NO. 13-873

IN THE

Supreme Court of the United States

US FOODS, INC.,
Petitioner,

v.

CATHOLIC HEALTHCARE WEST, *ET AL.*,
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

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether in a civil RICO action a plaintiff who pays a falsely inflated invoice generated by the defendant through a fraudulent scheme can recover the overcharge.

2. Whether the Second Circuit properly determined that the district court did not abuse its discretion in finding that class members could prove through common evidence that the defendant's falsely inflated invoices caused them to overpay for food products purchased under their agreements with the defendant.

3. Whether the Second Circuit properly determined that the district court did not abuse its discretion in certifying a nationwide class asserting breach-of-contract claims where evidence and analysis proffered by the parties regarding the applicable state-law provisions demonstrated no conflict or material differences that would preclude class treatment of the claims.

CORPORATE DISCLOSURE STATEMENT

In accordance with Supreme Court Rule 29.6, Respondents Catholic Healthcare West, Frankie's Franchise System, Inc., Thomas & King, Inc., and Waterbury Hospital, hereby make the following disclosure:

No Respondent has a parent corporation, and no publicly held company owns 10% or more of the stock of any Respondent.

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INTRODUCTION

This case stems from a long-running scheme by Petitioner US Foods, Inc. ("USF") to overcharge its customers. USF is a food wholesaler that sells to hospitals, restaurants, and other entities that buy in bulk. Respondents (the named plaintiffs and class members in the case below, collectively "Plaintiffs") are thousands of those customers, whom USF systematically overbilled through falsely inflated invoices.

The scheme to defraud caused direct and tangible injury to Plaintiffs. They unwittingly overpaid USF for food based on the misrepresentations in USF's invoices, which reflected a falsely inflated price rather than the price agreed upon in Plaintiffs' contracts with USF. This case is about Plaintiffs' efforts to recover the damages caused by USF's scheme.

After careful consideration of the evidence, the district court certified a class of USF customers, both with respect to claims under the Racketeer Influenced and Corrupt Organizations Act ("RICO"), 18 U.S.C. § 1961, *et seq.*, and for breach of contract. Pet. App. 42a-89a. On interlocutory review under Federal Rule of Civil Procedure 23(f), the Second Circuit unanimously affirmed the district court's ruling in a lengthy opinion. Pet. App. 1a-41a.

USF claims that the Second Circuit's decision is contrary to the approaches of several other circuits on three issues: whether Plaintiffs' claimed damages are recoverable under RICO; whether causation in a RICO case can be proven through common evidence; and whether the district court and Second Circuit

conducted a sufficiently thorough review of purported variations in state laws governing the breach-of-contract claims. Ultimately, though, USF's arguments are aimed not at the legal rules the lower courts applied, but rather at those courts' factual findings and application of the law to those facts. Contrary to USF's assertion, the decision below implicates no circuit splits.

First, the circuits are not split as to whether a plaintiff may recover RICO damages when a defendant commits a RICO violation by secretly overcharging the plaintiff under a pre-existing contract. All of the cases USF cites either support the Second Circuit's position in this case—that such damages are recoverable—or do not address the issue at all.

Second, USF incorrectly asserts that a circuit split exists about whether plaintiffs can prove RICO causation through common evidence of reliance. The cases USF cites apply the same legal principles as did the Second Circuit, but reach different conclusions based on the application of those legal principles to the specific facts of those cases.

Third, USF claims that the Second Circuit created a circuit split by "approv[ing] the proposed [contract] class without inquiry into state law differences." Pet. at 29. But both the district court and the Second Circuit analyzed the question whether state-law variations would render class proceedings unmanageable, which is the well-settled test for analyzing this issue. USF's dissatisfaction with the result of the courts' analyses does not create a circuit split.

USF presents no question worthy of review by this Court. The Petition should be denied.

STATEMENT OF THE CASE

A. USF and Its Scheme to Defraud Plaintiffs[1]

USF sells food and other products to a wide array of hospitals, restaurant groups, and other entities. Pet. App. 45a-46a. USF entered into "cost-plus" agreements with class members, through which USF agreed to sell its products at a price "derived by (1) a cost component based on the prices charged to USF by USF's suppliers ('cost'), (2) plus an agreed upon mark-up of either a fixed percentage or a set dollar amount ('plus')." Pet. App. 47a.

In 1998, two USF executives, Mark Kaiser and Tim Lee, devised a scheme to manipulate the "cost" component in cost-plus contracts.[2] Pet. App. 4a. USF created six so-called Value Added Service Providers ("VASPs"), shell companies wholly owned and completely controlled by USF. *Id.* USF created the VASPs for the purpose of falsely inflating USF's "costs" in such a way that USF could pocket that increase, paid by USF's customers, as profit. *Id.* USF used the VASPs as pass-through entities for the food products: USF negotiated the costs for the goods purchased from its suppliers and had the suppliers deliver the food directly to USF but bill the VASPs.

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[1] Both the district court and the Second Circuit included extensive discussions of the facts in their decisions. Plaintiffs here summarize only some of the most pertinent points.

[2] Kaiser was convicted of a related securities fraud. *See United States v. Kaiser*, 609 F.3d 556, 560 (2d Cir. 2010).

Pet. App. 5a. The VASPs then "sold" the goods to USF (on paper only, as the VASPs had never taken delivery), using a higher price dictated by Kaiser and Lee. *Id.* After USF "paid" the VASPs, the VASPs kicked back money to USF in the amount of the improper mark-ups under the guise of "promotional allowances." Pet. App. 5a-6a.

When USF billed its customers, the class members here, under the cost-plus agreements, it listed as its "costs" the falsely inflated amounts USF ostensibly "paid" to the wholly owned subsidiaries it used as middlemen. Pet. App. 5a. USF's customers had no way to know about USF's internal machinations. *Id.* On the contrary, the district court found that "there is evidence that USF actually took steps to conceal the VASP system from its customers." Pet. App. 65a.

B. The Unraveling of USF's Scheme

In 2000, the Royal Ahold Group ("Ahold") offered to acquire USF. Pet. App. 6a. Ahold undertook due diligence, in the course of which it uncovered part of USF's scheme to use the VASPs to "shelter" rebates and "hide" promotional allowances from USF's customers' auditors. Pet. App. 6a-7a. As one of Ahold's employees wrote in reaction to this discovery: "AVISO! MOLTO PELIGROSA," Italian for "Warning! Very Dangerous." Pet. App. 7a. Rather than heed that prescient warning, Ahold went ahead with the acquisition—and in fact allowed USF to continue its fraud. *Id.*

In January 2003, Ahold and its external auditor Deloitte & Touche received an anonymous letter warning that USF and its VASPs were engaged

in invoice fraud. *Id.* Ahold procured an opinion letter from a law firm stating that USF faced no "serious exposure to damages from any potential claims arising from USF's use of VASPs." Pet. App. 8a. But this opinion was based entirely on unsupported assurances from USF executives; after further consideration, the law firm withdrew the opinion letter, stating that it had "reason to doubt whether the assumptions on which we based our conclusions are valid." *Id.*

Following a separate discovery of accounting irregularities at USF in 2003, Ahold retained additional outside counsel, which retained PricewaterhouseCoopers ("PwC") to conduct an independent forensic accounting investigation into USF's use of VASPs and "'whether legal issues exist relative to cost-plus contracts vis a vis VASP passback earnings.'" *Id.* PwC concluded that USF's practices "raised 'significant questions' concerning USF's potential liability to its cost-plus customers," and that USF's control of the VASPs "clearly required" their consolidation into USF, putting an end to the scheme. Pet. App. 8a-9a.

On October 17, 2003, Ahold finally disclosed the VASP system to USF's customers and the public, and then quickly dismantled it. Pet. App. 9a. It was forced to restate earnings for the years during which USF operated the scheme. *Id.*

C. The Lawsuits and the Class-Certification Decision

The first lawsuit relating to USF's fraud was filed by Waterbury Hospital, a community and

teaching hospital in Connecticut.[3] Pet. App. 9a. Subsequently, numerous other lawsuits were filed across the country. Thomas & King, the owner and operator of 88 Applebee's franchises and one of the largest restaurant franchise companies in the country, filed suit in Illinois. *Id.* Catholic Healthcare West, the largest not-for-profit hospital system in California and the fifth-largest hospital system in the United States, filed suit in California. *Id.*

In 2008, all of the pending cases were consolidated for pretrial proceedings in the District of Connecticut before the Honorable Christopher F. Droney. *In re U.S. Foodservice, Inc. Pricing Litig.*, 528 F. Supp. 2d 1370, 1371 (J.P.M.L. 2007). After a consolidated amended complaint was filed, the district court denied USF's motion to dismiss the RICO and breach-of-contract counts. *In re U.S. Foodservice, Inc. Pricing Litig.*, No. 3:07-cv-1894, 2009 WL 5064468, at *14-24 (D. Conn. Dec. 15, 2009).

Following a lengthy class discovery period, Plaintiffs moved for class certification on July 31,

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[3] The United States also brought similar claims against USF under the False Claims Act, 31 U.S.C. § 3729, and the common law, based on USF's "false[] and fraudulent[] inflat[ion] [of] the prices it charged the United States under its cost-based contracts to supply agencies of the United States with food products." Pet. App. 9a n.4 (*quoting* Complaint, *United States v. U.S. Foodservice, Inc.*, No. 1:10-cv-06782 (S.D.N.Y. Sept. 13, 2010). USF settled with the United States for $30 million. *See* Press Release, United States Attorney's Office, Southern District of New York, *Manhattan U.S. Attorney Recovers $30 Million to Resolve Civil Fraud Lawsuit against Leading Food Distributor* (Sept. 13, 2010), *available at* http://www.justice.gov/usao/nys/pressreleases/September10/usfsettlementpr.pdf.

2009, filing 94 supporting exhibits and an expert declaration on damages. After briefing was complete, USF filed numerous surreplies and notices of supplemental authority, which further expanded the record. The district court requested, and the parties provided, supplemental briefing on potential conflicts in the state laws governing the contract claims. On May 25, 2010, the district court held a class-certification hearing and considered demonstrative presentations submitted by both sides. In total, the evidentiary record contained over 405 pages of argument, 170 exhibits, and 13 supporting declarations.

On November 29, 2011, the district court certified a class of "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. 45a. Recognizing the need for a "rigorous analysis" of Rule 23's requirements under *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541, 2551-52 (2011), even if there was some overlap with the merits, the district court determined that all of Rule 23(a)'s requirements had easily been met. Pet. App. 52a-60a. The principal dispute, the district court noted, was Rule 23(b)(3)'s predominance requirement. Pet. App. 60a. The district court examined the RICO and breach-of-contract counts separately and determined that common questions of law and fact predominated for each. Pet. App. 62a-78a.

Regarding the RICO claims, the district court recognized that "the alleged overriding uniform

misrepresentations that USF made to all members of the proposed class are the invoices that USF sent to its cost-plus customers containing cost-plus prices that were inflated through the use of the VASP enterprise," which was necessarily common evidence. Pet. App. 64a. Insofar as USF claimed that class treatment was improper because reference to the underlying agreements was necessary to assess whether USF had misrepresented anything, the district court found that "the focus here is on the alleged fraudulent misrepresentations in the invoices, not the contracts." *Id.* Moreover, the district court determined—based on extensive evidence, including the findings of USF's own auditor, Deloitte, and testimony from USF's own expert—that the contracts were consistent and "sufficiently similar" in all material respects. Pet. App. 65a, 77a.

The district court also held that Plaintiffs could establish causation by common evidence that USF's customers relied on the amounts specified in the invoices when paying them. Pet. App. 66a-71a. The district court found that USF had failed to proffer competent evidence that USF might have individualized defenses based on reliance, because there was "no evidence that USF's customers knew of the existence of the VASP system, the purpose of the VASPs, or the VASP's effect on the customers." Pet. App. 69a n.22.

The district court's damages analysis was likewise a standard application of the law to the facts before it. First, the district court resolved a legal dispute between the parties regarding the appropriate measure of RICO damages. The district

court rejected USF's efforts to rewrite Plaintiffs' claims as sounding in fraudulent inducement—*i.e.*, that Plaintiffs were claiming that USF's fraud caused them to enter into contracts with USF. Pet. App. 79a. Rather, the district court found that this case involved fraudulent invoices sent after the contracts were formed. *Id.* Recognizing this important distinction, the district court held that Plaintiffs could properly seek recovery for the actual, concrete financial loss they suffered due to the operation of the VASP scheme. *Id.* Second, the district court determined that Plaintiffs' damages model provided for a "universal calculation of damages" on a class-wide basis. *Id.*

With respect to the breach-of-contract claims, the district court again found that the contracts were substantially similar in all material respects. Pet. App. 77a. After consideration of the original and supplemental briefing on the applicable state-law provisions, the district court determined that any purported variations in those provisions would not preclude class certification, Pet. App. 71a-74a, and that common legal issues predominated, Pet. App. 78a.

D. The Second Circuit's Affirmance of the Class-Certification Order

USF sought interlocutory review of the class-certification order under Rule 23(f). The Second Circuit granted USF's petition and then unanimously affirmed the district court in all respects. In a thorough opinion, the Second Circuit analyzed and rejected all of the arguments made by USF, holding that:

> Upon a complete review of the record, we conclude that the district court conducted a rigorous analysis based on the relevant evidence, properly resolved factual disputes, and did not abuse its discretion in concluding that common issues predominate as to plaintiffs' RICO and breach of contract claims and that a class action is a superior method of litigating these claims.

Pet. App. 13a. Thus, the Second Circuit "discern[ed] no abuse of discretion in the district court's determination that certification was appropriate." Pet. App. 41a.

The Second Circuit considered USF's argument that the proper measure of damages here is the difference between what Plaintiffs actually paid and the market price available when the goods were bought and that the need for thousands of individual determinations of market prices should have precluded certification. Pet. App. 23a-24a. The court of appeals rejected this argument, holding that "[t]he key inquiry [here] is not what price customers could have procured elsewhere at the point of purchase, but rather the amount of overcharge—the amount customers paid USF as a result of its deception." Pet. App. 25a.

The Second Circuit just as readily dispensed with USF's argument that the district court had abused its discretion in finding that causation could be proven through common evidence. The Second Circuit agreed with the district court that, "[p]rovided the plaintiffs are successful in proving

that USF inflated their invoices and misrepresented the amount due, proof of payment constitutes circumstantial evidence" of reliance and causation. Pet. App. 19a. Moreover, the Second Circuit rejected USF's argument that individualized questions regarding some class members' knowledge of the fraud required denial of class certification because "the record here contains *no such individualized proof* indicating knowledge or awareness of the fraud by any plaintiffs." Pet. App. 20a (emphasis in original).

The Second Circuit also rejected USF's argument that "certification was improper because this multi-state class action implicates the laws of many jurisdictions." Pet. App. 32a. Just as the district court had, the Second Circuit undertook a considered review of the laws in question and concluded that "the district court did not abuse its discretion in determining that variations in state law do not preclude certification." Pet. App. 34a.

REASONS FOR DENYING THE PETITION

The decision below was nothing more than a garden-variety application of the law to the facts. These types of fact-based, case-specific disputes do not provide the basis for certiorari. *See, e.g.*, *United States v. Johnson*, 268 U.S. 220, 227 (1925) ("We do not grant a certiorari to review evidence and discuss specific facts."). USF apparently recognizes this, and therefore has tried to manufacture three legal issues on which the Second Circuit supposedly erred by departing from decisions of numerous circuits. As demonstrated below, USF's claimed circuit splits do not exist and the Petition should be denied.

I. THE SECOND CIRCUIT'S DECISION DOES NOT IMPLICATE ANY CIRCUIT CONFLICT THAT WARRANTS THIS COURT'S REVIEW.

A. The Second Circuit's Decision that Plaintiffs Can Recover Under RICO for USF's Falsely Inflated Charges Is in Accord with the Law of Other Circuits.

The damages issue in this case is simple. USF argued below 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." Pet. App. 24a. The Second Circuit easily rejected this argument: "The key inquiry [in this case] is not what price customers could have procured elsewhere at the point of purchase, but rather the amount of overcharge—the amount customers paid USF as a result of its deception." Pet. App. 25a. Thus, USF misconceives the nature of the case Plaintiffs pled, as well as the case the Second Circuit and district court addressed when it argues that Plaintiffs are seeking recovery for an "abstract contract expectancy." Pet. at 17.

USF continues to argue incorrectly that this is a case of fraudulent inducement, where the predicate acts occurred before the parties entered into the agreements. This case is about USF's false invoices—the predicate acts in USF's fraud—and Plaintiffs' payment of those invoices *after* the parties had already agreed to a pricing arrangement. *See Sedima S.P.R.L. v. Imrex Co.*, 473 U.S. 479, 497

(1985) (under RICO "the compensable injury necessarily is the harm caused by predicate acts"). It is *not* about fraudulent inducement or Plaintiffs' decisions about whether to enter into the agreements with USF. *See* Pet. App. 24a-25a ("This case . . . concerns a fraud that occurred after plaintiffs already had a protectable interest in their cost-plus contracts."). Nor is it about any expectation that Plaintiffs had when they entered into the agreements, but rather the losses Plaintiffs incurred when they paid the false invoices.

Thus, USF attacks a straw man in citing cases that it claims have "categorically refuse[d] to permit contract-expectation damages" in RICO cases. Pet. at 14. The damages sought in those cases are nothing like the concrete, specific, and measurable damages Plaintiffs incurred here. For instance, in *Price v. Pinnacle Brands, Inc.*, 138 F.3d 602 (5th Cir. 1998), and *Chaset v. Fleer/Skybox International, LP*, 300 F.3d 1083 (9th Cir. 2002), the plaintiffs were trading-card collectors who had hoped that the packs of cards they had purchased included sought-after "chase cards." *Price*, 138 F.3d at 604-05; *Chaset*, 300 F.3d at 1085-86. The plaintiffs had received exactly what they paid for (trading card packs that had the possibility of including chase cards) at the agreed-upon price—their complaint was that a hoped-for gain had failed to materialize. *Price*, 138 F.3d at 607; *Chaset*, 300 F.3d at 1087. As the Ninth Circuit explained, the plaintiffs' "disappointment upon not finding an insert card in the package is not an injury to property." *Chaset*, 300 F.3d at 1087.

Nor does *Jackson v. Sedgwick Claims Management Services, Inc.*, 731 F.3d 556 (6th Cir.

2013) conflict with the decision below. That case turned primarily on whether pecuniary damages flowing from personal injury fall within the scope of RICO. *Id.* at 566 ("Michigan's decision to create a workers' compensation system does not transform a disappointing outcome in personal injury litigation into damages that can support a RICO civil action."). There, the plaintiffs had expected to get more for their workers' compensation claims than they ultimately received, and they had no remedy under RICO because their alleged losses resulted from personal injuries.[4]

In all of the cases USF cites, "plaintiffs ran afoul of the rule that RICO damages cannot place plaintiffs in a *better* position than they would have been in if the racketeering had not occurred." *Elsevier Inc. v. W.H.P.R., Inc.*, 692 F. Supp. 2d 297, 311 (S.D.N.Y. 2010) (emphasis in original) (*citing Commercial Union Assurance Co. v. Milken*, 17 F.3d 608, 612 (2d Cir. 1994)). Here, however, the damages Plaintiffs claim are the difference between what they paid and the prices to which USF had agreed before sending the false invoices. Thus, Plaintiffs do not seek to be put in a better position. Rather, they seek to be put in the position they would have been in had

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[4] The Eighth Circuit decision cited by USF, *Regions Bank v. J.R. Oil Co.*, 387 F.3d 721 (8th Cir. 2004), is completely off point. That case addressed a plaintiff's "injury to a tangible property interest[] that . . . was not 'by reason of' a RICO violation." *Id.* at 731. The fraud that caused the plaintiff's injury was unrelated to the alleged RICO violation, and by the time the RICO violation occurred, the plaintiff had no valuable, tangible property interest left to injure. *Id.* *Regions Bank* raised a question more of causation than standing, and its holding has no useful application here.

USF issued accurate invoices. Indeed, this case is remarkably similar to this Court's decision in *Sedima*, in which it held that a plaintiff incurred RICO damages when the defendant presented it with "inflated bills, cheating [the plaintiff] . . . by collecting for nonexistent expenses." 473 U.S. at 484. The claim here is that USF presented Plaintiffs with "inflated [invoices], cheating [the plaintiffs] . . . by collecting for nonexistent [costs]."

The Second Circuit recognized the differences between cases like those that USF cites and the instant case, which fits squarely within the *Sedima* model. The Second Circuit acknowledged the cases holding that "benefit of the bargain" damages are typically not recoverable, so that RICO damages cannot include "what the fraudster promised, as opposed to the property the victim lost." Pet. App. 24a. But the Second Circuit then clarified that these holdings refer to situations in which the plaintiff's expectancy itself results from a RICO violation, such as in cases involving fraud in the inducement. Pet. App. 25a. As noted, however, the Second Circuit rejected USF's argument that this is a case of fraud in the inducement and held that Plaintiffs had standing to bring claims under RICO because they "already had a protectable interest in their cost-plus contracts with USF" when USF began submitting fraudulent invoices. *Id.* There is no reason to believe that the Fifth, Sixth, Eighth, or Ninth Circuits would have approached this case any differently. USF is not actually complaining about the *legal rule* applied by the Second Circuit or about a real circuit split. It is simply complaining about the *result* the district court and Second Circuit reached when they applied

the proper legal rule—the rule uniformly followed by all circuits that have addressed the issue—to Plaintiffs' RICO claims.

Nor does the Second Circuit's decision conflict with the First, Third, and Seventh Circuit cases cited by USF for the proposition that "contract-expectation damages [are recoverable] 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." Pet. at 15 (*citing Liquid Air Corp. v. Rogers*, 834 F.2d 1297, 1310 (7th Cir. 1987); *Wishnefsky v. Carroll*, No. 99-4065, 2002 WL 1840801, at *582 (3d Cir. Aug. 13, 2002); *Scivally v. Graney*, No. 93-2075, 1994 WL 140413, at *3 (1st Cir. Apr. 15, 1994); *Heinold v. Perlstein*, 651 F. Supp. 1410 (E.D. Pa. 1987)). For the reasons discussed above, the Second Circuit's decision is wholly consistent with those cases. Indeed, the Second Circuit cited *Liquid Air* and *Heinold*, two cases cited by USF as evidence of a supposed circuit split, as support for its holding. Pet App. 25a.

If there were a circuit split as deep and abiding as USF would like this Court to believe, presumably at least one of the eight courts of appeals apparently involved would have acknowledged that it exists. Yet there is no such acknowledgment in any of the opinions USF cites. In fact, courts supposedly on opposite sides of USF's invented circuit split have cited the same cases to justify their holdings. *See Price*, 138 F.3d at 607 nn.20-22 (citing *Heinold*, 651 F. Supp. at 1411-12); *Wishnefsky*, 2002 WL 1840801,

at *582 (same); *Scivally*, 1994 WL 140413, at *3 (same). There is no split of authority here.[5]

The damages Plaintiffs seek are not based on some sort of intangible expectancy. The class members here suffered actual losses when they overpaid USF as a direct result of USF's scheme. As the Second Circuit made clear:

> The key inquiry . . . [is] the amount of the overcharge—the amount customers paid USF as a result of its deception. The measure of damages as compensation for *this* injury is straightforward: 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 (or, stated

[5] USF also argues that this question warrants review because it "implicates" *Comcast Corp. v. Behrend*, 133 S. Ct. 1426 (2013). Pet. at 32-33. But USF's "contract-expectation" argument implicates *Comcast* only in the sense that it has something to do with damages. USF does not claim that the damages Plaintiffs seek cannot be easily calculated on a classwide basis. USF only argues that another measure of damages would be, in its view, more appropriate, and that *those* damages could not be calculated on a classwide basis. According to USF, Plaintiffs should only be entitled to the difference between the fraudulent price they paid USF for goods and the *market value* of those goods. But there is no need for reference to a market value where the contracts themselves provide the correct price, as the Second Circuit correctly held. *See* Pet. App. 25a, 25a n.8 ("Plaintiffs' proposed measure for damages is thus directly linked with their underlying theory of classwide liability (that the misrepresentations on the invoices caused overpayments) and is therefore in accord with" *Comcast*).

> differently, the price increase due to the use of VASPs).

Pet. App. 25a (emphasis in original). Not only does that decision not implicate a circuit split, but it is demonstrably correct. Review by this Court is unnecessary and unwarranted.

B. The Second Circuit's Decision that Plaintiffs' Payment of USF's False Invoices Is Common Evidence of Causation Is in Accord with the Law of Other Circuits.

The Second Circuit held that the facts here demonstrate that causation is susceptible to proof by common evidence: "In cases involving fraudulent overbilling, payment 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." Pet. App. 18a-19a. The Second Circuit further explained that it was the *evidence*, not some kind of "presumption," that compelled this conclusion:

> Provided the plaintiffs are successful in proving that USF inflated their invoices and misrepresented the amount due, proof of payment constitutes circumstantial evidence that the plaintiffs lacked knowledge of the scheme. Moreover, and as found by the district court, the record also contains generalized proof of USF's *concealment* of its billing practices, including the

> Ekelschot memo in which the head of Ahold's audit committee observed that USF used the VASPs to earn promotional allowance rebates on private label products and "*to hide [these rebates] from clients' auditors.*"

Pet. App. 19a (emphasis added by court).[6] *Cf. Klay v. Humana*, 382 F.3d 1241, 1259 (11th Cir. 2004) ("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. This is a far cry from the type of 'presumed' reliance we invalidated in *Sikes*[*v. Telelinem, Inc.*, 281 F.3d 1340 (11th Cir. 2002)]."), *abrogated in part on other grounds by Bridge v. Phoenix Bond & Indem. Co.*, 533 U.S. 639 (2008). The Second Circuit thus reviewed the evidence proffered by both parties and concluded that the district court's factual findings were well supported (and certainly not clear error), and that given the record, the district court correctly determined that common issues predominate. Pet. App. 20a-21a.

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[6] The DRI and the U.S. Chamber of Commerce have filed an amicus brief arguing that the Second Circuit's decision is incorrect because it permits a "presumption of reliance" in RICO class actions. But that is not what the district court or the Second Circuit held. Rather, as discussed herein, the class-certification decision was based on the evidence presented to the district court, notably the overwhelming evidence of the fraud, the concealment of the fraud, and the inability of USF to proffer any evidence of Plaintiffs' knowledge of the fraud. Plaintiffs who cannot prove these elements are unlikely to be able to convince courts that reliance presents a common issue, but that is a question for other cases with different facts.

USF's efforts to turn this decision into a broad legal ruling are unavailing.

USF claims that the Second Circuit's approach "conflict[s]" with those of the Fifth and Ninth Circuits. That is incorrect. USF first cites *Poulos v. Caesar's World, Inc.*, 379 F.3d 654 (9th Cir. 2004), for the proposition that 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." Pet. at 20. But in *Poulos* itself, the Ninth Circuit cautioned against reading the holding of that case as a rule applicable much beyond its specific facts. There, the plaintiffs sought certification of a class of "nearly everyone who ha[d] played video poker or electronic slot machines within the last fifteen years." 379 F.3d at 658. They alleged that virtually all gaming machine manufacturers and casino operators had defrauded gamblers by misrepresenting the odds of winning on the machines. *Id.* at 659-60. The plaintiffs further contended that the mere fact that the class members had played the machines was itself evidence that they had relied on the defendants' alleged misrepresentations, and thus that the misrepresentations had caused the class members' losses. *Id.* at 665.

The Ninth Circuit held that the specific facts in *Poulos* precluded that sort of common evidence of reliance "[d]ue to the unique nature of gambling transactions and the allegations underlying the class claims." *Id.* As the court noted, "[g]amblers do not share a common universe of knowledge and

expectations—one motivation does not 'fit all.'" *Id.* The court explicitly limited its decision to the facts before it, "not[ing] that [its] holding [wa]s both narrow and case-specific." *Id.* at 666. The Ninth Circuit emphasized that "to prove proximate causation *in this case*, an individualized showing of reliance is required." *Id.* (emphasis in original).

So clear was the Ninth Circuit about *Poulos*'s limited application that some district courts have relied on it "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. Deferred Annuities Litig.*, No. 3:05-cv-1018, 2013 WL 593414, at *1 (S.D. Cal. Feb. 14, 2013). At a minimum, district courts within the Ninth Circuit have heeded *Poulos*'s express limitations. For instance, in *In re Apple & AT&T iPad Unlimited Data Plan Litigation*, No. 10-cv-02553, 2012 WL 2428248 (N.D. Cal. June 26, 2012), a district court considered whether the plaintiffs might be able to prove through common evidence that they had relied on the defendants' alleged misrepresentations about the details of a data plan. *Id.* at *4-7. The court found that the plaintiffs' allegations supported an inference that they had relied on the misrepresentations. As the district court explained, *Poulos* did not preclude such a holding because "there are many reasons one chooses to gamble that do not depend on the odds of winning," but selecting a data plan will almost certainly depend on the details of that plan. *Id.* at *6. Moreover, "*Poulos* . . . raise[d] the issue of whether the class includes individuals who knew the truth and therefore were not deceived by the alleged

misrepresentations. Here, the truth . . . was information uniquely available to defendants." *Id.*

Similarly, there is only one reason a purchaser of food would pay an inflated price to a distributor: because that price is listed on the distributor's invoice. Moreover, the district court here found, and the Second Circuit affirmed, that USF had introduced no competent evidence that Plaintiffs were aware of the falsely inflated invoices or the role of the VASPs in the overcharges. Pet. App. 20a, 69a n.22. Indeed, one of the goals of the scheme was to create invoices reflecting the higher cost to prevent any customer who questioned USF from learning the true costs. Pet. App. 35a. Accordingly, *Poulos* does not conflict with the Second Circuit's decision, but is consistent with it. In both cases, the courts recognized the fact-bound nature of the question. That they reached different conclusions was solely a result of the different facts of the two cases, and not any differences in their legal approach.

Nor does the Second Circuit's decision conflict with the Fifth Circuit's decision in *Sandwich Chef of Texas, Inc. v. Reliance National Indemnity Insurance Co.*, 319 F.3d 205 (5th Cir. 2003). In *Sandwich Chef*, the plaintiffs alleged that their insurers had charged them rates in excess of regulatory limits, and that the insurers had misrepresented to regulators the rates they were charging. *Id.* at 212.

Contrary to USF's argument, *Sandwich Chef* does not actually hold that class members' payments of invoices could not serve as common evidence of reliance on false statements in the invoices themselves. Rather, the Fifth Circuit stated that the

district court "did not adequately account for individual issues of reliance that will be components of *defendants' defense* against RICO fraud." 319 F.3d at 220 (emphasis added). The defendants had introduced evidence that some class members had "[k]nowledge that invoices charged unlawful rates," which "would eliminate reliance and break the chain of causation." *Id.*

As the Second Circuit explained, the Fifth Circuit's discussion of individualized defenses to reliance is of no moment here: "Critically, however, the record here contains *no such individualized proof* indicating knowledge or awareness of the fraud by any plaintiff." Pet. App. 20a (emphasis in original).[7] As with *Poulos*, the difference in outcomes is based on important factual differences in the cases.

USF acknowledges that the Second Circuit's decision turns on these factual differences, but claims that the Second Circuit failed to address the Fifth Circuit's "*legal* determination" that "'the invoice theory does not [establish] reliance.'" Pet. at 21 (*quoting Sandwich Chef*, 319 F.3d at 221) (alterations added in Petition). But the Fifth Circuit never created such a rule. Instead, it found that the

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[7] For this reason, amici miss the point when they cite an Eighth Circuit case for the proposition that "even if circumstantial evidence, such as the mere fact of purchase following an alleged misrepresentation, were sufficient to meet plaintiffs' initial burden, the defendant should be allowed to raise such issues in defense of the claim." DRI & Chamber of Comm. Amicus Br. at 6 (*citing In re St. Jude Med., Inc.*, 522 F.3d 836 (8th Cir. 2008)). USF conducted extensive discovery but ultimately failed to develop any competent evidence that its customers knew about its fraudulent scheme.

defendants had proffered competent evidence that they would have individualized defenses to reliance—something the Second Circuit expressly (and correctly) found that USF failed to do here. Pet. App. 20a-23a. Indeed, had the Fifth Circuit created the rule that USF claims, it would have had no reason to discuss the factual issues that were the actual basis for its decision.

USF raises the specter of "[t]ens of thousands of customers . . . recover[ing] treble damages from [USF] even if they admit that they purchased based on [USF's] overall price and customer service, rather than as a result of alleged misrepresentations." Pet. at 25. But here USF makes two critical errors. First, USF is simply speculating that an individual issue could arise at some point down the road. Because there was no evidence that such individualized defenses exist, the district court could not have abused its discretion in refusing to engage in speculation about hypothetical individualized issues that might or might not arise in the future. *See Amgen Inc. v. Conn. Ret. Plans & Trust Funds*, 133 S. Ct. 1184, 1197 (2013) (conjectural "individualized questions of reliance" which are "far more imaginative than real[] . . . do not undermine class cohesion and thus cannot be said to 'predominate' for purposes of Rule 23(b)(3)").

Second, USF once again mischaracterizes the issue in this case. The relevant question is why Plaintiffs *paid* the falsely inflated invoices, not why they entered into agreements with USF in the first place. *See* Pet. App. 25a ("The key inquiry [in this case] is not what price customers could have procured elsewhere at the point of purchase, but

rather the amount of overcharge—the amount customers paid USF as a result of its deception."). USF's misrepresentations need only cause the *payment* of the false invoices; the misrepresentations need not cause the original *agreement to purchase*.

This distinction also answers USF's charge that "[t]he Second Circuit below thus disregarded the individualized evidence regarding particular customers' decisions to purchase from [USF] rather than its competitors." Pet. at 24. The "decisions to purchase"—that is, to enter into the agreements in the first place—are not relevant to the causation analysis. Rather, the decisions to *pay the inflated amounts on the invoices* are. And on that score, as the district court explained, "[d]espite USF's assertions, the record lacks evidence that any of USF's customers had knowledge of USF fraudulently inflating the cost component of its products through the operation of the VASPs." Pet. App. 68a; *see also* Pet. App. 20a-21a (Second Circuit reviewing and rejecting "evidence" proffered by USF and holding that the "district court did not err in finding that 'there is no evidence that the plaintiffs were aware of the VASP system or its purpose'"). This Court does not grant certiorari to review a district court's factual findings, especially when those findings have been reviewed and unanimously affirmed by a court of appeals. Sup. Ct. R. 10 ("A petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law.").

C. The District Court's Analysis and the Second Circuit's Review of the State-Law Issues Were in Accord with the Methodology Applied by Other Courts.

Plaintiffs' breach-of-contract claims against USF all turn on the same issue: USF had contracts with each of the class members under which it promised to charge one price; then it charged a different, higher price. While the contracts may have varied slightly in irrelevant ways, "USF's own expert testified that the contracts 'essentially all [say] the same thing' and that in the food service industry, '[i]t [is] well understood . . . what a cost plus contract is.'" Pet. App. 27a (alterations added by court). The uniformity of the contracts was further supported by USF's own auditor, which concluded "that USF's contracts are consistent in how they define invoice costs." *Id.* Thus, the Second Circuit found that "[t]he district court's conclusion that USF's cost-plus contracts are substantially similar in all material respects is amply supported by the record." Pet. App. 27a-28a (citation omitted).

Recognizing the unassailability of this factual finding, USF does not argue that there are variations in the agreements themselves, but rather that there are purported variations in the governing law. That argument fails, because while these contracts are governed by the laws of different jurisdictions, each of the jurisdictions would apply the same rule to answer the predominant (and common) question: whether charging a customer more than the agreed-to price by falsely inflating the cost component in a cost-plus contract constitutes a breach of contract.

USF argues that the Second Circuit departed from the approach of other circuits, which require that a putative class "credibly demonstrate, through an 'extensive analysis' of state law variances, 'that class certification does not present insuperable obstacles.'" Pet. at 27 (*quoting Walsh v. Ford Motor Co.*, 807 F.2d 1000, 1017 (D.C. Cir. 1986); *In re Sch. Asbestos Litig.*, 789 F.2d 996, 1010 (3d Cir. 1986)). Specifically, USF claims that the Second Circuit erred when it "approve[d] the proposed class without inquiry into state-law differences" and "rested its ruling not on an 'extensive analysis' of the variations in state law," Pet. at 29 (*citing* Pet. App. 29a-30a), but took "on faith" an "assertion that laws are similar." *Id.* (*citing Walsh*, 807 F.2d at 1016).

Contrary to USF's mischaracterization, the record demonstrates that the lower courts took nothing on faith. Rather, the courts examined significant evidence and briefing to reach their decisions. Plaintiffs proffered declarations explaining the relevant provisions of the laws of the 50 states. As the evidence demonstrated, the four UCC provisions that govern the contract claims in this case have been adopted with near uniformity across the states (with Louisiana the lone holdout). Plaintiffs thus affirmatively showed that regardless of jurisdiction, the class members' claims raise common questions, governed by common rules, that are susceptible to common answers. Moreover, recognizing the need to conduct a thorough analysis, the district court requested (and the parties provided) supplemental briefing on specific choice of law issues. The district court's treatment of these issues is an exemplar of the kind of analysis that

Walsh prescribes. USF's claim that the Second Circuit approved the proposed class "without inquiry into state-law differences," Pet. App. 29a, is simply untrue.

The district court examined all of the briefing and information provided, examined USF's contrary declaration and arguments, and devoted several pages of its opinion to demonstrating why Plaintiffs were right and USF wrong. Pet. App. 71a-75a. The district court concluded that "[w]hether a contract has been breached is a question of contract interpretation that does not vary from state to state." Pet. App. 72a (*citing Klay*, 382 F.3d at 1262). That ruling is consistent with this Court's precedent. *See Am. Airlines v. Wolens*, 513 U.S. 219, 233 n.8 (1995) ("[C]ontract law is not at its core 'diverse, nonuniform, and confusing.'") (*quoting Cipollone v. Liggett Grp., Inc.*, 505 U.S. 504, 529 (1992) (plurality opinion)).

On appeal, USF reiterated its state-law variations argument. The Second Circuit rejected that argument, concluding that the district court did not abuse its discretion in determining that common legal issues predominate. Pet. App. 30a. The Second Circuit further explained that "[t]he fact that each of these contracts is governed by the UCC . . . supports the district court's conclusion that common issues will predominate in the adjudication of these contract claims." Pet. App. 29a.[8] The Second Circuit also

[8] USF's state-law variations argument attacks the Second Circuit's opinion, but fails to acknowledge that the Second Circuit was reviewing under an abuse-of-discretion standard and appears to suggests that the Second Circuit should have undertaken a deeper *de novo* type review. Pet. at

considered how the contract claims would actually be tried, and concluded that "adjudication of the breach of contract claims will largely parallel adjudication of the RICO claims." Pet. App. 31a (identifying issues common to both the contract and RICO claims).

Ultimately, what USF attacks is not the approach the lower courts used but rather the result they reached. That is not a valid basis for certiorari. Moreover, the cases from other circuits cited by USF would not have dictated a different result:

- In *Gariety v. Grant Thornton, LLP*, 368 F.3d 356, 370 (4th Cir. 2004), a securities fraud case, the court of appeals remanded because the district court recognized that it might have to apply the laws of at least six different states—some of which had adopted the fraud-on-the-market presumption, and some of which required individualized reliance proof—but nevertheless found that common issues predominated, without resolving the choice-of-law issue.
- In *Castano v. American Tobacco Co.*, 84 F.3d 734, 740-44 (5th Cir. 1996), a fraud and breach-of-warranty case brought on behalf of a putative class of all nicotine-dependent people in the United States, the court of appeals remanded because the district court had conditionally certified a class while deferring consideration of how variations in state law would affect predominance.

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29. Thus, USF ignores the extensive district court record on this issue and the Second Circuit's actual holding.

- In *In re American Medical Systems, Inc.*, 75 F.3d 1069, 1085 (6th Cir. 1996), a breach-of-warranty case, the court of appeals remanded because the district court had "failed to consider how the law of negligence differs from jurisdiction to jurisdiction."
- In *Sacred Heart Health Systems, Inc. v. Humana Military Healthcare Services*, 601 F.3d 1159, 1180 (11th Cir. 2010), the court of appeals remanded because it could "find no serious analysis of the variations in applicable state law relative to [the defendant's] affirmative defenses."

In each of these cases, either the plaintiffs or the district court completely sidestepped the choice-of-law issue. That stands in sharp contrast to the record here, where Plaintiffs proffered the necessary 50-state surveys regarding the applicable UCC provisions, the district court received additional briefing on the choice of law, and the district court and Second Circuit analyzed the issue in depth.[9]

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[9] Nor does the Fifth Circuit's decision in *Cole v. General Motors Corp.*, 484 F.3d 717 (5th Cir. 2007), signal the existence of a circuit split warranting this Court's attention. In that case, the plaintiffs sought certification of a nationwide class, asserting express and implied warranty claims relating to allegedly defective airbags. *Id.* at 720-21. The court found that the plaintiffs failed to demonstrate that common legal issues predominated, based on the defendant's contrary evidence of important differences among the state laws governing several important issues in the case. *Id.* at 725-26. That decision, applicable to the specific claims and issues presented in that case, has no relevance to the very different claims and issues in this case.

The courts in all cases cited by USF applied the same legal rule as did the Second Circuit: they asked whether the laws at issue "differ in a material manner that precludes the predominance of common questions." Pet. App. 33a. And the Second Circuit cited many of the cases that USF cites in support of its claim of a circuit split. *Id.* (*citing Walsh*, 807 F.2d at 1017; *In re Sch. Asbestos*, 789 F.2d at 1010; *Castano*, 84 F.3d at 741). USF dislikes the answer that both the district court and the Second Circuit reached in this particular case based on the specific law and facts at issue. But that does not mean that their analysis was somehow faulty, that the district court abused its discretion, or that this Court should grant certiorari to decide whether Plaintiffs cited enough case law in their presentations to the district court.[10]

[10] USF cites a few other ways in which it believes the district court and the Second Circuit were wrong. Pet. at 29-30 nn.8-9. Those issues are irrelevant to whether certiorari should be granted, and in any event were thoroughly considered by the district court and the Second Circuit. Pet. App. 29a-31a, 71a-74a. Thus, Plaintiffs do not believe it is necessary to repeat those arguments here. USF does not ask this Court to grant certiorari to undertake a detailed review of state contract law, determine whether variations exists, determine whether those variations are material to the claims at issue given the particular facts of this case, or determine whether, in light of any variations, the case would be manageable as a class action. That is a task for the lower courts, as embodied by the abuse-of-discretion standard by which courts of appeals review class-certification decisions. *See Califano v. Yamasaki*, 442 U.S. 682, 703 (1979).

II. AN INTERLOCUTORY APPEAL OF CLASS CERTIFICATION IS NOT THE APPROPRIATE VEHICLE FOR GLOBAL REEVALUATION OF THE ROLE OF CIVIL RICO IN PRIVATE LITIGATION.

Finally, USF calls upon the Court to use this Rule 23(f) appeal as a vehicle to "clarify[] the scope of civil RICO." Pet. at 31. The Court should decline USF's request for three reasons.

First, just six years ago the Court unanimously rejected a similar request, based on similar policy grounds, to narrow the scope of civil RICO. In *Bridge v. Phoenix Bond & Indemnity Co.*, 553 U.S. 639 (2008), this Court unanimously rejected the argument that it should "interpret RICO to require first-party reliance for fraud-based claims in order to avoid the 'over-federalization' of traditional state-law claims." *Id.* at 659. As the Court held there:

> Whatever the merits of petitioners' arguments as a policy matter, we are not at liberty to rewrite RICO to reflect their—or our—views of good policy. We have repeatedly refused to adopt narrowing constructions of RICO in order to make it conform to a preconceived notion of what Congress intended to proscribe.

Id. at 660 (*citing Nat'l Org. for Women, Inc. v. Scheidler*, 510 U.S. 249, 252 (1994); *H. J. Inc. v. Nw. Bell Tel. Co.*, 492 U.S. 229, 244 (1989); *Sedima*, 473 U.S. at 481). The same holds true today. USF's policy arguments do not provide a legal basis for

reversing the well-reasoned decision of the Second Circuit, which affirmed an equally well-reasoned decision by the district court.

Second, USF argues that public policy calls out for limitation of RICO class actions in particular. But it offers no legal support for adopting different, stricter standards for RICO claims in class actions than in other cases, which would, in any event, violate the Rules Enabling Act. *See Dukes*, 131 S. Ct. at 2561.

Third, this is an interlocutory appeal from a class-certification decision, not an appeal from a final judgment. This should make the Court reluctant to grant certiorari for the purpose of reworking civil RICO standards. The purpose of a Rule 23(f) appeal is to determine whether a particular case can go forward as a class action, not to make final merits determinations. If the Court deems it necessary to revisit its precedent regarding the scope of civil RICO, the best vehicle would be a case with a full trial record, where the lower courts have already decided the merits. This is not that case.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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