses. The damages that Liquid Air was entitled to under its contract with D&R provide the appropriate measure of full compensation." *Id.* at 1310. The court thus concluded that Liquid Air had a RICO-protected "business or property" interest in its expectation of rental income under a contract that predated (and existed independently of) D&R's fraudulent scheme to deprive it of that expectancy.

3. The Second Circuit's decision below departs from both of these two camps in holding that "customers are entitled to the difference between the amount they paid on fraudulently inflated cost-plus invoices and the amount they should have been billed [under the cost-plus agreements]." Pet. App. 25a. By allowing contract-expectation damages at all, the decision conflicts with the approach of the Fifth, Sixth, Eighth, and Ninth Circuits, which never allow such damages.

The decision below also conflicts with the approach of the First, Third, and Seventh Circuits by allowing contract-expectation damages where the expectation was created by the RICO violation itself. Unlike in *Liquid Air*, many of the "cost-plus" contracts here (the source of the class members' allegedly RICO-protected

interests) were entered into *after* the inception of, and as part of, the allegedly fraudulent scheme. See *supra* p. 7. That is, the alleged contract-expectation interest those class members seek to vindicate by their RICO claim did not pre-exist the alleged RICO violation; instead, the RICO violation created the expectation that they would be charged prices free of VASP markups. A customer could only have such an expectation if and to the extent that US Foods misrepresented or concealed the VASPs' existence.⁴ Thus, respondents are seeking to recover for injuries to a contract-expectation interest that was created by the alleged RICO violation, which would not be recoverable under the approach taken in the First, Third, and Seventh Circuits.

In short, none of the other courts of appeals to have considered this issue would have certified a RICO class here based on the Second Circuit's damages theory below: Under the rule applied in the Fifth, Sixth, Eighth, and Ninth Circuits, the customers' abstract contract expectancy would *never* be available in a RICO case, while in the First, Third, and Seventh Circuits, the claim would have been condemned by the fact that the expectancy was created after, and predicated upon, the alleged RICO violation. By allowing contract-expectation damages in a RICO case in which even the most generous of its sister circuits

⁴ Even for those customers whose "cost-plus" agreements predated the VASPs, much of the purported expectation interest in markup-free prices was created in part by the alleged scheme: A customer whose *initial* expectation of VASP-free prices was not created by concealment of the VASPs' existence (because the VASPs did not yet exist) would still have had its expectations regarding post-VASP purchases shaped by US Foods' alleged nondisclosure of the VASPs' inception and role.

would have denied such recovery, the Second Circuit has created a three-way circuit split that warrants this Court's review.⁵

4. The result that would obtain outside the Second Circuit is the correct one: A plaintiff does not have a RICO-protected "business or property" interest in an abstract contract expectation, especially one that was created by, and predicated upon, the alleged RICO violation. The plaintiff may have an interest in having the contract honored, but "RICO does not provide a federal treble-damages action for breach of contract." *Oak Park Trust & Sav. Bank v. Therkildsen*, 209 F.3d 648, 651 (7th Cir. 2000) (Easterbrook, J.); see also, e.g., *Carr v. Tillery*, 591 F.3d 909, 918 (7th Cir. 2010) (Posner, J.) ("allegations amount[ing] merely to a breach of contract claim . . . cannot be transmogrified into a RICO claim by the facile device of charging that the breach was fraudulent, indeed criminal").

5. Applying the correct measure of damages to a RICO fraud claim is dispositive of class certification here. Respondents avoided a finding that individualized damages issues would predominate over class-wide questions, and thus secured class certification, by relying on a damages formula that purports to measure the difference between the prices that the class members paid and the prices purportedly called for in their "cost-plus" contracts.

⁵ While the Second Circuit purported to apply *Heinold* and *Liquid Air* (see Pet. App. 25a), as explained in text, the rule for which its decision stands diverges from those cases. And even if the court of appeals could be said to have faithfully applied *Liquid Air*, there would remain a circuit split between courts adhering to that approach and those (the Fifth, Sixth, Eighth, and Ninth Circuits) that deny contract-expectation damages in every case.

If the Second Circuit below had followed its sister circuits and limited plaintiffs to out-of-pocket damages, it could not have certified the class, for respondents concede that they cannot prove out-of-pocket damages on an individual basis. C.A. J.A. A1918, A1967. Proof of out-of-pocket damages would require determining the actual value of the goods in each of hundreds of millions of individual sales, which occurred over a period of years and in numerous different regional markets. Thus, if the Second Circuit had limited respondents to recovery of out-of-pocket losses in connection with their RICO claim, individualized calculations would have overwhelmed any potentially triable class-wide issues.

B. The Second Circuit's Decision That Class-Wide Causation May Be Established By Generalized Proof Conflicts With Decisions Of The Fifth And Ninth Circuits

Certiorari should also be granted to resolve a circuit split regarding whether RICO's causation element may be established on a class-wide basis by generalized proof, so as to avoid individualized issues of reliance and causation that would otherwise preclude a finding of predominance under Rule 23(b)(3). Under 18 U.S.C. § 1964(c), a plaintiff is entitled to recover only for injuries sustained "by reason of" the defendant's racketeering activity. This Court has repeatedly stated that this element of the private RICO cause of action requires proof of "but for" causation, as a predicate to "proximate causation," *Hemi Grp., LLC v. City of New York*, 559 U.S. 1, 9 (2010); *Anza v. Ideal Steel Supply Corp.*, 547 U.S. 451, 457 (2006); *Holmes v. Sec. Investor Prot. Corp.*, 503 U.S. 258, 268 (1992), but has not articulated how

this requisite must be established. Lacking specific guidance on this question, the courts of appeals have taken conflicting approaches.

1. The Ninth Circuit has construed RICO's causation element to require particularized evidence of causation in a RICO fraud class action that (as here) alleged reliance by differently situated class members on similar misrepresentations. In *Poulos v. Caesars World, Inc.*, 379 F.3d 654 (9th Cir. 2004), a putative RICO class action alleging that the defendant casinos and gaming machine manufacturers had committed mail fraud in their marketing of the machines to gamblers, the Ninth Circuit affirmed the district court's denial of class certification on the ground that the plaintiff class could not establish reliance and causation through generalized, circumstantial proof. See *id.* at 660-61. Although all of the class members had received similar misrepresentations, the Ninth Circuit concluded that they could not maintain a class action, explaining that "[c]ausation lies at the heart of a civil RICO claim" and that, "[e]ven . . . assuming that all plaintiffs . . . suffered financial loss . . . , it does not necessarily follow that plaintiffs' injuries are causally linked to [defendants'] alleged misrepresentations." *Id.* at 664-65. Instead, the court held that "an individualized showing of reliance [and causation was] required" with respect to each member of the class, and that such individualized issues precluded certification by predominating over any class-wide issues. See *id.* at 666. Further, the court rejected the plaintiffs' attempt to support a class-wide finding of causation through circumstantial evidence that it is "common sense" that a person who lost money at a gambling machine relied on misrepresentations concerning the machine in deciding to wager. *Id.* at 667-68.

The Fifth Circuit took an approach similar to the Ninth Circuit's in *Sandwich Chef of Texas v. Reliance National Indemnity Insurance Co.*, 319 F.3d 205 (5th Cir. 2003), rejecting the attempt by a putative class of RICO plaintiffs to prove causation via an "invoice theory" similar to that advanced by respondents in the instant case. *Id.* at 220. While the Second Circuit below purported to distinguish *Sandwich Chef* on factual grounds,⁶ it ignored the Fifth Circuit's *legal* determination that "the invoice theory does not [establish] reliance . . . and eliminate individual issues of reliance and causation that preclude a finding of predominance of common issues of law or fact." *Id.* at 221.

2. In contrast, the First and Eleventh Circuits have approved certification of RICO classes on the basis of generalized, circumstantial proof of reliance and causation. In *Klay v. Humana, Inc.*, 382 F.3d 1241 (11th Cir. 2004), on which the Second Circuit relied below (Pet. App. 16a), a putative class of doctors asserted RICO mail- and wire-fraud claims against health maintenance organizations that had allegedly systematically underpaid the doctors' claims for reimbursement over a period of years. The defendants

⁶ Specifically, the Second Circuit purported to distinguish *Sandwich Chef* on the ground that the defendants there "had produced evidence" showing that individual customers had not relied on the alleged misrepresentations, whereas in this case US Foods supposedly had presented "no such individualized proof." Pet. App. 20a (emphasis omitted). This characterization of the record ignores US Foods' evidence that particular class members—the *named plaintiffs themselves*—had not relied on the alleged misrepresentations in choosing to purchase from US Foods, but would have made the same choices even if the VASPs had been disclosed because of US Foods' lower prices or superior customer service. See *supra* p. 6.

opposed class certification on the ground that individualized issues of causation and reliance would predominate over any issues common to a nationwide class of doctors, but the Eleventh Circuit affirmed certification. According to the Eleventh Circuit, individualized issues would not predominate because “the circumstantial evidence that can be used to show reliance is common to the whole class”: even absent any particularized evidence, “[a] jury could quite reasonably infer that guarantees concerning physician pay—the very consideration upon which those agreements are based—go to the heart of these agreements, and that doctors based their assent upon them.” *Id.* at 1259.

The First Circuit similarly holds that a RICO mail- and wire-fraud class may be certified even in the absence of individualized proof of but-for causation. See *Harden Mfg. Corp. v. Pfizer, Inc. (In re Neurontin Mktg. & Sales Practices Litig.)*, 712 F.3d 60, 68-69 (1st Cir. 2013), cert. denied, 2013 WL 4763873 (U.S. Dec. 9, 2013). *Harden* involved a putative class of insurance companies and self-insured employers that claimed to have paid excessively for pharmaceuticals as an alleged result of Pfizer’s purportedly fraudulent marketing campaign despite the fact that the prescriptions resulted from the innumerable prescribing decisions of doctors exercising their independent discretion. See *id.* at 62. The First Circuit held that there was no need for any individualized proof that the fraud had actually caused any given transaction or any given financial loss, ruling instead that an expert witness’s aggregate statistical analysis of a correlation between Pfizer’s marketing expenditures and the number of prescriptions, together with other generalized circumstantial evidence, shifted to the defendant the burden to show that the plaintiff’s

injury was the result of some other causal factor. See *id.*; see also *Kaiser Found. Health Plan, Inc. v. Pfizer, Inc. (In re Neurontin Mktg. & Sales Practices Litig.)*, 712 F.3d 21, 29 (1st Cir. 2013) (describing expert's report).

3. The Second Circuit's decision below deepens this circuit split: Siding with the First and Eleventh Circuits, the Second Circuit affirmed the certification of respondents' RICO class despite the absence of individualized evidence of reliance or causation, and despite US Foods' evidence that individual customers did not make purchasing decisions in reliance on the alleged misrepresentations.

The Second Circuit found that respondents could adequately prove causation on a class-wide basis solely by reference to an "inference" that any customer who paid an allegedly inflated invoice must have relied on its contents. Pet. App. 18a-19a. It did not consider the processes by which respondents and the members of their proposed class made their purchasing decisions, under which each customer (i) chose to enter a US Foods distribution agreement, in most cases after reviewing sample prices based on allegedly inflated VASP invoice prices; (ii) reviewed US Foods' published order guide, which offered products at their full delivered prices inclusive of the VASPs' mark-up; (iii) chose to purchase food from US Foods, at the published, VASP-inclusive price, rather than from one of its competitors; and (iv) paid US Foods the final, published price to which it had agreed, which was the same price reflected in US Foods' invoice. Respondents did not offer evidence that any individual class member bought goods from US Foods at the offered price *because of* the alleged concealment of the VASPs, nor did they present evidence that any

customer would have purchased from US Foods' competitors at *higher* prices had they been aware of US Foods' supply chain. To the contrary, respondents testified that they purchased from US Foods when it offered the lowest available prices, and purchased from the competitors when those competitors' prices were lower. See *supra* p. 6.

The Second Circuit below thus disregarded the individualized evidence regarding particular customers' decisions to purchase from US Foods rather than its competitors, instead focusing only on the invoice step of the relationship and holding that mere payment of an invoice was enough to presume reliance and causation as to the entire class. Pet. App. 18a ("[P]ayment may constitute circumstantial proof of reliance based on the reasonable inference that customers who pay the amount specified in an inflated invoice would not have done so absent reliance upon the invoice's implicit representation that the invoiced amount was honestly owed."). The Fifth and Ninth Circuits, in contrast, would have required on these facts that each plaintiff provide individualized proof of this chain of causation.

4. By certifying respondents' class in the absence of any individualized evidence of causation, the Second Circuit adopts the First and Eleventh Circuits' approach to RICO causation rather than the Fifth and Ninth Circuits', and thus deepens a circuit split warranting this Court's review. As this Court recently explained, "[t]he class action is 'an exception to the usual rule that litigation is conducted by and on behalf of the individual named parties only,'" and accordingly "a class cannot be certified on the premise that [the defendant] will not be entitled to litigate its . . . defenses to individual claims." *Wal-Mart Stores, Inc. v. Dukes*,

131 S. Ct. 2541, 2550, 2560-61 (2011) (citation omitted). Rule 23 thus permits a representative plaintiff to pursue claims on behalf of other, similarly situated individuals *only* where the named plaintiff has the necessary evidence to prove the absent class members' claims and to provide the defendant with all the discovery necessary to its defenses. The Second Circuit's interpretation of RICO and Rule 23, however, allows respondents to try their case by proxy and effectively to eliminate US Foods' ability to challenge causation as to individual purchases. Tens of thousands of customers thus may recover treble damages from US Foods even if they admit that they purchased based on US Foods' overall price and customer service, rather than as a result of alleged misrepresentations concerning US Foods' pricing practices.

Such a result would "sacrifice[e] procedural fairness" in the name of expedience, *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 615 (1997) (quoting Fed. R. Civ. P. 23 advisory committee's note (1966)), and would contravene the Rules Enabling Act's proscription of certification decisions that may "abridge, enlarge or modify any substantive right," *Ortiz v. Fibreboard*, 527 U.S. 815, 845 (1999). Accord, *Phillip Morris USA, Inc. v. Scott*, 131 S. Ct. 1 (2010) (Scalia, J., in chambers) (granting stay of class certification decision that "eliminated any need for plaintiffs to prove, and denied any opportunity for applicants to contest, that any particular plaintiff" relied on a fraud; noting that the certification decision presents "an important question" that "implicates constitutional constraints on the allowable alteration of normal process in class actions"); *Philip Morris USA v. Williams*, 549 U.S. 346, 353 (2007) (due process requires that a defendant be provided "an opportunity to present every available defense") (citation omitted).

5. As with the RICO damages question, this causation question is dispositive of class certification. Had the Ninth Circuit's approach been applied by the Second Circuit in this case, questions of fact concerning what caused particular food-purchase transactions would necessarily predominate over class-wide issues and thus require denial of class certification: A court attempting to try the case collectively would be forced to address tens or hundreds of thousands of individualized questions concerning whether customers with full knowledge of the VASP scheme would still have chosen to buy from US Foods *to the extent that* its prices and customer service were better than the prices and customer service offered by US Foods' competitors. Certiorari should be granted to resolve the circuit split.

**C. The Second Circuit's Approval Of A
Nationwide Class Of Contract Plaintiffs
Without "Extensive Analysis" Of
Variations In State Law Conflicts With
The Decisions Of Other Circuits**

Certiorari should also be granted to resolve the additional question, arising in connection with respondents' contract claims, of what showing is required under Rule 23(b)(3) to justify certification of a nationwide class of plaintiffs asserting claims governed by the laws of dozens of states and/or other jurisdictions.

"An overwhelming number of federal courts have denied certification of nationwide state-law class actions" because the prospect of applying several states' laws often renders a class-wide trial so unmanageable as to preclude the requisite finding of predominance. Ryan, Comment, *Uncertifiable?: The Current Status of Nationwide State-Law Class*

Actions, 54 Baylor L. Rev. 467, 470 & n.5 (2002) (collecting cases). Recognizing these limits on certification of multi-state classes, the weight of authority follows then-Judge Ginsburg's directive in *Walsh v. Ford Motor Co.*, 807 F.2d 1000 (D.C. Cir. 1986): "[T]o establish commonality of the applicable law, nationwide class action movants must creditably demonstrate, through an 'extensive analysis' of state law variances, 'that class certification does not present insuperable obstacles.'" *Id.* at 1017 (quoting *In re Sch. Asbestos Litig.*, 789 F.2d 996, 1010 (3d Cir. 1986)) (emphasis added). See, e.g., *Sacred Heart Health Sys., Inc. v. Humana Military Healthcare Servs., Inc.*, 601 F.3d 1159, 1180 (11th Cir. 2010); *Powers v. Lycoming Engines*, 328 F. App'x 121, 124 (3d Cir. 2009) (quoting *In re Sch. Asbestos Litig.*, 789 F.2d at 1010); *Cole v. Gen. Motors Corp.*, 484 F.3d 717, 724 (5th Cir. 2007) (all requiring "extensive analysis"); see also, e.g., *Ward v. Dixie Nat. Life Ins. Co.*, 257 F. App'x 620, 629 (4th Cir. 2007) (denying certification where the movant failed in her obligation to "identify all governing state laws and compare any variations") (citing *Gariety v. Grant Thornton, LLP*, 368 F.3d 356, 370 (4th Cir. 2004)); *In re Am. Med. Sys., Inc.*, 75 F.3d 1069, 1085 (6th Cir. 1996) (reversing certification where the district court "failed to consider how the law . . . differs from jurisdiction to jurisdiction," because "[i]f more than a few of the laws of the fifty states differ, the district judge would face an impossible task of instructing a jury on the relevant law"); accord, 7AA Wright *et al.*, Federal Practice & Procedure § 1780.1, at nn.12-20 and accompanying text (3d ed.); 2 Newberg on Class Actions § 4:61 (5th ed.).

In the specific context of contract law, *Walsh* explained that it is insufficient for a moving party simply

to “say no variations in state . . . laws relevant to this case exist”:

A court cannot accept such an assertion “on faith.” Appellees, as class action proponents, must show that it is accurate. We have made no inquiry of our own on this score and, for the current purpose, simply note the general, unstartling statement made in a leading treatise: “The Uniform Commercial Code is not uniform.”

Walsh, 807 F.2d at 1016 (quoting White & Summers, Uniform Commercial Code 7 (2d ed. 1980)) (emphasis added); see also *Castano v. Am. Tobacco Co.*, 84 F.3d 734, 741 (5th Cir. 1996) (quoting *Walsh*).

The Fifth Circuit’s decision in *Cole* is illustrative. The plaintiffs sought to proceed as representatives of a nationwide class of car owners alleging breaches of express and implied warranties. 484 F.3d at 718. These claims implicated the law of all fifty states and the District of Columbia; recognizing this problem, the plaintiffs undertook substantial efforts to show that individualized issues would not defeat predominance: They provided an “extensive catalog of the statutory text[s] . . . implicated in this suit,” as well as an “overview of textual variations in the relevant UCC provisions” and a “report from an expert on contract law who opined . . . that the few variations . . . are such that they do not affect the result.” *Id.* at 725 (quotation marks omitted). The Fifth Circuit nevertheless found the plaintiffs’ presentation insufficient, “because they failed both to undertake the required ‘extensive analysis’ of variations in state law concerning their claims and to consider how those variations impact predominance.” *Id.* Their analysis was inadequate because it “relied primarily on the textual similarities of each jurisdiction’s applicable

law and on the general availability of legal protection in each jurisdiction for express and implied warranties”; this “largely textual presentation of legal authority oversimplified the required analysis and glossed over the glaring substantive legal conflicts among the applicable laws of each jurisdiction.” *Id.* at 725-26.

The Second Circuit’s decision below to approve the proposed class without inquiry into state-law differences is thus contrary to the holdings of other circuits. Respondents presented no evidence identifying or comparing variations in interpretation and application of these statutes; nor did the Second Circuit attempt to assess the state-law issues itself. As a result, the Second Circuit rested its ruling not on an “extensive analysis” of the variations in state law, but *solely* on its observations that the States⁷ have adopted versions of the UCC provisions pertaining to the duty of good faith and the use of extrinsic evidence in interpreting a contract. Pet. App. 29a-30a. Respondents’ bare-bones demonstration that there are “textual similarities” between the states’ statutory provisions falls far short even of the showing that the Fifth Circuit found inadequate in *Cole*, 484 F.3d at 725. Nor would this presentation have survived the scrutiny required by the other courts that follow the D.C. Circuit’s admonition that an assertion that laws are similar cannot be accepted “on faith,” and that instead the “class action proponents . . . must show that it is accurate.” *Walsh*, 807 F.2d at 1016.⁸ Had the

⁷ The Second Circuit did not purport to analyze the applicable tribal law.

⁸ The Second Circuit brushed aside the existence of differences in state law by asserting that “state contract law defines breach consistently such that the question will usually be the same in all

Second Circuit followed the lead of those other circuits rather than shifting the burden of proof onto US Foods, it could not have approved certification of the proposed class.⁹ Certiorari should be granted to clarify the degree of scrutiny necessary prior to certification of a class action implicating the law of multiple states.

jurisdictions.” Pet. App. 33a. Even if true, that contention ignores that US Foods highlighted differences in state law that pertain not to the existence of a *breach*, but to the antecedent question of the scope of the relevant contractual *duties*: what the duty of good faith required of US Foods, and how the contracts’ expressed terms should be interpreted in view of the parties’ individual contract negotiation histories and courses of performance.

⁹ Even setting aside the Second Circuit’s failure to analyze the statutes and its decision to shift the burden of proof onto US Foods, its affirmance of the class certification decision is in error. For instance, the applicable state contract laws vary in their definitions of the duty of good faith: At least Alabama, Idaho, Virginia, Hawaii, Illinois, and Nebraska have adopted modified versions of U.C.C. § 1-201(b)(20), none of which incorporates the model UCC’s “reasonable commercial standards of fair dealing” standard. See Ala. Code § 7-1-201(b)(20); Haw. Rev. Stat. Ann. § 490:1-201(b); Idaho Code Ann. § 28-1-201(b)(20); 810 Ill. Comp. Stat. Ann. 5/1-201(b)(20); Neb. Rev. Stat. Ann. UCC § 1-201(b)(20); Va. Code Ann. § 8 1A-201 (b)(20). And with respect to extrinsic evidence, respondents’ own evidence shows that the States have adopted at least two versions of the UCC’s “course of performance” provision; the differences are left unexplored. See C.A. J.A. A2647-49.

II. THE PETITION PRESENTS IMPORTANT QUESTIONS REGARDING THE ROLE OF CIVIL RICO IN PRIVATE LITIGATION, ESPECIALLY IN THE CLASS-ACTION CONTEXT

The questions presented in the petition are important and recurring, presenting additional need for this Court's review.

1. A decision clarifying the scope of civil RICO—including what damages theories are viable, and whether generalized, circumstantial evidence is sufficient to prove causation—would provide guidance in numerous cases where RICO's draconian treble damages and substantial awards of attorneys' fees are at stake.

Civil RICO has taken on an increasingly significant role in private business litigation in recent years, despite the lower courts' frequently expressed misgivings about "widespread abuse." *Parker & Parsley Petroleum Co. v. Dresser Indus.*, 972 F.2d 580, 588 (5th Cir. 1992). The litigation and settlement leverage provided by the threat of automatic awards of treble damages and attorneys' fees has been appropriately described as "the litigation equivalent of a thermonuclear device." *Miranda v. Ponce Fed. Bank*, 948 F.2d 41, 44 (1st Cir. 1991). Yet despite this Court's efforts to rein in civil RICO overuse through recognition of the proximate-causation element in *Holmes* and its progeny, invocation of the statute has continued apace: Over the past three years, an average of more than 800 civil RICO cases have been filed annually; more than 7,500 such cases have been

filed in the last decade.¹⁰ Only a fraction of those cases (6 cases out of 739 in the year 2012; 1 case out of 917 in 2011) were filed on behalf of the government; the remainder were filed by private plaintiffs.

Concerns about RICO's overuse are only magnified in the context of *class-action* litigation, in which hundreds or thousands of plaintiffs—here, a sprawling class of 75,000—may join together to assert crippling large treble-damages claims. The result of combining the class-action device with RICO treble damages is to bestow inordinate settlement leverage upon plaintiffs and their lawyers, unfairly disadvantaging defendants who are unwilling to risk multi-billion-dollar damages claims or the destruction of their lawful businesses. By expanding RICO damages theories while relaxing RICO's causation requirement, the decision below will inevitably lead to more such lawsuits—and thus to an increase in the already substantial threat that RICO class actions pose to the business community.

2. The first question presented (concerning RICO damages) is important for the additional reason that it implicates this Court's recent decision in *Comcast Corp. v. Behrend*, 133 S. Ct. 1426 (2013). *Comcast* clarified and affirmed the rule that, "at the class-certification stage (as at trial), any model supporting a plaintiff's damages case must be consistent with its liability case." *Id.* at 1433 (citation and internal quotation marks omitted). If US Foods is correct on

¹⁰ See U.S. District Courts—Civil Cases Commenced, by Basis of Jurisdiction and Nature of Suit (2012), *available at* <http://www.uscourts.gov/uscourts/Statistics/FederalJudicialCaseloadStatistics/2012/tables/C02Mar12.pdf>; U.S. District Courts—Civil Cases Commenced, by Basis of Jurisdiction and Nature of Suit (2011), *available at* <http://www.uscourts.gov/uscourts/Statistics/FederalJudicialCaseloadStatistics/2011/tables/C02Mar11.pdf>.

the damages point discussed above, then allowing class certification of respondents' RICO claim would pave the way for using Rule 23 to end-run this basic principle: A group seeking to recover on what is fundamentally a fraud theory of liability would be permitted to shift to a contract-law theory of damages when necessary to obtain certification.

3. Finally, resolving the circuit split created by the Second Circuit's approval of a nationwide class action under multiple state contract laws is a matter of considerable national importance. Prior to the decision below, the law was settled that the representative of a proposed class seeking recovery under the laws of multiple states bears the burden of demonstrating through "extensive analysis" that material variations in the applicable state legal regimes will not render the case unmanageable. Under the Second Circuit's new approach (permitting certification on no greater showing than a cursory chart of statutory texts), nationwide class action filings based on multiple state laws will proliferate and present burdensome management difficulties for the lower courts. And with or without the additional threat of RICO treble damages, approval of a large nationwide class involving multiple state laws confers tremendous litigation leverage on the class representatives. This Court should review the Second Circuit's decision to allow such complex and unmanageable class actions to proceed without any meaningful threshold scrutiny of variations among the relevant state laws.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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