No. 16-1309

IN THE

Supreme Court of the United States

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

Petitioners,

v.

JUAN RAMON TORRES, ET AL.

Respondents.

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

BRIEF IN OPPOSITION

Eric F. Citron
GOLDSTEIN & RUSSELL, P.C.
7475 Wisconsin Ave.
Suite 850
Bethesda, MD 20814
(202) 362-0636
ecitron@goldsteinrussell.com

QUESTION PRESENTED

The class certified in this interlocutory appeal consists of the victims of an alleged pyramid scheme. Under the unchallenged, substantive law applicable to such cases, pyramid schemes are deemed "inherently deceptive" and "*per se* illegal," and thus constitute "schemes to defraud" as a matter of law for purposes of the Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U.S.C. §1961; *see, e.g.*, *See Webster v. Omnitrition Corp*., 79 F.3d 776, 788 (9th Cir. 1996). Both lower courts here found as a matter of fact that: (1) participation in the scheme a plausible proximate cause of the victims' injuries; and (2) "the record is devoid of evidence that a single putative class member joined [the scheme] despite having knowledge of the fraud," or "would have paid to [join] knowing of the fraud." Pet.App. 24a. Both lower courts further concluded that petitioners never "even attempted" to show that class members' injuries were attributable to anything other than reliance on the defendants having falsely held out their operation as a legitimate business rather than an inherently fraudulent pyramid scheme. *Id.* 25a. Accordingly, the question presented is:

Whether a plausible allegation, supported by extensive proof, that defendants operated an inherently deceptive and illegal pyramid scheme, and thereby caused a class of victims to inevitably lose money by paying to participate, can support class certification under Federal Rule of Civil Procedure 23(b)(3)—at least where "the Defendants produced no evidence that a single class member even knew of the fraud or would have paid to become [a part of the scheme] knowing of the fraud." Pet.App. 24a.

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INTRODUCTION

Both questions presented here have been recently denied in superior vehicles. *See* Petition for Certiorari, No. 15-949, *Plambeck v. Allstate Ins. Co.* (denied May 2, 2016); Petition for Certiorari, No. 13-873, *U.S. Foods Inc. v. Catholic Healthcare West* (denied Apr. 28, 2014). Having failed to identify or distinguish these denials, petitioners offer this Court no reason to change course. Indeed, by describing this petition as the "intersection" of these two questions, Pet. 2, petitioners euphemistically admit that this Court would have to grant review on *two separate issues* it has recently rejected just to entertain this case. Several petitioners are also jurisdictionally out-of-time. These and other vehicle problems would recommend denial even if the circuit conflicts identified were real and the questions presented otherwise certworthy. The alleged splits are not real, however, and the questions presented unworthy of review.

The first question, concerning the meaning of *Bridge v. Phoenix Bond & Indemnity Co.*, 553 U.S. 639 (2008), has received the same answer in this Court and every other. Petitioners' position is that proof of reliance is required in every RICO fraud case; Justice Thomas's unanimous opinion says that "[r]eliance …, whether characterized as an element of the claim or as a prerequisite to establishing proximate cause, *simply has no place* in a remedial scheme keyed to the commission of mail fraud [*i.e.*, RICO], a statutory offense that is distinct from common-law fraud and that *does not require proof of reliance*." *Id.* at 656 (emphasis added). This language is absent from the petition.

The second alleged split—concerning the general standard for when a jury can infer reliance from com-

mon, circumstantial evidence about particular fraudulent schemes—is even more illusory. Thus, for example, while petitioners conjure a split between the Fifth and Tenth Circuits, the Tenth Circuit decision at issue *favorably cited* the same district court decision the Fifth Circuit affirmed below. Pet.App. 23a. The other courts petitioners invoke in their favor have, likewise, plainly rejected petitioners' rule in much more analogous cases—including cases *about pyramid schemes*. *See, e.g.*, *Arata v. Nu Skin*, 5 F.3d 534 (9th Cir. 1993) (affirming certification in pyramid-scheme case); *In re U.S. Foodservice Pricing Litig.*, 729 F.3d 108, 118 (2d Cir. 2013) (affirming class certification in RICO fraud case based on common, circumstantial evidence of reliance). Petitioners represent otherwise only by repeating the sin for which they were chided below and relegating core, contrary decisions to footnotes. *See* Pet.App. 21a-22a; Pet. 25 n.3.

Petitioners, moreover, simply fail to engage with the case-specific reasoning below. The real issue here is whether victims of an alleged pyramid scheme masquerading as a legitimate multi-level marketing venture (or "MLM") can ever proceed by class action. The circuits are unanimous on that question: They "have upheld the predominance of common issues … and have granted certification to comprehensive plaintiff classes in cases arising from similar multi-level pyramid schemes." *Nguyen v. FundAmerica, Inc.*, 1990 WL 165251, *2 (N.D. Cal. Aug. 16, 1990) (collecting cases). Below, a supermajority of the *en banc* Fifth Circuit agreed, distinguishing one of its own general precedents that other circuits had likewise been forced to distinguish as an outlier. *See* Pet.App. 26a-28a & n.71. Accordingly, while the leading MLM trade group and U.S.

Chamber of Commerce supported petitioners' effort to leverage that uniquely favorable precedent below, both have abandoned them in this Court—presumably because they recognize that this is a uniquely poor vehicle for class-action challengers to press petitioners' points.

Importantly, pyramid-scheme claims are both rare and subject to specialized legal doctrines, making them ill-suited venues for considering such highly generalized questions. That vehicle problem is particularly vexing here because it directly affects the proper analysis. Unlike most deceptions, a pyramid-scheme fraud is *structural*—it is the compensation plan that inevitably harms a huge class of participants, not individualized lies or tricks—and the law thus uniquely deems proven pyramid schemes "inherently fraudulent." *United States v. Gold Unlimited*, 177 F.3d 472, 479, 484 (6th Cir. 1999). The standards for applying RICO and Rule 23 here will take all their meaningful content from this specialized substantive law. *See Tyson Foods v. Bouaphakeo*, 136 S. Ct. 1036, 1045 (2016). The generalized questions petitioners offer as bait will thus dissolve at the merits stage into esoteric, splitless issues that have little application outside the handful of private pyramid-scheme cases arising each decade.

The theory of petitioners' Rule 23(f) petition in this *interlocutory* appeal was, essentially, that no fraud case should ever be certified. *See* CA5 No. 14-90004 (Jan. 27, 2014 entry) at 2 ("[T]his Court has *never* approved class certification in a RICO fraud case … [a]nd this case should be no different."). This Court's view, however, has been the opposite—"predominance," it has said, "is a test readily met in certain cases alleging consumer … fraud," *Amchem Prods., Inc. v. Windsor*, 521 U.S. 617,

625 (1997)—and it is hard to imagine a more prototypical fraud case for class certification. Pyramid schemes are (1) inherently fraudulent (2) self-replicating structures that (3) cause the same small harm in the same way to each victim. The Fifth Circuit thus reached a narrow holding applicable to the particular record of this pyramid-scheme case. As the extensive evidence of their malfeasance demonstrates, *see infra* pp.7-12, petitioners simply want to immunize their frauds against claims for redress by their victims, which are too small to bring alone. This Court should not provide that immunity under the guise of resolving illusory conflicts.

BACKGROUND

The petition (at 4-6) entirely omits this case's concrete context. It is critical, however, to understanding how its predominating questions will be proven with common evidence. *See Tyson Foods*, 136 S. Ct. at 1045 (certification appropriate where plaintiffs can "use the same evidence … to make a prima facie showing"). We thus begin with a necessary sketch of how pyramid-scheme law works, and the evidence showing how petitioners' scheme harmed the respondent class.

I. Legal Background

In MLMs, individuals sell a company's products and recruit others into a similar role, earning returns based on their own sales and those of their "downline" recruits (including, often, a few tiers of their recruits' recruits as well). Such programs are legal if rewards are strongly tied to sales. MLMs become illegal pyramid schemes, however, if rewards are paid predominantly for recruiting—when the only way to make real money is to sign up more people, rather than selling

more product. When that is true, it unleashes a mathematically inexorable harm that will be visited on a geometrically expanding class of victims at the bottom of the pyramid. Eventually, there will be no one left to recruit: The market for "salespeople" quickly saturates, and because the only meaningful rewards are paid for recruiting, there will *always* be a large group at the bottom that has not yet recruited anyone, and so ends up holding the bag for those at the top.

Pyramid schemes are thus a special kind of fraud the law has categorically condemned for decades. The fraud inheres in the *structure* of the scheme, rather than any particularized misrepresentations. As the FTC held in its seminal decision, holding out the right to participate in pyramid schemes as valuable and legitimate is "inherently unlawful" because "the operation of such plan *due to its very structure* precludes the realization of [substantial] rewards to most of those who invest." *In re Koscot Interplanetary, Inc.*, 86 F.T.C. 1106, *59 (1975); *see id.* (participation in pyramid scheme is "likely to prove worthless for many participants, *by virtue of the very nature of the plan* as opposed to any particular dishonest machinations of its perpetrators") (emphases added). Following the FTC's reasoning, the federal courts have uniformly held that pyramid schemes are "inherently fraudulent," *Gold Unlimited*, 177 F.3d at 479, and "*per se* illegal," *Webster*, 79 F.3d at 788.

The elements of proving an illegal pyramid scheme are straightforward. Legal MLMs like Avon or Tupperware only become unlawful when participants (1) pay the company for the right to serve as seller/recruiters; and (2) the recruitment rewards dominate sales incentives. *See* Pet.App. 15a-16a.

The FTC explained the core insight in its prosecution of Fortune Hi-Tech Marketing—another pyramid scheme established by petitioners' former peers. *See* PEBr. 5:[1]

> The fundamental problem with the pyramid structure is that, *inherent* in its design, at any point in time and no matter what the size, most participants will be out the money they have contributed to the pyramid. A few people at the top … make large sums, but the vast majority lose their investment. This *inherent* characteristic of pyramids … *inevitably* leads to a situation where only a small number of participants can ever even recover their money. … Indeed, pyramid schemes might be more aptly explained as icebergs. No more than a small percentage of an iceberg is above water, no matter what the size. The *inevitable consequence* of a pyramid scheme, akin to an iceberg, is that most participants will remain 'underwater.'

Memorandum at 23, *FTC v. Fortune Hi-Tech Mktg.*, https://goo.gl/hhS79N (Jan. 24, 2013) (emphasis added).

The "per se illegality" of pyramid schemes thus depends on two propositions intimately connected to RICO's cause of action and critical here. First, settled law deems pyramid schemes fraudulent apart from any particular misrepresentations. *See supra* pp.5-6. And second, that condemnation stems from the *causative*

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[1] PEBr., PPBr., and SRE refer to plaintiffs' *en banc* brief, panel brief, and Supplemental Record Excerpts, respectively. *See* CA5 Dkt. No. 14-20128 (filed May 9, 2016 and October 10, 2014). These identify the underlying exhibits, which are part of a voluminous, sealed record.

link between their structure and the "inevitable" losses of a large "underwater" class at the bottom. *See id.*; *Gold Unlimited*, 177 F.3d at 479 (pyramid schemes are *per se* unlawful because they "will inevitably harm later investors").

Pyramid schemes are—as a matter of *law*—schemes to defraud under RICO that not just proximately but "inevitably" harm the huge class in the pyramid's bottom tiers. *Id.* at 484. Accordingly, in the most-cited private pyramid-scheme case—also a certified RICO class action—the Ninth Circuit held that "[t]he existence of a triable issue of fact as to [defendant's] operation of a pyramid scheme" will ordinarily permit a reasonable jury to infer not just the elements of RICO, but *any* common-law fraud claim as well, including "justifiable reliance and resulting damage." *Webster*, 79 F.3d at 788.

II. Factual Background

Notwithstanding petitioners' suggestions (at 4), Stream is not much of an "energy company." It is a *sales* company: It does not own any plants, pipes, or power lines, and sells everything from long-distance calling to credit-monitoring services—none of which it provides itself. *See* https://mystream.com. Its "energy" business consists of charging retail prices for energy it must pay real utilities to produce and transport—often for illusory customer benefits. *See* PEBr. 3-5.

To generate these accounts, Stream relies on MLM-style sales. But unlike legal MLMs, Stream plainly satisfies both elements of the pyramid-scheme test. Their participants ("IAs") must pay for the right to sell Stream's products and recruit other IAs. The fee to join

this ever-expanding force was typically $329 plus several hundred dollars annually ($25/month) for a website. Conversely, the commission for finding an energy customer was only $0.50/month. *See* Pet.App. 2a. That compared with hundreds of dollars in bonuses available for recruiting, and multiplying returns on the activity of those in an IAs "downline." The decision below explains Stream's overwhelming recruitment tilt, *See* Pet.App. 3a-4a; even the initial panel majority concluded that "[a]n IA's success depends primarily on recruiting." *Id*. 53a. But it perhaps suffices to note that, while IAs never averaged more than about three accounts each, it takes *fifty accounts* just to pay the monthly website fee with direct sales commissions. Recouping one's initial investment required recruiting others.

Voluminous evidence thus shows that Stream was a pyramid scheme and, worse, that defendants knew what they were setting up. All this evidence is common; none turns on anything particular to any class member. Space limits the following presentation, but an illuminating account of defendants' perfidy can be found in the briefing below. *See* PEBr. 3-18.

First, and tellingly, Stream openly preached recruiting over sales. It's "Business Plan" says:

> "[T]his is *not about becoming an energy expert or salesperson*. You only need a few customers to be successful. But by teaching others and *duplicating* your efforts, you can be paid on potentially hundreds or even thousands of energy customers every month."

SRE2 (emphasis added). This is a concise statement of a pyramid fraud; a scheme that "is not about becoming

an energy expert or salesperson" necessarily collapses because it is impossible for *everyone* to have "only a few customers" and still be successful. Instead, each tier can be successful only if recruits a tier below it—a chain that must eventually end and harm those at the bottom.

Stream's compensation plan practiced what it preached. The fifty cent direct commission was the only concrete sales inducement, but IAs who signed up yet more IAs would earn multiplying commissions from an expanding pyramid of "downline" sales plus "leadership bonuses" of up to $275 per head for new recruits. *See* PEBr. 8-9; SRE7-9. Notably, the plan sent most of the "commission" on any given sale to a IA's *recruiters*, not the salesperson herself. *See* SRE8. And unlike legitimate MLMs, Stream allowed IAs to earn commissions on sales by IAs in *infinite* tiers below them, promising "geometric growth to infinity." *See* Pet.App. 53a. The plan thus inevitably encouraged IAs to recruit others, not seek out thousands of sales leads.

In four key respects, the real-world results reflected Stream's recruitment-dominated plan: (1) most lost money; (2) it was impossible to earn real returns through sales alone; (3) most substantial returns went to pre-placed recruiters like petitioners; and (4) average sales rates per IA were egregiously low.

1. Over 86% of Stream IAs who joined during the class period lost money in fees, collectively losing over $87,000,000. *See* Pet.App. 4a. These figures are comparable to confirmed pyramid schemes. *See* PEBr. 9; *FTC v. BurnLounge*, 753 F.3d 878, 883 (9th Cir. 2014).

2. Only a tiny fraction of IAs (<0.001) had direct sales commissions exceeding their costs. PEBr. 10. And

even they typically had recruiting bonuses, which constituted their major revenue source. Simply put, the only way anyone made non-trivial returns was by replicating the recruiting scam, not selling energy. *See* PEBr. 9-12.

3. All the real money went to recruiters, including the petitioners who rigged the game at the outset. Even before Stream was approved to sell power, those insiders created a web of sales to themselves and close associates, building a multi-level capstone positioned to reap enormous returns from sales and sign-ups by the later-joining IAs. These top layers consisted of the insiders themselves, their personal corporations, and even their family members, all of whom had miniscule sales activity but earned colossal returns. One insider was credited with over 200,000 people in his downline and made $16,500,000 in "commissions" and recruitment bonuses; another had 282,000 downline recruits and (together with his family) pocketed over $6 million. One even inserted his ailing mother in a lucrative upline such that—despite her death and consequent lack of sales activity—she still earned over $500,000 in commissions and bonuses. The ratio of returns from these petitioners' "downlines" relative to their personal sales was thousands to one. *See* PEBr. 12-16; PPBr. 12-14.

The aggregate numbers don't lie. In years where its customer count implied $3 million in direct sales commissions, Stream paid out *$42 million* in IA "bonuses" and other compensation. Even under maximally charitable assumptions, its payout ratios correspond to confirmed pyramid schemes. *See* PEBr. 12-13.

4. Finally, like other pyramid schemes, Stream never achieved a sustainable sales rate. Petitioners'

own, best-case story is that Stream has a million customers, Pet. 4, compared to 300,000 IAs—implying an "outside" sales rate below 2.5-to-1. That is grossly insufficient to prevent massive IA losses, and relies on very generous assumptions.[2] In truth, by 2012 the inevitable effects of saturation meant that Stream had more new IAs paying to sell accounts each year than new customers buying them. PEBr. 16; SRE14; SRE17. Math itself dictates that the overwhelming majority of IAs *must* lose money in that situation, as they did here.

The following chart shows Stream playing out the familiar pattern of pyramid schemes. After decent (if unremarkable) total returns for those who joined immediately, the average result falls off dramatically and becomes increasingly negative with each passing year.

Year (Texas & Blank)	New IAs	Including Website		Average Profit For IAs Who Profited	Average Profit/Loss All IAs
		#Who Profited	%Who Profited		
2005	21,201	3,421	16.14%	$31,098	$4,674
2006	35,735	5,226	14.62%	$5,912	$524
2007	35,318	4,659	13.19%	$3,311	$102
2008	20,294	3,621	17.84%	$1,686	$7
2009	16,602	2,245	13.52%	$1,712	-$84
2010	18,943	2,346	12.38%	$1,264	-$105
2011	11,400	1,430	12.54%	$743	-$147
2012	5,699	481	8.44%	$642	-$249
Total	165,192	23,429	14.18%		

[2] Stream's claim is, frankly, deceptive. Stream has *had* a million customers *cumulatively*; it plateaued at half that, because many leave after Stream's low teaser rates skyrocket in subsequent energy bills. *See* PEBr. 4-5.

Finally, the record evidence showed that petitioners knew they were creating a saturation trap in which most IAs would lose money, and worked to conceal it. They recognized, for example, the need to suppress information about the relative number of IAs and customers. *See* SRE31 (email titled "saturation" exhorting that "we need to start NOT giving out our IA #s as the ratio does not look very good vs. customers."). They also fully anticipated the inevitable saturation problem—believing Texas would be saturated with IAs by 2006, SRE30, and did nothing as that played out. *See* SRE24 (email explaining "the area is very saturated with Ignite," making it "*impossible* for someone to come into Ignite right now and make significant money") (emphasis added). They even resisted changes to their compensation structure because they "need[ed] to keep in mind our breakage profit," *see* PEBr. 17—that is, fees retained from IAs who never break even.

Petitioners' CEO captured matters precisely in a letter to a friend: **"You'll rapidly understand that there are Peters here to rob for the purpose of paying Paul."** Pet.App. 15a. The insiders knew Stream's IAs were not receiving a legitimate sales opportunity, but were rather a source of breakage profit; in fact, the only way to earn back one's money was to find yet more human "breakage profit" for petitioners to consume. Petitioners nonetheless continued holding out their scheme as a legitimate business, allowing its harm to continue its viral self-replication.

III. Procedural History

After the close of discovery and an extensive evidentiary hearing, the district court granted certification

to a class of the victims who lost money in petitioners' scheme. It did so *only* with respect to respondents' theory requiring proof of the pyramid scheme at trial: The court held that any theory that depended on particular misrepresentations could not be certified. *See* Pet.App. 114a-116a. The pyramid-scheme theory, in contrast, was appropriate for certification because it depended only on common evidence supporting a classwide inference of reliance on petitioners' implicit representation that Stream was a legitimate business and not an illegal pyramid scheme. *Id.* 116a-118a. Critically, the district court relied on petitioners' failure to introduce any evidence rebutting—in general or with respect to particular class members—the plausible inference of reliance petitioners had supported with their common, classwide evidence. *See* Pet.App. 116a.

Petitioners were granted interlocutory review under Rule 23(f) and a stay of trial proceedings. In seeking that stay, petitioners themselves represented that *no one* would join Stream if a class notice even hinted that Stream was an illegal pyramid scheme. *See* PEBr. 55-56, A-3, A-10 (excerpting and attaching stay motion).

A panel reversed the certification, but the *en banc* court granted review and affirmed the district court. The eleven-Judge majority ruled on two alternative and independent grounds.

First, it recognized that both its cases and its sister circuits' unanimous precedent had followed *Bridge* by shifting the jury question in RICO fraud cases from "reliance" to "proximate cause." Pet.App. 12a-13a. Accordingly, certification was appropriate if respondents could use common, classwide evidence to make a *prima facie* showing of a "direct" and "foreseeable" link between the

pyramid scheme and respondents' losses, without necessarily making recourse to proof of first-party reliance. *Id.* Extensively considering the special legal rules applicable to pyramid schemes and unique record facts—including petitioners' failure even to try to introduce evidence of individualized issues—the court found that such a showing could be made from the common evidence in this case, especially because the law has already concluded that pyramid schemes *inevitably* cause harm. *Id.* 14a-19a. This alone sufficed to affirm.

Separately, the Court also affirmed the district court's holding that the class as a whole could proceed by establishing for the jury—from the common evidence in the record—a reasonable inference of reliance on Stream being a legitimate business and not an *inherently* fraudulent scheme. *Id.* 19a. Again, the Fifth Circuit agreed with the unanimous approach to such inferences as a basis for certification in in other circuits, distinguishing one of its own outlier precedents that other circuits had likewise been forced to distinguish. *Id.* 20a-23a. And, again, it based its conclusion on an extensive consideration of the special legal rules governing pyramid schemes and the unique factual record below. *Id.* 23a-30a. Among other things, the Court noted how implausible it was that any non-trivial number of class members knowingly joined a scheme where they would *inevitably* lose money or cause others to lose it—typically, the friends and family they are encouraged to recruit. *Id.* 23a-24a. Given petitioners' failure to even attempt a contrary showing, *id.* 24a, 25a-26a, the court affirmed on this theory as well.

Only three judges joined the two initial panel members in dissenting, in three disparate opinions. *See id.*

30a-49a. For example, the apparent theory of the principal dissent was the ironic and factbound conclusion that Stream was so obviously a pyramid scheme that some respondents must have known what they were joining. *See id.* 33a ("[T]he tell-tale signs of an illegal pyramid scheme were disclosed[.]"). For perhaps obvious reasons, petitioners had never made that argument, which would require them to acknowledge that Stream *was* an illegal scheme respondents could "knowingly" join. *See* 19a-20a.

An extension was sought for this petition, identifying only some of the present petitioners. *Compare* Pet. ii (listing 63 petitioners), *with* App. 16A788 at n.1 (listing 33 companies in Rule 29.6 disclosure). Justice Thomas extended the time for those who applied, and this petition followed.

REASONS TO DENY THE WRIT

I. Petitioners' First Question Was Recently Denied, Seeks Splitless Review In A Unique, Factbound Context, And Does Not Challenge The Operative Reasoning Below.

Petitioners' first question asks the Court to review the substantive requirements for proving RICO fraud on the merits in an interlocutory setting. This is poor posture for considering an uncertworthy question. Indeed, this Court recently denied a petition raising the same question from the same circuit in a far better vehicle. That petition challenged jury instructions that did not require the plaintiffs to prove reliance to prevail on a RICO fraud claim. *See* Pet. No. 15-949 (denied May 2, 2016). The petition neither discloses nor seeks to distinguish this recent denial.

Leaving such problems aside, the petition's arguments fail on their own terms, for three key reasons: (1) the decision below follows directly from *Bridge*; (2) there is no circuit conflict, because every court similarly follows *Bridge*'s clear, textualist holding; and (3) this case uniquely involves a pyramid scheme—a factbound context on which the courts have long been unanimous. In fact, by failing to challenge the Fifth Circuit's pyramid-scheme-specific analysis, petitioners leave this Court with nothing to review.

1. Petitioners represent that the decision below departs from *Bridge* by not requiring RICO plaintiffs to prove reliance. This misrepresents both *Bridge* and the decision below.

The question in *Bridge* was whether first-party reliance was required for RICO claims predicated (as here) on a pattern of mail fraud. The Court unanimously held that it was *not*, as petitioners admit. *See* Pet. 14; *Bridge*, 553 U.S. at 650-58.

Bridge's rationale was that reliance, *by anyone*, was simply not something RICO required. Justice Thomas's opinion says expressly that "[u]sing the mail to execute … a scheme to defraud is indictable as mail fraud, and hence a predicate act of racketeering under RICO, *even if no one relied* on any misrepresentation." *Bridge*, 553 U.S. at 648 (emphasis added). It was thus "plain" that "*no showing of reliance* is required to establish that a person has violated [RICO] by conducting the affairs of an enterprise through a pattern of racketeering activity consisting of acts of mail fraud." *Id.* at 649 (emphasis added). The only other statutory limit, this Court explained, is RICO's cause-of-action provision, which ap-

plies to "any person" injured "by reason of" a RICO violation. *Id.* at 649-50. But *Bridge* held this language provided no "textual support" for the "counterintuitive position" that plaintiffs could "have no cause of action under RICO, even though they were the primary and intended victims of the scheme to defraud" and in fact lost money because of the scheme. *Id.* at 650. Accordingly, the Court adhered to its long-standing view that RICO plaintiffs need prove only that the defendants' actions were the "proximate cause" of their injuries—which, this Court repeatedly emphasized, "is a flexible concept that *does not lend itself to a black-letter rule that will dictate the result in every case*." *Id.* at 653 (emphasis added); *see also id.* at 659 (similar).

Petitioners' core argument here would turn this all upside down. As *Bridge* emphasized, neither RICO nor the underlying fraud statutes mention reliance. And petitioners' proposed, bright-line reliance requirement cannot possibly be derived from *Bridge*'s "proximate cause" discussion, because the whole point of *Bridge* was to *reject* any "bright-line rules" for proving proximate causation. *Id.* at 659. Thus, far from being required by precedent, petitioners' rule would itself be a rejection of *Bridge* and its predecessors. *See, e.g.*, *Holmes v. Securities Investor Protection Corporation*, 503 U.S. 258 (1992); *Anza v. Ideal Steel Supply Corp.*, 547 U.S. 451 (2006).

Petitioners suggest otherwise (at 13-14) by quoting selectively from portions of *Bridge* that focused on the distinction between first-party and third-party reliance. But these quotations say only that "[*i*]*n most cases*, the plaintiff will not be able to establish even but-for causation if no one relied on the misrepresentation," or that it "*may well be* that a RICO plaintiff … must establish

at least third-party reliance in order to prove causation." *Bridge*, 553 U.S. at 658, 659 (emphasis added). This language obviously preserves the possibility that in some cases—like, say, *per se* structural frauds that do not depend on particular misrepresentations—proof of individual reliance may be unnecessary. *Id.* at 659. Importantly, petitioners' summary of *Bridge* leaves out the words "may well be" in the quote above, along with *Bridge*'s very next sentence, both of which remind the reader that all RICO requires is proximate cause, *not reliance*. *See id.* ("[T]he fact that proof of reliance is often used to prove an element of the plaintiff's cause of action, such as the element of causation, does not transform reliance itself into an element[.]").

This is not the only language from *Bridge* petitioners abuse. Elsewhere, they give the implication that *Bridge* endorsed a requirement that "plaintiff's loss must be a foreseeable result of someone's reliance on the misrepresentation." Pet. 13. But the quoted portion of *Bridge* isn't even about RICO, let alone announcing a rule this Court endorsed. It is, instead, only a description—*without* endorsement—of a sentence in the Restatement of Torts. *See Bridge*, 553 U.S. at 656. The footnote petitioners repeatedly cite hangs from this same sentence, and likewise describes only the meaning the Court ascribes to (1) a comment, from (2) the Restatement; about (3) principles of *common-law fraud*, not RICO. *See id.* at 656 n.6. It mangles *Bridge* beyond recognition to describe this language as "holding" that "some form of reliance remains necessary," Pet. 14—particularly because *Bridge*'s mainline holding expressly severs RICO's requirements from common-law fraud's. *See* 553 U.S. at 655 ("[W]e see no reason to … hol[d] that the proximate-cause analysis under RICO

must precisely track the proximate-cause analysis of a common-law fraud claim.").

Ultimately, petitioners' argument rests on out-of-context language *Bridge* offered only as a "[s]econd" reason to reject a "twice flawed" argument. *See id.* at 655-56. The "[f]irst" reason was that "[r]eliance … whether characterized as an element of the claim or as a prerequisite to establishing proximate cause, simply has no place in a remedial scheme keyed to the commission of mail fraud, a statutory offense that is distinct from common-law fraud and that does not require proof of reliance." *Id.* at 656. Petitioners' caricature tries to make *Bridge* mean the exact opposite by relying on language it used, in context, only to describe a common-law requirement it had *just held inapplicable to RICO*. Such obtuse readings of clear cases are endemic to the petition.

2. Because *Bridge* is clear, the circuits have agreed fully in applying it. Petitioners cite four courts that have allegedly "rejected the notion that reliance is unnecessary to show causation under RICO." Pet. 15. But each court has said exactly what this Court said in *Bridge* and the Fifth Circuit said below—namely, that *most* RICO fraud theories require proof of reliance, but the statutory element is proximate cause, and proving reliance is thus unnecessary for plaintiffs to prevail. Certainly, no court has "held" that a plaintiff who has offered a logical theory of proximate cause must still lose because that theory does not sound in reliance.

Start with the Fifth Circuit. Its conceptualization of RICO's requirements follows word-for-word from *Bridge*, which the court quoted at length. *See* Pet.App. 10a-11a. It acknowledged—citing *Bridge*—that "proof

of reliance is often used to prove an element of the plaintiff's cause of action," but emphasizes that this "does not transform reliance into an element." *Id* 11a. Accordingly, the question for the jury will be posed in those terms—*i.e.*, whether the plaintiffs' injuries were a "reasonably probable consequence" of defendants' illegal actions. *Id.* 12a. Indeed, the court noted that it adopted this common formulation of RICO's proximate-cause requirement immediately after *Bridge*, and approved jury instructions based on that language in *Allstate Insurance Co. v. Plambeck*, 802 F.3d 665, 676 (5th Cir. 2015)—the case on which this Court recently denied certiorari. Pet.App. 11a-12a; *supra* p.1. And it pointed to several other circuits with identical standards and instructions for proof of causation in RICO cases, *see* Pet.App. 12a-13a—cases petitioners relegate to a footnote, *see* Pet. 3 n.1, and exclude from their alleged split. This is a dispositive omission: If every circuit would send a RICO fraud case to the jury with the same instructions for finding proximate cause, there is no disagreement on what RICO requires plaintiffs to prove.

Relatedly, petitioners are wrong to say that the Fifth Circuit held that a plaintiff could prevail even if "they [had] full knowledge of the alleged fraud." *See* Pet. 13. The Fifth Circuit said just the opposite: That "knowledge … could serve as an intervening cause that would break the chain of causation." Pet.App. 18a. Knowledge of course remains a defense to fraud; it was irrelevant here only because there was "no evidence that any putative class member knew Ignite was an illegal pyramid scheme," *id.*, and petitioners failed even to *try* that evidentiary argument in district court. *Id.* 25a-26a. This now-incontestable, factbound rationale demonstrates simultaneously that the Fifth Circuit's

holding was far narrower than petitioners suggest, and that this is a poor vehicle for review.

As petitioners misread *Bridge* and the Fifth Circuit, they likewise misread the other cases in their alleged split. In general, each court's holding merely adheres to *Bridge*'s explicit conclusion that reliance is not required, although it "may well" be part of the plaintiffs' theory in "most" or "typical" cases. *See, e.g.*, *Sergeants Benevolent Ass'n Health & Welfare Fund v. Sanofi–Aventis U.S. LLP*, 806 F.3d 71, 87 (2d Cir. 2015) (reliance required in "most RICO mail-fraud cases" because it is "typically" part of proximate-cause showing); *Hoffman v. Zenith Ins. Co.*, 587 F. App'x 365, 365 (9th Cir. 2012) (unpublished) (similar); *CGC Holding Co. v. Broad & Cassel*, 773 F.3d 1076, 1088 (10th Cir. 2014) (while reliance "frequently serves as a proxy for both legal and factual causation," it is "not an explicit element of a civil RICO claim"). None of these decisions even purports to consider a case in which plaintiffs attempted to prove a theory of proximate cause not sounding in reliance, let alone "holds" that such a theory must fail. *See, e.g.*, *Ray v. Spirit Airlines*, 836 F.3d 1340, 1350 (11th Cir. 2016) (finding that plaintiffs failed to allege "proximate cause" because they did not allege "a direct link—or, indeed, *any link at all*—between" defendant's actions and plaintiffs' injuries (emphasis added)).

Indeed, some of these citations are indefensible. For example, *CGC Holding* explains that, "[f]or RICO purposes, reliance and proximate cause remain distinct—if frequently overlapping—concepts. While reliance is often used to prove … causation, *that does not mean it is the only way to do so*." *Id.* at 1089 (quoting *Wallace v. Midwest Fin. & Mortg. Servs., Inc.*, 714 F.3d 414, 420 (6th Cir.2013)) (emphasis added). Petitioners'

position here is, quite literally, that reliance *is* the only way to prove causation in RICO fraud cases. *See* Pet. 15-16. The Tenth Circuit cannot be on their side of an alleged "split" while rejecting that view in so many words.

3. Most fundamentally, petitioners simply ignore the unique basis for the ruling below. After laying out the nationally uniform standard for proving proximate cause under RICO, the Fifth Circuit spent six pages explaining how, in the unusual context of pyramid schemes, such proof does not depend on individualized showings of reliance—or even particular misrepresentations. *See* Pet.App. 13a-19a. Instead, the injury to the class of victims at the bottom of the pyramid derives from the "inherently fraudulent" payment structure. *Id.* 16a (citing *Webster*, 79 F.3d at 788-789 and *Gold Unlimited,* 177 F.3d at 475)). Anyone who sets in motion such a scheme knows this class of victims is the "direct and foreseeable"—indeed, *inevitable*—result of a business model that requires that "there [be] Peters … to rob for the purpose of paying Paul." *Id.* 17a. Not only did the Fifth Circuit carefully explain this special causative mechanism, *id.* 18a, it also highlighted that, "[a]s in *Bridge*, 'there are no independent factors that account for [plaintiffs'] injury, there is no risk of duplicative recoveries by plaintiffs removed at different levels of injury from the violation, and no more immediate victim is better situated to sue.'" *Id.*

Petitioners challenge *none* of this case-specific and dispositive reasoning, though it would form the core of any further dispute here. After *Bridge*, all must agree that the merits question under RICO is whether a reasonable jury could find that petitioners' particular form

of pyramid scheme was the proximate cause of the respondent class's injuries. That is a particularly fact-bound question that turns on unique propositions of pyramid-scheme law and the record in this case—especially given *Bridge*'s conclusion that proximate cause analysis should not be subjected to *any* bright-line rules. *Supra* p.17. Accordingly, even if petitioners had challenged these conclusions, there is no reason for this Court to waste its time, in an *interlocutory* appeal, deciding whether these plaintiffs can hypothetically establish proximate cause at trial under their particular pyramid-scheme theory.

The body of law that makes pyramid schemes unique is also longstanding, uniform, and dispositive on its own. The reason the law treats pyramid schemes as "inherently deceptive" and "*per se* unlawful" is that they *inevitably cause injury* to the unavoidable class of people who join and must lose their investment by operation of mathematics. *See supra* pp.4-7. If anything, that unbreakable causal connection between the victims' losses and the fraudulent scheme goes one step beyond proximate cause. *See* Pet.App. 17a-18a.

These settled legal rules about pyramid schemes do all the work in the decision below but are unchallenged in the petition. Petitioners thus fail to show that any court anywhere would reject their dispositive role in the Fifth Circuit's analysis. Moreover, by failing to encompass this dispositive reasoning in the question presented, petitioners leave the Court with nothing meaningful to review.

II. Petitioners' Second Question Was Recently Denied, Seeks Splitless Review In A Unique, Factbound Context, And Does Not Challenge The Operative Reasoning Below.

Petitioners' second question faults the Fifth Circuit for adopting, as an alternative holding, a "class-wide presumption of reliance whenever it 'follows logically' from the allegations." Pet. 22. That argument begins from an unfaithful description of the Fifth Circuit's holding, and goes downhill from there.

The decision below intentionally follows the other circuits, expressly disavows any "presumptions," and creates no splits. Far from breaking new ground, the Fifth Circuit's supermajority joined the circuits' unanimous view in holding that certain RICO fraud class actions are permissible where a reasonable jury could draw an inference of reliance from the plaintiffs' common evidence about the nature of the scheme—an inference plaintiffs must still test at trial. Pet.App. 28a. The Fifth Circuit thereby resolved a situation where it alone had (in petitioners' own words) "never approved class certification in a RICO fraud case" and seemingly never would. *See supra* p.3. Petitioners once again rely on out-of-context dicta to make the other circuits appear to have adopted the opposite of their respective rules. And although we repeatedly emphasized it below, petitioners tellingly omit that every private pyramid-scheme case any circuit has even encountered proceeded as a class action.

1. The petition uses some conjugation of "presume" 28 times. It appears once in the decision below. There, the Fifth Circuit explains that the district court "*did not* simply presume that individual issues of reliance would

not predominate; rather, it specifically made this conclusion based on its determination that the Plaintiffs' case could be made with common evidence," and "in the absence of any evidence showing that individuals joined the pyramid scheme knowingly." Pet.App. 25a. (emphasis added). Indeed, the Fifth Circuit *rejected* any presumption of reliance on any misrepresentation at any stage, endorsing the identical reasoning of *CGC Holding* on this point—a case petitioners strangely assert as part of their alleged split. As both courts explained, class certification is appropriate where the circumstances of the fraudulent scheme would permit a reasonable jury to make a common, logical "inference of reliance"—plaintiffs must still convince the jury to accept that inference at trial. *See* Pet.App. 28a ("[T]he trier of fact is not required to accept the inference; it is merely permitted to utilize it as common evidence to establish the class's *prima facie* claims under RICO.") (quoting *CGC Holding*, 773 F.3d at 1093).

This case thus involves no extension of the *Basic* presumption regarding efficient markets (as petitioners' solo academic amicus suggests), or any "presumption" at all. It is, instead, a factbound application of this Court's oft-repeated rule that, where plaintiffs can make out the *prima facie* elements of their claim entirely through common evidence, class certification is appropriate—even if "individualized questions of reliance" will sometimes remain regarding defenses applicable to isolated class members. *Halliburton Co. v. Erica P. John Fund, Inc.*, 134 S. Ct. 2398, 2412 (2014); *see Tyson Foods*, 136 S. Ct. at 1045 ("When 'one or more of the central issues in the action are common to the class and can be said to predominate, the action may be considered proper under Rule 23(b)(3) even though other

important matters will have to be tried separately, such as damages or some affirmative defenses peculiar to some individual class members.'" (quoting 7AA Wright & Miller §1778)).

Similarly, the Fifth Circuit neither relieved petitioners of their burden of proving Rule 23's elements, nor shifted any burden to the petitioners. *See* Pet.App. 24a (specifically *rejecting* any burden shift). It merely observed that the purely common evidence plaintiffs had offered in this case—about an egregious pyramid scheme—would suffice to satisfy their burden to show that a scheme to defraud had caused their injuries, especially because petitioners hadn't even tried to introduce any contrary evidence that plaintiffs were aware of the fraud or would have joined regardless. Put otherwise, plaintiffs *carried* their burden by introducing (extensive) evidence that petitioners operated the kind of scheme from which a reasonable jury could make a plausible, classwide inference of reliance, and petitioners provided *nothing* to suggest otherwise. Pet.App. 23a-27a.

This Court has held that "[p]redominance is a test readily met in certain cases alleging consumer … fraud," *Amchem*, 521 U.S. at 625, and the drafters of Rule 23 themselves explained that, "a fraud perpetrated on numerous persons by the use of similar misrepresentations may be an appealing situation for a class action." Fed. R. Civ. P. 23(b)(3) cmt. note (1966). That is because, when everyone would typically be misled by the same aspect of the alleged fraudulent scheme, the jury may infer reliance for the whole class from the common, circumstantial evidence. Pet.App. 20a-23a (collecting precedents). Unless this Court and the Rules Committee had it precisely backwards, there can be few

fact-patterns where class certification is more "appealing," or the test more "easily met," than a case about a kind of fraudulent scheme the *law itself* deems "inherently misleading" because of how it reliably fools people into either losing their own investments or unwittingly defrauding their friends and family. *See* Pet.App. 23a-24a. The only possible conflict with this Court's precedent would thus arise if some court actually adopted petitioners' rule.

2. In fact, no court has. Every case in which a court of appeals has even encountered a pyramid-scheme claim has proceeded as a class action, and the "federal courts have upheld the predominance of common issues, and … have granted certification to comprehensive plaintiff classes in cases arising from similar multi-level pyramid schemes." *Nguyen*, 1990 WL 165251, at *2 (collecting cases). This includes, *inter alia*, every private pyramid-scheme case petitioners cited in *their* opening brief to the Fifth Circuit.[3] Many courts seem to treat

[3] *See, e.g.*, *Webster*, 79 F.3d at 776 (certified RICO fraud class and leading pyramid-scheme case); *Koscot*, 86 F.T.C. at 1181 (seminal FTC pyramid-scheme decision, which led to numerous certified class actions, *e.g.*, *In re Glenn W. Turner Enters. Litig.*, 521 F.2d 775 (3d Cir. 1975)); *Piambino v. Bailey*, 610 F.2d 1306, 1308 (5th Cir. 1980) (class certified regarding "multi-level distributorship system" that was "species of pyramid sales scheme"); *Arata*, 5 F.3d at 534 (upholding certification where MLM was alleged to be pyramid scheme); *Bell v. Health-Mor, Inc.*, 549 F.2d 342 (5th Cir. 1977) (pyramid scheme pursued as class action); *Marshall v. Holiday Magic, Inc.*, 550 F.2d 1173, 1175 (9th Cir. 1977) (upholding plaintiff class respecting "company which distributes its product via a 'pyramid sales' scheme"); *Davis v. Avco Corp.*, 371 F. Supp. 782 (N.D. Ohio 1974), *aff'd*, 739 F.2d 1057, 1062 (6th Cir. 1984) (upholding certification of class regarding pyramid scheme).

the relevant inquiries as incontestably plain. *See, e.g.*, *Stull v. YTB Int'l, Inc.*, 2011 WL 4476419, at *1, *6 (S.D. Ill. Sept. 26, 2011) (consolidating *sua sponte* cases about same pyramid scheme, including class complaint, because "[j]udicial economy obviously would be served," given the many "common questions of law and fact").

There is thus no conflict. For five decades, plaintiffs have brought their (rare) pyramid-scheme cases as class actions, and received approval in both contested proceedings and settlements—where such class-definition issues "demand undiluted, even heightened, attention." *See Amchem*, 521 U.S. at 620. This is, in short, a unique topic that both comes up infrequently and engenders no dissention among the circuits.[4]

Even shifting to the petitioners' super-abstracted version of the question presented does nothing to create a split. Petitioners claim there are three circuits—the Second, Ninth, and Tenth—that apply a "narrower standard" for determining when an inference of reliance may reasonably follow from classwide evidence regarding the fraudulent scheme. Petitioners' recourse to these courts is revealing, because *each* has upheld certification of RICO fraud cases under a standard indistinguishable from the Fifth Circuit's. If anything, the *en banc* decision below moved the Fifth Circuit *closer* to its sister courts, not further away. The varying results in different cases within these circuits—and among other cases petitioners hide in footnotes—show only that factbound cases vary according to their facts.

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[4] For example, one basic search indicates that—excluding government enforcement contexts—there have been only 11 other appellate cases in the past five decades using the term "pyramid scheme" more than twice. Four of those are unpublished.

For example, petitioners claim there are "at least three cases" in which the Second Circuit has held that certification is appropriate *only* when "*each* class member would have taken the action leading to its injury if it had relied." Pet. 22 (citing *Sergeants Benevolent*, 806 F.3d at 88 (emphasis petitioners')). Petitioners read this as holding that no fraud class action may be certified if there is *any* other explanation for how *any* class member acted apart from reliance—however conjectural or hypothetical that explanation might be.

But, repeating a sin for which they were rightfully castigated below, *see* Pet.App. 22a, petitioners bury the Second Circuit's leading case on this issue in a footnote. *See* Pet. 25 n.3 (citing *In re U.S. Foodservice*, 729 F.3d at 119). Most importantly, *Foodservice* upheld class certification in a RICO fraud case while specifically rejecting "bald speculation" about what plaintiffs "might have know[n]" as a basis for refusing certification. *Id.* at 122. The Fifth Circuit both emphasized this Second Circuit holding and held itself that such speculation was all petitioners offered here. *See* Pet.App. 24-a26.

Similarly, the Fifth Circuit noted (*id.* 21a) that petitioners' "requirement that the plaintiffs prove that no other rational explanation existed for their behavior other than reliance" was "[c]onspicuously absent" from both *Foodservice* and *Klay v. Humana*, 382 F.3d 1241, 1259 (11th Cir. 2004)—another decision petitioners footnote and exclude from their alleged split. *See* Pet. 25 n.3. Indeed, the Fifth Circuit carefully explained that petitioners' no-other-possible-explanation rule was not only inconsistent with *Foodservice*'s reasoning but its *factual holding* as well: There *were* other possible explanations for why the *Foodservice* plaintiffs would have accepted underpaid invoices (the alleged fraud

there), but these explanations were far less logical or plausible than a common inference of reliance. *See* Pet.App. 21a & n.56. The Fifth *expressly* followed the Second Circuit's standard; there can be no split.

Tellingly, the *Foodservice* defendant raised the same question presented here in a petition this Court recently denied. *See supra* p.1; Pet. No. 13-873. That petition made the same hyperbolic suggestion that the Second Circuit had adopted "a classwide presumption of reliance." *Id.* (question presented). But, notably, it claimed that the Second Circuit was on the side that was too favorable to certification, while the Fifth was too unfriendly—the opposite of petitioners' argument here. *Id.* 20-21. Such inconsistency among able counsel demonstrates both that the circuits have moved together and that the alleged split is as slippery as it seems.

Petitioners fare no better in relying on the Ninth Circuit's decision in *Poulos v. Caesars World, Inc.*, 379 F.3d 654 (9th Cir. 2004). *Poulos* held that gamblers as a class cannot be expected to have relied on misrepresentations about the odds of winning at slots—largely because people often play slots without caring about the odds. (If people gambled based mostly on the odds of winning, no one would gamble at all, particularly on slots.) *See id.* at 668. This holding thus demonstrates nothing more than a difference between slot machines and pyramid schemes, obviously apples and oranges.

Poulos does not remotely adopt a rule that no class is ever certifiable in a RICO fraud case unless the only possible explanation for plaintiffs' behavior is reliance on a misrepresentation. Instead, *Poulos* clearly limits its own scope to the "unique facts" before it, expressly

describing its holding as "both narrow and case-specific." *Id.* at 666. District courts in the Ninth Circuit have thus read *Poulos* "for the proposition that 'reliance can be shown where it provides the "common sense" or "logical explanation" for the behavior of plaintiffs and the members of the class,'" *In re Nat'l W. Life Ins. Litig.*, 2013 WL 593414, *1 (S.D. Cal. 2013) (quoting *Poulos*)—the exact rule petitioners say *Poulos* rejects.

Moreover, neither the Second nor Ninth Circuit even treats a common theory of reliance as indispensable for class certification in fraud cases. Instead, both circuits look primarily to whether the fraud is predicated on using the same scheme to trick people in the same way—to the uniformity of *the misrepresentation* or the fraudulent *scheme*—in adjudicating certification. *See, e.g.*, *In re First Alliance Mortg. Co.*, 471 F.3d 977, 991 (9th Cir. 2006) (Where, as here, the "gravamen of the alleged fraud is not limited to the specific representations made" to class members, and is instead rooted in "the underlying scheme," it "would be folly to force each [plaintff] to prove the nucleus of the alleged fraud again and again"); *Moore v. PaineWebber, Inc.*, 306 F.3d 1247, 1253 (2d Cir. 2002) (Sotomayor, J.) (for certification purposes, "[f]raud actions must … be separated into two categories," comprising "uniform" and "individualized misrepresentations"). The drafters of Rule 23 and the leading treatise focus on the same distinction. *See supra* p.26; 2 *Newberg on Class Actions* 223-25 (5th ed. 2011). Apart from petitioners themselves, no one believes that RICO fraud class actions are certifiable only in the extreme situation where there is literally no hypothetical explanation for class members' actions apart from reliance.

This certainly includes the Tenth Circuit's decision in *CGC Holding*, petitioners' final effort to find a split. Not only does *CGC Holding* approve the certification of a RICO fraud class action, it also cites with approval to the district court's decision to certify the class *in this case*. Pet.App. 23a. As the Fifth Circuit exhaustively explained, *CGC Holding* broadly adopts the same rule, and petitioners' attempt to suggest otherwise is predicated on confusing sufficient and necessary conditions. *Id.* 22a-23a. There is, accordingly, every reason to believe that the Tenth, Second, Ninth, Eleventh, and every other Circuit would reach the same result both lower courts reached below.

3. Finally, once again, the core of petitioners' error is the failure to engage with the highly factbound pyramid-scheme context that formed the operative rationale below. Having set out the circuits' uniform rule that an "inference of reliance" can support class certification "when it follows logically from the nature of the scheme, and there is common, circumstantial evidence that class members relied on the fraud," Pet.App. 20a-23a, the Fifth Circuit spent the remaining eight pages explaining why this standard was met in the unique context of this pyramid scheme. The court's central point was that "(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. Relying on the special legal rules that deem pyramid schemes inherently deceptive, the Court found strong support for an inference of reliance in "the sheer improbability that more than a handful of class members (and even a handful seems unlikely)

would be able to recognize that Ignite was a fraudulent pyramid scheme before joining." *Id.* 24a.

Importantly, the petition does not ask this Court to review this settled law, let alone challenge it. Having failed to seek certiorari on the legal rule that pyramid schemes are "inherently deceptive" and that rational people do not join them—a point petitioners *admitted* below when it suited their purposes, *see supra* p.13—petitioners would lose under any standard.

Moreover, the Fifth Circuit's decision was bounded not only by the unique legal rules regarding pyramid schemes, but by unique record facts as well—most critically, that petitioners didn't even try to introduce evidence rebutting the plaintiffs' inference-of-reliance showing in the trial court. Pet.App. 25a-26a. Instead, petitioners offered nothing more than speculation that there might be some other (largely, implausible) reasons why class members would have joined as IAs. As the Fifth Circuit emphasized, all circuits agree that is not enough. *See supra* pp.29-30. The court then further explained that, given both the special legal and factual contexts, petitioners' speculative arguments about class members' knowledge or motivations would represent, at very best, "the defendant … attempt[ing] to pick off the occasional class member here or there through individualized rebuttal"—which *this* Court recently held would "not cause individual questions to predominate." *See id.* 28a-29a (quoting *Halliburton*, 134 S. Ct. at 2412). Thus, the court's core conclusions were framed in expressly case-specific terms that make it ill-suited to review here, particularly under an abuse-of-discretion standard. *See* Pet.App. 25a, 30a.

III. Many Petitioners Are Jurisdictionally Out-Of-Time.

In 2013, this Court amended Rule 13.5 to explicitly require that petition extension applications "*clearly identify* each party for whom an extension is sought." S. Ct. R. 13.5 (emphasis added). The Rule now likewise specifies that granted extensions apply only "to the … parties named in the application." *Id.* Yet 30 out of 63 petitioners (Pet. ii) appear nowhere in the extension application, and all but five appear solely for corporate-disclosure purposes under Rule 29.6. App. No. 16A788 at Cover, 1. Thus, *at least* 30 petitioners are jurisdictionally out-of-time.

This court has strictly enforced similar rules. *See, e.g.*, *Torres v. Oakland Scavenger Co.*, 487 U.S. 312, 318 (1988) (jurisdictionally barring parties from appeal because "et al." was deemed insufficient to add them, though this "leads to a harsh result"). And because this error is *jurisdictionally* inexcusable, certiorari must be denied for at least these petitioners. Given the clarity of the rule and all petitioners' common counsel here *and* below, however, this error also suffices as a reason to deny certiorari for *all* petitioners. Intractable procedural problems will result from treating the opinion below as law of the case for 30 defendants, while reviewing that decision for others, many of which are personal corporations of the individual defendants who themselves failed to join the application. Denial is thus appropriate on this ground alone.

CONCLUSION

The petition should be denied.

Respectfully submitted,

Eric F. Citron
Counsel of Record
Thomas C. Goldstein
GOLDSTEIN & RUSSELL, P.C.
7475 Wisconsin Ave.
Suite 850
Bethesda, MD 20814
(202) 362-0636
ecitron@goldsteinrussell.com

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