No. 16–1309

IN THE

Supreme Court of the United States

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

v.

JUAN R. TORRES, ET AL.,
Respondents.

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

REPLY BRIEF FOR PETITIONERS

JAMES C. HO
Counsel of Record
ROBERT C. WALTERS
KYLE D. HAWKINS
BRADLEY G. HUBBARD
SEAN J. COOKSEY
GIBSON, DUNN & CRUTCHER LLP
2100 McKinney Avenue
Suite 1100
Dallas, Texas 75201
(214) 698-3100
jho@gibsondunn.com

Counsel for Petitioners

PARTIES TO THE PROCEEDING

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

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

RULE 29.6 STATEMENT

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

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

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

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REPLY BRIEF FOR PETITIONERS

Respondents' brief in opposition dodges the first question presented and offers no real response to the second. By falsely painting these issues as "narrow" (Opp. 4) and "unique" (Opp. 3, 14), while focusing on irrelevant matters not in dispute, Respondents only confirm that certiorari is warranted.

First, Respondents argue that reliance is not a formal element of a RICO fraud claim. But that is not disputed—the Court held exactly that in *Bridge v. Phoenix Bond & Indemnity Co.*, 553 U.S. 639 (2008). The question the petition actually asks is whether a RICO fraud plaintiff must demonstrate reliance in order to establish the element of causation. As *Bridge* explained, establishing causation requires the plaintiff to show "that *someone* relied on the defendant's misrepresentations." *Id*. at 658. The Fifth Circuit held the opposite, by instead establishing a rebuttable presumption of reliance—thereby shifting the burden on causation to defendants, disregarding this Court's guidance, and deepening a split among the circuits.

Second, Respondents overlook the violence the decision below inflicts on Rule 23. This Court has explained repeatedly that "plaintiffs wishing to proceed through a class action must actually *prove*" Rule 23(b)'s requirements through common evidence. *Halliburton Co. v. Erica P. John Fund, Inc.*, 134 S. Ct. 2398, 2412 (2014). In other words, plaintiffs must prove that virtually *all* class members relied on the alleged misrepresentation, such that reliance becomes a common issue. The ruling below, by contrast, establishes a broad new inference of class-wide reliance so long as it "follows logically from the nature of the scheme" alleged. Pet. App. 20a. Plaintiffs now must show only that *some* plaintiffs might have relied on

defendants' alleged misrepresentations—in complete disregard of the established requirement of commonality under Rule 23 and the decisions of this Court and numerous circuits.

Respondents attempt to avoid certiorari by writing off the decision below as unique to alleged pyramid schemes. To be sure, if the Fifth Circuit had wanted to carve out a special exception limited only to alleged pyramid schemes, it could have done so. But it did precisely the opposite: It cited RICO and Rule 23 case law that have nothing to do with pyramid schemes, in order to establish RICO and Rule 23 legal rules that readily apply outside the pyramid-scheme context (and split with other circuit decisions that involve no pyramid-scheme allegations of any kind)—namely, that reliance is now rebuttably presumed in *all* RICO fraud cases, and that *all* RICO fraud class actions should now be certified so long as it "follows logically" that merely *some* class members relied.

In sum, this petition presents substantial legal issues that have divided the circuits—as the Fifth Circuit itself indicated, first by taking this matter en banc, and again by staying its mandate pending the resolution of this petition. The Court should grant the petition.

I. THE FIFTH CIRCUIT MISCONSTRUES *BRIDGE* AND SPLITS WITH OTHER COURTS OF APPEALS

1. *Bridge* was straightforward: The question presented was whether a civil RICO claim predicated on mail or wire fraud requires proof of first-party reliance, as common-law fraud does. 553 U.S. at 646. The Court held that RICO has no such strict requirement. Instead, RICO demands proof of proximate causa-

tion—meaning "some direct relation between the injury asserted and the injurious conduct alleged"—consistent with the common-law standard. *Id.* at 654. That holding reaffirmed what this Court has said in earlier decisions: that RICO follows "the common-law foundations of the proximate-cause requirement." *Anza v. Ideal Steel Supply Co.*, 547 U.S. 451, 457 (2006) (citing *Holmes v. Sec. Inv'r Protect. Corp.*, 503 U.S. 258, 268 (1992)).

In the context of RICO fraud claims, this Court held, proximate causation requires the plaintiff to prove "that the plaintiff's loss [was] a foreseeable result of *someone's* reliance on the misrepresentation," if not the plaintiff's own reliance. *Bridge*, 553 U.S. at 656. This Court restated the point multiple times, noting that while *first-party* reliance was not necessary, "none of this is to say that a RICO plaintiff . . . can prevail without showing that *someone* relied on the defendant's misrepresentations." *Id*. at 658.

Thus, while *Bridge* rejected reliance as a formal *element*, it endorsed the common-law understanding of proximate causation *and its limitation* that "a misrepresentation can cause harm only if a recipient of the misrepresentation relies on it." *Id*. at 656 n.6.

Respondents miss this distinction entirely, insisting that reliance is not a formal element of RICO fraud claims. We agree. But Respondents' claim that "*Bridge*'s mainline holding expressly severs RICO's requirements from common-law fraud's" (Opp. 18) is both mistaken and beside the point. Stream Energy has always acknowledged that there is no reliance element in a RICO fraud claim. Pet. 14. *Bridge* does require, however, that plaintiffs prove common-law causation, as *amicus curiae* the Cato Institute explains (at 6–9). That requirement, in turn, obliges

plaintiffs to show how their injury was "by reason of" *someone's* reliance on an alleged misrepresentation. Pet. 14–15; 18 U.S.C. § 1964(c). That is the issue on which this petition turns—and Respondents have glossed over it.

2. The en banc Fifth Circuit erred when it misread *Bridge*'s holding to mean that RICO plaintiffs need not prove *anyone* relied on any alleged misrepresentations. Declining to follow the common-law limits on proximate causation, the Fifth Circuit held that a plaintiff can prove causation so long as he or she is a "foreseeable victim" of a fraudulent enterprise. Pet. App. 12a, 17a. Respondents claim that the opinion below adheres to *Bridge*'s message "that *most* RICO fraud theories require proof of reliance." Opp. 19. But that is contradicted by the Fifth Circuit's own statement that "[i]n cases predicated on mail or wire fraud, reliance is not necessary"—full stop. Pet. App. 11a (alteration in original) (quoting *Allstate Ins. Co. v. Plambeck*, 802 F.3d 665, 676 (5th Cir. 2015)).

Instead, the Fifth Circuit's blanket refusal to require the plaintiff to prove reliance joins the short side of a 4-2 split with the Fourth Circuit's decision in *Biggs v. Eaglewood Mortgage, LLC* (which Respondents never cite). 353 F. App'x 864 (4th Cir. 2009). There, the Fourth Circuit held that a defendant "will be liable under RICO, without anyone actually relying on a fraudulent misrepresentation." *Id.* at 867. The en banc majority cited *Biggs* as supporting its holding. Pet. App. 13a. These two courts hold that, because reliance is not an element of RICO under *Bridge*, the plaintiff need not prove reliance *at all*, so long as the plaintiff was foreseeably harmed by the alleged misrepresentations.

Four other courts of appeals refuse to read *Bridge* so myopically. The Second Circuit has recognized that "if the person who was allegedly deceived by the misrepresentation (plaintiff or not) would have acted in the same way regardless of the misrepresentation, then the misrepresentation *cannot be a but-for, much less proximate, cause* of the plaintiffs' injury." *Sergeants Benevolent Ass'n Health & Welfare Fund v. Sanofi–Aventis U.S. LLP*, 806 F.3d 71, 87 (2d Cir. 2015) (emphasis added). That reasoning adheres to *Bridge*, and it is irreconcilable with the Fourth and Fifth Circuit's holdings. *See also In re U.S. Foodservice Inc. Pricing Litig.*, 729 F.3d 108, 119 (2d Cir. 2013).

As Stream Energy's petition laid out, the Ninth, Tenth, and Eleventh Circuits also hew to this more faithful interpretation of *Bridge*. Pet. 16. These courts recognize that "[w]ithout reliance on the fraud by someone . . . the plaintiffs would not be able to show that they were injured by reason of the alleged racketeering activity." *Ray v. Spirit Airlines, Inc.*, 836 F.3d 1340, 1350 (11th Cir. 2016). *See also Hoffman v. Zenith Ins. Co.*, 487 F. App'x 365, 365 (9th Cir. 2012); *CGC Holding Co. v. Broad & Cassel*, 773 F.3d 1076, 1089 (10th Cir. 2014).

Respondents do not engage with these holdings. Instead, they devote one page toward attempting to camouflage the division. Opp. 21. Respondents claim that these courts are applying the same rule from *Bridge* to different facts, and misleadingly quote one or two sentence fragments from each. But they fail to include each court's conclusion: "[A] plaintiff's ability to show a causal connection . . . will be predicated on plaintiff's alleged reliance on that misrepresentation." *CGC Holding*, 773 F.3d at 1089. *Contra* Opp. 21. Read in their entirety, these decisions disagree with

the Fourth and Fifth Circuits. This Court should grant certiorari to resolve the split.

II. THE FIFTH CIRCUIT'S BROAD INFERENCE OF RELIANCE CONFLICTS WITH THIS COURT'S PRECEDENTS AND CREATES A NEW SPLIT

1. The Fifth Circuit's alternative holding created a broad new exception to Rule 23 for RICO class actions. The en banc majority held that district courts may presume class-wide reliance whenever the inference that at least *some* class members relied "follows logically from the nature of the scheme" alleged, regardless of whether *other* class members knowingly joined or did not otherwise rely on the alleged misrepresentations. Pet. App. 20a.

To be sure, Petitioners submit that Stream Energy is obviously lawful. *See* Pet. App. 45a (Jones, J., dissenting). Respondents know this, because "[h]ad they truly believed" Stream Energy is unlawful, "they could have invoked the Department of Justice or FTC to assist in shutting Stream down." Pet. App. 46a. Yet, to this day, the FTC has taken no action—enforcement or otherwise—against Stream Energy, nor has there been any indication of market saturation. *See* Pet. App. 45a–46a. But even if Stream Energy's lawfulness were uncertain, that is only because the regulatory and jurisprudential landscape has made it so. *See* Pet. App. 89a (Wiener, J., dissenting) ("[T]he line between a legal 'multi-level marketing entity' and an 'illegal pyramid scheme' is fuzzy at best.").

Thus, Stream Energy at most imposes legal risk no different from what rational actors assume every day. *See* Independent Associates Amicus Br. 7–9. They invest in disruptive technology start-ups that lack traditional regulatory approval, and they pursue untested tax-reduction strategies. *See* Pet. App. 36a–

37a (Jolly, J., dissenting). But based on the mere supposition that no one would join Stream Energy knowingly based on legal uncertainty, the court held that reliance could be presumed for all 230,000 class members. Pet. App. 22a–23a.

To satisfy Rule 23(b)(3)'s predominance requirement, plaintiffs must use common evidence, not mere pleadings, "to generate common *answers* apt to drive the resolution of the litigation." *Wal–Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 350 (2011) (quoting Richard A. Nagareda, *Class Certification in the Age of Aggregate Proof*, 84 N.Y.U. L. Rev. 97, 132 (1999)). Typically, "individual reliance issues would overwhelm questions common to the class," absent a special presumption. *Amgen Inc. v. Conn. Ret. Plans & Trust Funds*, 133 S. Ct. 1184, 1193 (2013). Such special presumptions are both harmful to defendants and contrary to this Court's cases. *See* Moller Amicus Br. 3–4, 6.

In the absence of any common evidence of reliance in a suit alleging RICO fraud, most courts have found Rule 23(b)(3) satisfied only in narrow circumstances: where *no rational person* would have acted as plaintiffs did unless he or she relied on the misrepresentation. Pet. 22–24. The Fifth Circuit, however, went much further. It allowed an inference to substitute for common evidence based solely on the fact that plaintiffs alleged an illegal pyramid scheme, and shifted the burden to *disprove* reliance onto Stream Energy—a standard akin to the *Basic* presumption. Pet. 20–21. *See also* Moller Amicus Br. 3–4. Respondents try to disclaim this burden-shifting framework, but they contradict themselves by acknowledging that the Fifth Circuit "observed that the purely common evidence . . . would suffice to satisfy their burden . . .

especially because petitioners *hadn't even tried to introduce any contrary evidence*." Opp. 26 (emphasis added). In other words, the Respondents admit that the Fifth Circuit put the onus on Stream Energy to *disprove* reliance. That erroneous holding "stack[s] the deck legally," and undermines this Court's class-action precedents. Pet. App. 46a (Jones, J., dissenting).

2. Respondents again attempt to create the illusion of unity among the courts by describing their holdings at a high level of abstraction. There is no conflict, Respondents claim, because all courts "hold[] 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." Opp. 24. True enough, but this misses the point entirely: The issue is not *whether* lower courts allow an inference of class-wide reliance under Rule 23(b). Rather, it is *under what standard* courts allow such an inference. And on that, the courts of appeals are divided.

The Fifth Circuit's standard is extraordinarily broad, allowing RICO plaintiffs to certify a class whenever it "follows logically" from the alleged fraudulent scheme that *some* class members—rather than *virtually all* class members—relied. Pet. App. 20a. This breaks directly with other circuit courts. Pet. 22.

Decided in 2015, *Sergeants Benevolent* is the chief case expressing the Second Circuit's narrower standard. *Contra* Opp. 29. There, the Second Circuit held that a court could presume class-wide reliance only when class plaintiffs all faced the same "one-dimensional decisionmaking process." 806 F.3d at 88 (quoting Nagareda, 84 N.Y.U. L. Rev. at 121). *Sergeants Benevolent*, in turn, relies on two earlier decisions: *UFCW Local 1776 v. Eli Lilly & Co.*, 620 F.3d 121, 135

(2d Cir. 2010), and *McLaughlin v. American Tobacco Co.*, 522 F.3d 215, 225 (2d Cir. 2008). These two cases confirm that the Second Circuit will infer a class-wide presumption of reliance only where "*each* class member would only have taken the action leading to its injury if it had relied on the defendant's alleged misrepresentation." *Sergeants Benevolent*, 806 F.3d at 88 (emphasis added). *See also* Pet. 22–23.

The Ninth and Tenth Circuits employ a similar rule, and Respondents fail to distinguish those decisions. *See* Pet. 23–24. Respondents' claim that "*CGC Holding* broadly adopts the same rule" as the Fifth Circuit is particularly outlandish, given that the Tenth Circuit wrote the exact opposite: "[T]he inference of reliance here is *limited to transactional situations*—almost always financial transactions—where it is sensible to assume that *rational economic actors* would not make a payment unless they" relied on the alleged misrepresentation. *CGC Holding*, 773 F.3d at 1091 n.9 (emphases added). *See also* Pet. App. 42a (Jolly, J., dissenting). The Fifth Circuit rejected that formulation. Pet. App. 20a (majority op.) ("[Defendants] urge us to adopt a rule requiring that . . . *no rational actor* would have participated had they known of the misrepresentation.") (emphasis added).

This Court should grant certiorari to decide which standard applies to infer class-wide reliance in order to satisfy Rule 23(b)(3)'s predominance requirement.

III. This Case Is a Suitable Vehicle to Review These Issues

1. Respondents claim the issues this case presents are *sui generis* and obscure, but the Fifth Circuit's actions demonstrate the opposite. It heard this case en banc, confirming the crucial importance of the questions presented. And the court recognized the

weight of its own holding when it granted Stream Energy's motion to stay the mandate pending its petition for certiorari. *See* Pet. App. 2a; *Torres v. S.G.E. Mgmt., L.L.C.*, No. 14-20128 (5th Cir. Dec. 7, 2016) (granting Stream Energy's motion).

This Court should also decline Respondents' invitation to wait for a future case invoking these same issues outside the context of an alleged pyramid scheme. The Fifth Circuit's broad holding will create enormous *in terrorem* settlement pressure that will stymie future efforts to reach this Court. *See AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 350 (2011).

2. Respondents further press a baseless claim that other petitions for certiorari have presented similar questions and were superior vehicles, but that is belied by the facts. Opp. 1. Those cases suffered serious defects such as mootness (*Plambeck*), or presented multiple, disjointed questions unrelated to RICO class actions (*US Foods*). *See* Br. in Opp. at 10–13, *Plambeck v. Allstate Ins. Co.*, 136 S. Ct. 1824 (2016) (No. 15-949); Br. in Opp. at 12–18, 26–32, *US Foods, Inc. v. Catholic Healthcare W.*, 134 S. Ct. 1938 (2014) (No. 13-873). This case carries no such defects.

Moreover, no factual issues make this case "unique." Opp. 22. Respondents invent an illusory body of "pyramid-scheme law," which they claim distinguishes this case from other decisions. Opp. 4. No such law exists, which is why Respondents cannot cite any case supporting that proposition. Opp. 22–23, 32–33. Rather, the courts of appeals are interpreting the same Supreme Court precedents in similar cases, and arriving at opposite legal conclusions.

3. Finally, Stream Energy's applications for extensions of time complied with this Court's Rule 13.5

and made the petition timely as to all Petitioners. Indeed, Stream Energy's applications referred to the entire set of "Petitioners," not a subset thereof. *See* Application to Extend Time at 1, No. 16A788 (Feb. 2, 2017); Application to Extend Time at 1, No. 16A788 (Mar. 6, 2017). And this Court's orders granting those applications did not limit the beneficiaries. *See S.G.E. Mgmt., L.L.C. v. Torres*, No. 16A788 (Feb. 15, 2017); *S.G.E. Mgmt., L.L.C. v. Torres*, No. 16A788 (Mar. 7, 2017).

Respondents wrongly suggest (Opp. 34) that this Court does not distinguish between court-promulgated rules and jurisdictional statutory requirements. The opposite is true. *See Bowles v. Russell*, 551 U.S. 205, 211–13 (2007). No wonder, then, that Respondents cannot cite a single case declaring certain petitioners out of time because they were not explicitly named in an application for an extension. *See* Opp. 34. As far as Stream Energy is aware, no such authority exists, and with good reason—Respondents' "magic words" argument would upend one of the most prosaic tools of appellate practice in the name of elevating form over substance.

Finally, Respondents concede that there is no jurisdictional reason to bar Stream Energy's petition altogether, and they cannot name any specific procedural problem that would arise. Opp. 34.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

JAMES C. HO
Counsel of Record
ROBERT C. WALTERS
KYLE D. HAWKINS
BRADLEY G. HUBBARD
SEAN J. COOKSEY
GIBSON, DUNN & CRUTCHER LLP
2100 McKinney Avenue
Suite 1100
Dallas, Texas 75201
(214) 698-3100
jho@gibsondunn.com

Counsel for Petitioners

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