NO. 24-_____

In the Supreme Court of the United States

SBFO OPERATOR NO. 3, LLC, ET AL.,

Petitioners,

v.

ONEX CORPORATION, ET AL.,

Respondents.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

This petition presents three questions on which the circuits disagree:

1. Does a boilerplate release, induced as an integral part of a wire fraud scheme before a plaintiff learns of the fraud, immunize the defendant from RICO liability arising out of that scheme?

2. May the same release operate prospectively, absolving a RICO defendant of violations and injuries that arise after the release was signed?

3. When a party requests first-time leave to amend in opposition to a dispositive motion, and explains why the proposed claim to be added is plausible, may the court deny leave merely because the party had not yet filed a separate, formal motion for leave?

PARTIES TO THE PROCEEDING

Petitioners and Plaintiffs-Appellants below

SBFO Operator No. 3, LLC

HC Stores 2017, LLC

SBFO Operator No. 4, LLC

SBFO Operator No. 5, LLC

SBFO Operator No. 6, LLC

SBFO Operator No. 9-Wichita, LLC

Anchor Mobile Food Markets, Inc.

Respondents and Defendants-Appellees below

Onex Corporation

Onex Partners IV, LP

Anthony Munk

Matthew Ross

CORPORATE DISCLOSURE STATEMENT

Each of Petitioners SBFO Operator No. 3, LLC, HC Stores 2017, LLC, SBFO Operator No. 4, LLC, SBFO Operator No. 5, LLC, SBFO Operator No. 6, LLC, and SBFO Operator No. 9-Wichita, LLC, are limited liability companies. No publicly held corporation owns 10% or more of the stock or membership interests of any of these entities.

Petitioner Anchor Mobile Food Markets, Inc. is a not-for-profit corporation. It has no parent corporation. No publicly held corporation owns 10% or more of its stock or membership interests.

LIST OF PROCEEDINGS

U.S. Court of Appeals, Eighth Circuit

No. 23-1786

SBFO Operator No. 3, LLC, et al, *Plaintiffs-Appellants* v. Onex Corporation, et al., *Defendants - Appellees.*

Final Opinion: May 8, 2024

U.S. District Court, Eastern District of Missouri

No. 4:19-cv-03271

SBFO Operator No. 3, LLC, et al., *Plaintiffs* v. Onex Corporation, et al., *Defendants.*

Final Memorandum and Order: March 24, 2023

TABLE OF CONTENTS

TABLE OF CONTENTS – Continued

TABLE OF CONTENTS – Continued

Page

OPINIONS AND ORDERS

REHEARING ORDERS

TABLE OF AUTHORITIES

Page

CASES

TABLE OF AUTHORITIES – Continued

Page

TABLE OF AUTHORITIES – Continued

Page

TABLE OF AUTHORITIES – Continued

Page

CONSTITUTIONAL PROVISIONS

STATUTES

TABLE OF AUTHORITIES – Continued

Page

JUDICIAL RULES

REGULATIONS

OTHER AUTHORITIES

PETITION FOR A WRIT OF CERTIORARI

Petitioners SBFO Operator No. 3, LLC, HC Stores 2017, LLC, SBFO Operator No. 4, LLC, SBFO Operator No. 5, LLC, SBFO Operator No. 6, LLC, SBFO Operator No. 9-Wichita, LLC, and Anchor Mobile Food Markets, Inc., respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eighth Circuit.

INTRODUCTION

> Juries are wise, right? And they're a check both on the executive branch and prosecutors and they're a check on judges, too, right? And the framers really believed in juries. I mean, there it is in Article III. There it is in the Sixth Amendment. There it is in the Seventh Amendment. They really believed in juries, and we've lost that.
>
> – Justice Neil Gorsuch[1]

In this case, the Eighth Circuit stripped Veteran-owned small business plaintiffs (petitioners) of their Constitutional right to a jury trial against members of a private equity enterprise before full discovery on the merits even commenced. And its reasoning creates and deepens fractures in the circuits on several issues.

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[1] https://www.nytimes.com/2024/08/04/opinion/neil-gorsuch-supreme-court.html

Petitioners and respondents were "partners" in a years-long endeavor in which petitioners invested in, and operated, ten Save-A-Lot ("SAL") branded grocery stores. Respondents owned and controlled SAL. After respondents ran SAL into the ground, petitioners sued, asserting RICO as well as state law claims.

Respondents claimed immunity based on boilerplate disclaimers and release language in certain SAL transaction documents executed toward the beginning of the relationship.

But the limited discovery the district court permitted confirmed that petitioners were induced into signing the transaction documents with false statements in the transaction documents themselves, such that the purported releases should have been unenforceable.

Yet the Eighth Circuit invoked Missouri—not federal—common law to immunize respondents from petitioners' federal RICO claims, holding that petitioners "did not have a right to rely" on the misrepresentations "as a matter of law." (App.9a.)

This holding conflicts with decisions from this Court and the Second and Sixth Circuits: it frustrates the purpose of the RICO Act. It immunizes defendants from the Act's protections when they employ the very fraudulent conduct the Act is designed to remedy; particularly because, as this Court has held unanimously, "no showing of reliance is required to establish that a person has violated [RICO]." *Bridge v. Phx. Bond & Indem. Co.*, 553 U.S. 639, 649 (2008). And it frustrates the franchise regulatory scheme the FTC has promulgated for situations like this: "hidden franchises."

Further, the Eighth Circuit held that the releases immunized claims that arose *after* the releases were

executed because some of the conduct occurred before the releases were executed. This deepens another entrenched split between the Seventh, Eighth, and Eleventh Circuits on one side, holding that parties can release future violations of federal claims, while on the other side, this Court, as well as the Second, Third, Fourth, Fifth, Sixth, Ninth, and Federal Circuits, hold that federal violations cannot be released prospectively.

The district court also ignored petitioners' first (and only) request for leave to amend the complaint. Despite this Court's holding that outright refusal without explanation to permit leave to amend is itself an abuse of discretion, the Eighth Circuit affirmed, claiming petitioners requested leave only in their opposition to respondents' dispositive motion and did not file a separate, formal motion for leave to amend. But the circuits are split on this question too. Despite this Court's mandate that Rule 15 is designed "to facilitate a proper decision on the merits," not to avoid the merits based on "mere technicalities," *Foman v. Davis*, 371 U.S. 178, 181-82 (1962), the First, Fourth, Sixth, Eighth, and Eleventh Circuits all hold that leave to amend may be denied if there is no formal motion for leave to amend, while the Second, Third, Fifth, Seventh, and Ninth have all held that a formal motion is not required, particularly when it is the plaintiff's first request for leave to amend.

The Court should grant this petition, and resolve these circuit splits by reversing the Eighth Circuit's decision.

OPINIONS BELOW

The Court of Appeals' opinion is reported at 101 F.4th 551. (App.1a.) Its order denying the petition for rehearing is not reported but available at App.69a. The District Court's opinion granting summary judgment to respondents is reported at 663 F. Supp. 3d 990. (App.18a.)

JURISDICTION

The Court of Appeals issued its decision on May 8, 2024, and denied Petitioners' petition for rehearing on June 11, 2024. (App.69a.) This Court has jurisdiction under 28 U.S.C. § 1254(1)

RELEVANT STATUTORY PROVISIONS INVOLVED

18 U.S.C. § 1343
Fraud by wire, radio, or television

> Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, transmits or causes to be transmitted by means of wire, radio, or television communication in interstate or foreign commerce, any writings, signs, signals, pictures, or sounds for the purpose of executing

such scheme or artifice, shall be fined under this title or imprisoned not more than 20 years, or both.

18 U.S.C. § 1962
Prohibited Activities

. . .

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

15 U.S.C. § 45
Unfair methods of competition unlawful; prevention by Commission

(a) Declaration of unlawfulness; power to prohibit unfair practices; inapplicability to foreign trade

(1) Unfair methods of competition in or affecting commerce, and unfair or deceptive acts or practices in or affecting commerce, are hereby declared unlawful.

(2) The Commission is hereby empowered and directed to prevent persons, partnerships, or corporations . . . from using unfair methods of competition in or affecting commerce and unfair or deceptive acts or practices in or affecting commerce.

. . .

16 C.F.R. § 436.1
Definitions

. . .

(h) Franchise means any continuing commercial relationship or arrangement, whatever it may be called, in which the terms of the offer or contract specify, or the franchise seller promises or represents, orally or in writing, that:

(1) The franchisee will obtain the right to operate a business that is identified or associated with the franchisor's trademark, or to offer, sell, or distribute goods, services, or commodities that are identified or associated with the franchisor's trademark;

(2) The franchisor will exert or has authority to exert a significant degree of control over the franchisee's method of operation, or provide significant assistance in the franchisee's method of operation; and

(3) As a condition of obtaining or commencing operation of the franchise, the franchisee makes a required payment or commits to make a required payment to the franchisor or its affiliate.

. . .

(s) Required payment means all consideration that the franchisee must pay to the franchisor or an affiliate, either by contract or by practical necessity, as a condition of obtaining or commencing operation of the franchise. A required payment does not include payments for the purchase

of reasonable amounts of inventory at bona fide wholesale prices for resale or lease.

. . .

(v) Trademark includes trademarks, service marks, names, logos, and other commercial symbols.

16 C.F.R. § 436.9
Additional prohibitions

It is an unfair or deceptive act or practice in violation of Section 5 of the Federal Trade Commission Act for any franchise seller covered by part 436 to:

. . .

(h) Disclaim or require a prospective franchisee to waive reliance on any representation made in the disclosure document or in its exhibits or amendments . . . .

STATEMENT OF THE CASE

A. Factual Background

1. The seven petitioners are Veteran-owned small businesses whose founders include decorated U.S. Naval Academy graduates who volunteered for service shortly after 9/11. After active-duty combat in Iraq, and hazardous duty elsewhere, the Veterans formed the petitioner entities to provide affordable fresh food to underserved communities and to help other Veterans start businesses. (C.A. Pls. App. 023; C.A. Pls. App.384.)

Respondents are members of a multi-billion-dollar private equity enterprise. Respondents procured the nationwide grocery chain Save-a-Lot ("SAL") from nonparty SuperValu, and then controlled it. (C.A. Pls. App. 435-437.)

In this litigation, respondents have sought to portray petitioners as a private equity fund, but they were not. The handful of Veterans who founded the petitioner entities had no grocery experience, and were mostly young, fresh out of the military, and from modest means.

Petitioners borrowed and invested millions to own and operate the ten SAL-branded stores. (C.A. Pls. App. 434.) They forwent income for years to start this business. (C.A. Def. App. 348.) And, over time, SAL came to recognize petitioners as "masterful in their store operations." (C.A. Pls. App. 640.)

At all relevant times, both SAL and respondents recognized petitioners as "partners," admitting: "we were all in business together, and we were partners." (C.A. Pls. App. 408-411.)

2. SAL represented itself as a "hard discount" grocer. (C.A. Pls. App. 390-391.) Undisputedly, "hard discount" is an "understood term in the industry." (C.A. Pls. App. 442-443.)

SAL required all store Owner-Operators, including petitioners, to sign several standard-form, non-negotiable agreements (the "Transaction Documents"). One, the "License and Supply Agreement" ("LSA"), expressly states that SAL has "developed programs for operation of hard discount, limited assortment grocery stores (the 'Save-A-Lot Program' or 'Program')," and that SAL licenses the use of its intellectual property "under the

terms of the Program to operate a hard discount" store, subject to extensive control by SAL over the Owner-Operators. (C.A. Pls. App. 390-394.)

The LSA obligates SAL to sell, and the Owner-Operators like petitioners to buy, inventory at "bona fide wholesale prices," on terms SAL sets unilaterally. (C.A. Pls. App. 394.)

"Bona fide wholesale prices" ("BFWP") comes from the franchise regulatory framework. The FTC defines a franchise as an entity (regardless of how the parties characterize it) that (1) provides a trademark; (2) exercises control over/provides assistance to the operation of the business; and (3) charges a "required payment." SAL unquestionably meets the first two criteria. The third criterion is read broadly and is satisfied by inventory purchases unless such payments are for "reasonable" amounts of inventory at BFWP. (C.A. Pls. App. 394-395; 16 C.F.R. § 436.1 (h), (s), and (v).)

Because SAL unilaterally set the prices Owner-Operators were required to pay for inventory, petitioners relied on the BFWP representation as protection. (C.A. Pls. App. 396.)

3. Before acquiring SAL, respondents invested significant resources over years of due diligence and concluded that SAL was not a "hard discount" grocer, did not sell inventory to petitioners and other Owner-Operators at BFWP, (C.A. Reply Br. 16-17, 19-21; C.A. Pls. App. 442-456), and that Owner-Operators like petitioners were being duped because SAL/respondents were not "running the [hard discount] model anymore," (C.A. Reply Br. 19-21, C.A. Pls. App. 448.)

Respondents' diligence concluded that SAL required a significant turnaround, which would take years to execute, cause significant disruption to the stores, and faced long odds of succeeding. (C.A. Pls. App. 421-426.) Respondents saw an outsized return if their turnaround succeeded, but stopped investing their own capital into building out new stores to first see if their turnaround would work. (C.A. Pls. App. 466.)

Yet nobody informed petitioners. Rather, both SAL and respondents continued to induce petitioners and others to invest in new stores with various misrepresentations so that respondents could use the Owner-Operators' capital and conserve respondents.' (C.A. Pls. App. 461.)

4. After petitioners were induced to open the stores, respondents defrauded them more. Specifically, every week, petitioners ordered inventory electronically on the understanding that prices would be set at BFWP. SAL invoiced and collected payment without explaining how the prices were determined. And discovery has confirmed that respondents had caused SAL, for all periods relevant here, to secretly charge substantially in excess of BFWP. (C.A. Pls. App. 450-456, 471-472.)

5. Before too long, the SAL house of cards collapsed. Only after respondents had secured billions of dollars to launch their next multi-billion dollar investment fund, (C.A. Pls. App. 125-126), did respondents admit in 2018 that SAL had been a disaster for years—claiming now that respondents had "inherited a mess." (C.A. Pls. App. 114-115.)

With this shocking news, petitioners sought some accommodation. SAL and respondents not only refused, but they also retaliated against petitioners in violation

of petitioners' contractual rights, forcing petitioners' stores to close, causing petitioners substantial losses. (C.A. Pls. App. 47-53, 118, 472.)

B. Procedural Background

1. Petitioners sued respondents,[2] asserting RICO and state law claims, alleging:

First, that respondents and non-party SAL induced petitioners into the transactions with misrepresentations and fraudulent omissions (Compl. Counts I – VI, C.A. Def. App. 044-057);

Second, that *after* the releases were signed and the stores were open, respondents and SAL intentionally and secretly breached contractual obligations to sell inventory to Plaintiffs at BFWP (*Id.* Count VII, C.A. Def. App. 058-59); and

Third, that, *even later,* after petitioners asked for accommodation in 2018, respondents and SAL instead conspired to destroy petitioners' businesses in breach of contractual obligations (*Id.* Count VII.)

2. Respondents moved to dismiss, arguing that boilerplate language in the Transaction Documents immunized respondents from liability. Though respondents and the Eighth Circuit referenced "54 broad contractual releases and anti-reliance disclaimers" (App.4a), most of those addressed other transactions that did not go forward, and/or other representations not at issue (C.A. Pls. Br. 13-15).

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[2] SAL was not a defendant because respondents drove SAL to insolvency. (C.A. Reply Br. 2.)

The relevant Transaction Documents included:

- One LSA (*supra.* p.8) for each of petitioners' ten stores, purporting to disclaim any reliance by Owner-Operators "upon any representations or warranties of [SAL]," (C.A. Pls. App. 086); and
- One "FOERA" for each store, providing that:

> *Except for SAL's continuing obligations contained in the License Documents and this Agreement*,
>
> Retailer does hereby release and discharge
>
> SAL, its parent, subsidiaries and affiliated corporations . . . from any and all claims . . . which may result from or relate in any manner *to the Store*.

(C.A. Pls. App. 095 (emphasis added).) The defined term, "License Documents" includes the LSA. (C.A. Pls. App. 090.)

The LSA and FOERA for each "Store" were usually executed (if at all) before or around the date the store opened. (C.A. Pet. For Reh'g 5.)

3. Because the Transaction Documents were outside the complaint, the district court, *sua sponte*, converted respondents' Rule 12 motion into a Rule 56 motion and permitted only limited discovery on the validity of the purported releases, up to January 3, 2018. And no discovery from SAL. (C.A. Pls. App. 177.)

Respondents objected to only one of petitioners' document requests but nevertheless, and in violation of Fed. R. Civ. P. 34(b)(2)(C), refused to produce all

documents responsive to petitioners' other requests, and refused even to identify what categories of responsive documents they were hiding. Petitioners moved to compel. But the district court denied the motion, and petitioners' motion for reconsideration too. The district court "emphasize[d]," (App.67a), and then "re-emphasized" that "this case has not reached full merits discovery" (App.74a.)

4. Respondents then filed supplemental briefing for their still-pending motion which, they made clear, was brought pursuant to both Rule 56 (as to the releases) and Rule 12 (as to the allegations in the complaint). (C.A. Pls. App. 217.)

Petitioners' opposition included an organized, 102-page separate statement containing 512 paragraphs of facts, all with citations to the 280+ evidentiary exhibits the parties filed. (C.A. Pls. App. 014-019, 379-472.)

In petitioners' accompanying memorandum, petitioners (among other things) cited controlling law and explained how the allegations, as well as the facts and evidence petitioners cited, showed that petitioners were induced into the Transaction Documents with actionable misrepresentations, including that the "hard discount" and BFWP representations in the LSAs were false (*supra*, p.9).

While the RICO claim and the state law misrepresentation claims in the complaint were based on this theory of liability, petitioners also showed how the evidence supported a second theory of RICO liability.

Petitioners cited evidence and controlling law to explain how respondents' ongoing scheme to secretly charge prices in excess of BFWP was also a RICO

violation. (D. Ct. Doc.106-1 at 34-35 (of 45).) While the complaint expressly stated a state law conspiracy claim based on these facts (C.A. Def. App. 058-059), the complaint did not explicitly premise RICO liability on this theory. And given the posture of the case, petitioners had not yet had an opportunity to amend the complaint. (C.A. Pls. App. 372.)

Petitioners argued that the Transaction Documents could not immunize respondents from RICO liability as a matter of public policy. (C.A. Def. App. 737-738.)

Petitioners also requested leave to amend the complaint to incorporate allegations based on the facts and evidence cited in their brief and petitioners' separate statement. (C.A. Pls. App. 372 and 378.)

5. Without a hearing, the district court granted summary judgment to respondents.

The district court ignored petitioners' argument that the releases could not immunize respondents from RICO liability as a matter of public policy under federal law.

The district court also ignored petitioners' request for leave to amend the complaint.

Instead, the district court held that as a matter of Missouri state law, petitioners had no right to rely on the "hard discount" and BFWP misrepresentations.

In doing so, the district court drew substantial factual inferences in respondents'—not petitioners'—favor, believing (mistakenly) that its role was to interpret and weigh the evidence in consideration of the "overall record" on summary judgment. (*See e.g.* App.33a, 42a, 43a.)

With respect to the "hard discount" grocer misrepresentation, the district court held that the representation was "puffery" (App. 41a), despite the facts that "hard discount" was a material term in the LSA, that it undisputedly had an "understood" meaning in the industry, it was verifiably false (C.A. Reply Br. 17), and that even respondents had concluded internally that Owner-Operators like petitioners did not get what they signed up for because SAL was no longer running the "hard discount" model (*supra*, p.9).

With respect to the BFWP misrepresentation, the district court improperly drew disputed factual inferences from the incomplete discovery record in respondents' favor, and relied on another district court's decision—that no party cited—which had been abrogated more than a decade earlier.[3]

Further, the district court acknowledged that under controlling state law, "[a] party may not, *by disclaimer or otherwise*, contractually exclude liability for fraud in

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[3] The district court (at C.A. Pls. App. 317) cited *Coyne's & Co., Inc. v. Enesco, LLC*, CIV.07-4095, 2007 WL 3023345 (D. Minn. Oct. 12, 2007) which initially thought that "even a 35-50% mark-up is not a franchise fee," but the Eighth Circuit then instructed that "[t]he question of whether the mark-up is a bona fide wholesale price or an indirect franchise fee is a fact-specific inquiry." *Coyne's v. Enesco,* 553 F.3d 1128, 1132 (8th Cir. 2009). Then, after further discovery, the *Coyne's* district court determined that there was a "genuine issue of material fact" on the issue; noting that "[m]inimum volume sales requirements can constitute an indirect franchise fee if the prices exceeded bona fide wholesale prices." *Coyne's v. Enesco,* No.07-4095, 2010 U.S. Dist. LEXIS 83630, at *49-50 (D. Minn. Aug. 16, 2010).

inducing a contract." (App. 36a (*citing Hess v. Chase Manhattan Bank, USA, N.A.,* 220 S.W.3d 758, 767 (Mo. 2007)) (emphasis added).) But it nevertheless ruled, citing no authority, that the "no reliance" disclaimers in the Transaction Documents *did* immunize respondents from liability for fraud in inducing the contract. (App.48a-49a.)

The district court found not only that the releases were enforceable, but it then went further: analyzing and then entering summary judgment on the merits of all of petitioners' claims, despite respondents not even moving for summary judgment on the merits of the claims, and the district court's prior rulings refusing to permit discovery on the merits of those claims.

6. The Eighth Circuit affirmed.

Like the district court, the Eighth Circuit ignored all evidence to the contrary to hold that the "hard discount" representation in the LSA was "puffery," on which petitioners had no right to rely. (App.9a)

With respect to both the "hard discount" and BFWP representations, the Eighth Circuit emphasized petitioners' "extraordinary," "full-scale, boots-on-the ground investigation," with professional advisors, to perform due diligence on SAL. (App.10a-12a.) The law encourages diligence like this such that, when a party does *not* conduct suitable diligence, he will not be heard to complain when the truth would have been discovered through ordinary diligence. (C.A. Pet. For Reh'g 16-18.)

But the Eighth Circuit flipped this law on its head; penalizing petitioners for their "extraordinary" efforts. The Eighth Circuit drew the factual inference in respondents' favor that petitioners "had access to

the contours of Save-A-Lot's hard discount business model . . . and method for charging bona fide wholesale prices." (App.10a.) It also cherry-picked facts such as "after opening their third store, [petitioners] saw deflated financial results." (App.12a.) But that did not disprove the BFWP or "hard discount" grocer representations. Even if it did, it could not invalidate the releases as to (at the very least) the first three stores.[4] The Eighth Circuit also noted that in May 2017, petitioners learned that SuperValu, which owned SAL *before* respondents, had "sucked the life out of" SAL. (App.12a.) But the Eighth Circuit ignored that petitioners had already committed to opening all stores by then, and ignored other parts of the same document where petitioners reported that they were "excited about the future of SAL" because of the promising pitch respondents had just delivered. (C.A. Reply Br. 8-9.)

Critically, the Eighth Circuit cited no evidence (there is none) that, despite petitioners' "extraordinary" diligence, they ever discovered the truth behind the "hard discount" and/or BFWP misrepresentations before entering into the Transaction Documents.[5] And because petitioners undisputedly conducted diligence, it was for the jury to decide the reasonableness of

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[4] Indeed, the Eighth Circuit's approach created a factual line-drawing problem: precisely when should petitioners have known enough such that they lost their right to rely? That's another reason why this should have gone to the jury, or—at the very least—proceeded to full discovery. (C.A. Pet. For Reh'g 13-14.)

[5] Missouri law entitles one to rely on a representation unless the party's investigation "conclusively" determines the representation is false. *See Renaissance Leasing, LLC v. Vermeer Mfg. Co.,* 322 S.W.3d 112, 135 (Mo. 2010)

petitioners' reliance on these misrepresentations for the state law claims. *Hess*, 220 S.W.3d at 765-767; *Tietjens v. Gen. Motors Corp.*, 418 S.W.2d 75, 83 (Mo. 1967). But the Eighth Circuit stripped petitioners of that Constitutional right.

The Eighth Circuit also ignored the fiduciary relationship between petitioners and respondents/SAL, which had significant relevance to the "right to rely" inquiry.

After holding that the boilerplate releases were valid as a matter of Missouri state law, the Eighth Circuit held that the releases "extinguishe[d]" all of petitioners' claims; even the ones that were unrelated to the misrepresentations and arose years after the releases were signed; and even those grounded in "SAL's continuing obligations contained in the License Documents," which the Transaction Documents expressly exclude from the scope of the purported release. (*Supra*, p.12.)

With respect to the RICO claims, the Eighth Circuit characterized those claims as being based on SAL "fraudulently promising to charge bona fide wholesale prices and fraudulently representing certain aspects of its business to induce their investment." (App.14a.) With respect to this aspect of the RICO claims, the Eighth Circuit held that "the alleged RICO conduct occurred before the Owner-Operators executed the releases, so the claims are barred." (*Id.*) It ignored the evidence and argument petitioners marshalled showing that every week after the stores were open (and thus after the releases were executed), petitioners made inventory purchases, and respondents kept secretly charging petitioners substantially

in excess of BFWP. (C.A. Pls. Br. 51-52; C.A. Reply Br. 24.)

The Eighth Circuit claimed it was refusing to "address the enforceability of a release that is an integral part of an alleged RICO scheme or that immunized future RICO conduct." (App.15a.) But by enforcing the releases to extinguish all of petitioners' RICO claims, that is what it did.

The Eighth Circuit also affirmed the district court's unexplained refusal to permit petitioners to amend the complaint for the first time. Despite petitioners citing actual evidence in the record and authority to explain how the ongoing scheme to secretly charge petitioners higher than BFWP established RICO liability (D. Ct. Doc. 106-1 at 34-35 (of 45); C.A. Pls. Br. 60-62), the Eighth Circuit nevertheless ruled (erroneously) that leave to amend was properly denied.

7. Petitioners petitioned for rehearing.

Petitioners pointed out that, in "extinguish[ing]" all of petitioners' claims based on the releases, the Eighth Circuit overlooked claims (including the RICO claims) that even respondents conceded could not have been covered by the releases due to public policy and the plain language of the releases. (C.A. Pet. for Reh'g 3-11.)

Petitioners also pointed out how the Eighth Circuit's refusal to permit petitioners leave to amend the complaint was directly contrary to this Court's prior jurisprudence. (*Id.* 21-24.)

But the Eighth Circuit summarily denied the petition. (App.69a.)

REASONS FOR GRANTING THE PETITION

A. The Court Should Resolve When Contractual Releases of RICO Claims Are Enforceable

1. The Circuits Are Split on this Question

The Eighth Circuit's decision to enforce the releases in the SAL Transaction Documents to extinguish petitioners' RICO claims based on state law justifiable reliance principles is squarely at odds with decisions from this Court, as well as the Second and Sixth Circuits.[6]

In *Turkish v. Kasenetz*, 27 F.3d 23 (2d Cir. 1994), for example, the Second Circuit refused to enforce a provision in a settlement agreement purporting to abrogate the plaintiffs' RICO claim because: "We could not uphold any provision intended to insulate parties from their own fraud. It is well settled that parties cannot use contractual limitation of liability clauses to shield themselves from liability for their own fraudulent conduct." *Id.* 27-28. The defendants pointed to other provisions of the same agreement stipulating that parties had full access to the relevant books and records for their own investigation, but the Second Circuit rejected the argument because plaintiffs were relying on representations in the document itself. It is the same here: petitioners were relying on the false "hard discount" and BFWP representations in the Transaction Documents. Yet the Eighth Circuit departed from the Second Circuit by holding that

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[6] It contradicts Missouri law too. (*Supra*, p.16-17)

petitioners had no right to rely on those contractual terms.

Of course, the Eighth Circuit pinning the enforceability of purported releases on the "right to rely" in a RICO case blatantly contradicts the RICO Act, as this Court has held unanimously that "no showing of reliance is required to establish that a person has violated [RICO]." *Bridge*, 553 U.S. at 649.

This Court was unambiguous in *Bridge*: "There is simply no reason to believe that Congress would have defined 'racketeering activity' to include acts indictable under the mail and wire fraud statutes, if it intended fraud-related acts to be predicate acts under RICO only when those acts would have been actionable under the common law." *Id.* 652 (quotation omitted).

Thus the Eighth Circuit extinguishing petitioners' RICO claims by inserting the common law notion of justifiable reliance as an obstacle to relief was clearly wrong as a matter of law, undermining the enforcement scheme Congress enacted.

Yet the Eighth Circuit erred not only by improperly erecting the justifiable reliance obstacle, the Eighth Circuit also decided the issue in a way that directly contradicts both the Second (*supra*) and Sixth Circuits.

In *Street v. J.C. Bradford & Co.*, 886 F.2d 1472 (6th Cir. 1989), the Sixth Circuit held that, under federal common law, a release signed after a dispute arose would not defeat the plaintiffs' federal claims as a matter of law because of the fiduciary relationship between the parties. It held that "at a minimum" federal law adopts the Restatement of Contracts 2d § 173, which voids contracts between fiduciaries unless both parties are on "equal footing with full understanding

of [their] legal rights and of all relevant facts." *Id.* 1481-82. In *Street* the court sent the case to the jury because there was evidence this standard was not met.

Unlike the Sixth Circuit, the Eighth Circuit gave no weight to how this federal common law affected the purported releases executed by admitted "partners": petitioners and SAL/respondents (*supra*, p.8); and deprived petitioners of their Constitutional right to a jury.

Petitioners would have prevailed had they been in the Second or Sixth Circuits but did not even get to full merits discovery because they were in the Eighth.

2. Resolving This Question Is Important

The Eighth Circuit's decision draws a roadmap for fraudsters and others to immunize themselves from statutory enforcement schemes Congress and regulatory agencies have established.

a. RICO's private-enforcement mechanism serves an important public policy function: to "bring to bear the pressure of 'private attorneys general' on a serious national problem for which public prosecutorial resources are deemed inadequate." *Agency Holding Corp. v. Malley-Duff & Assocs., Inc.*, 483 U.S. 143, 151 (1987). *See also Sedima, S.P.R.L. v. Imrex Co.*, 473 U.S. 479, 498-99 (1985). RICO's "pattern" requirement ensures that RICO claims do not lie unless there is a broader scope that serves the public interest—the threat of continuing criminal activity—including, in cases like this one, where "it is shown that the predicates are a regular way of conducting defendant's ongoing legitimate business." *H.J. Inc. v. Nw.*

Bell Tel. Co., 492 U.S. 229, 243 (1989); *see also Cedric Kushner Promotions, Ltd. v. King*, 533 U.S. 158, 164 (2001).

Here, respondents defrauded hundreds of small business owners across the country out of tens if not hundreds of millions of dollars over the course of several years by inducing them into opening SAL stores and/or secretly charging them in excess of BFWP. This is exactly the kind of wide-spread pattern of fraudulent conduct RICO proscribes.[7]

But the Eighth Circuit's published opinion defeats this Congressional act. All a fraudster must do to extricate himself from this Congressionally-enacted, important public policy enforcement mechanism is to include general, boilerplate release language in standard forms that the victims sign as part of the scam, before they even know they have been scammed or injured.

That cannot be. But if this Court does not act, that will be controlling law for the millions of Americans who live in the seven states comprising the Eighth Circuit, and potentially millions more in other circuits that have not yet considered the question without this Court's guidance.

b. This danger is particularly acute in "hidden franchises" like this one.

The franchise business model is an important pathway for everyday Americans to start and own their own small businesses. "The franchise business

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[7] Notably, respondents have conducted other widespread unlawful schemes too. *In re Jeld-Wen*, 2021 U.S. Dist. LEXIS 59767 (E.D. Va. Mar. 29, 2021)

model is growing rapidly. A 2017 Census report found 498,328 franchise establishments nationwide, with over $1.7 trillion in revenue. The International Franchise Association projected a 60% increase by 2024, estimating more than 820,000 franchised establishments nationwide."[8] But franchisees' economic position typically renders them particularly susceptible to exploitation. A recent study by the FTC noted that three of the top ten concerns for franchisees were franchisor misrepresentations and deception, retaliation, and private equity takeovers.[9]

In Section 5 of the FTC Act, Congress "declared unlawful" "[u]nfair methods of competition in or affecting commerce, and unfair or deceptive acts or practices in or affecting commerce," and "empowered" and "directed" the FTC to prevent such practices. 15 U.S.C. § 45(a)(1). Following this Congressional mandate, the FTC has established a franchise regulatory framework. *See e.g.* 16 C.F.R. §§ 436 & 437.

For obvious reasons, the franchise regulatory scheme does not apply only to companies that call themselves a "franchise;" it applies to all that meet the regulatory definition. (*Supra*, p.9.) SAL's false representation that it sold inventory at BFWP was designed to avoid the franchise regulatory scheme because inventory sold at BFWP does not constitute a "required payment" under the third prong of that definition.

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[8]https://www.ftc.gov/system/files/ftc_gov/pdf/Franchise-Issue-Spotlight.pdf

[9] *Id.*

But by surreptitiously charging substantially in excess of BFWP, and requiring petitioners and other Owner-Operators to buy inventory from them at the inflated prices SAL/respondents set, the resulting padded margins satisfied the "required payment" prong of the definition. 16 C.F.R. 436.1 (s). And because SAL undisputedly met the other two prongs of the definition, (*supra*, p.9), SAL should have been subject to regulation as a franchise.

Notably, FTC Regulations expressly prohibit franchisors from requiring a prospective franchisee to waive reliance on representations made in required disclosure documents. *See* 16 C.F.R. § 436.9 (h).

Further, the secretly padded margins constituted SAL/respondents clandestinely "skimming off the top;" defrauding and injuring petitioners and hundreds of mom and pop Owner-Operators across the country. A straightforward RICO violation.

But the Eighth Circuit not only permitted SAL/respondents to evade RICO liability and the franchise regulatory framework, the Eighth Circuit illustrated how easy it is to do: just put a general release in the transaction documents all franchisees are required to sign at the beginning of the relationship.

3. The Eighth Circuit's Decision Is Wrong

The Eighth Circuit's decision must be wrong. And it is.

Federal—not state—law applies to determine whether a release defeats a federal claim, for "a federally declared standard could be defeated if states were permitted to have the final say as to what defenses could and could not be properly interposed to suits

under the Act. Moreover, only if federal law controls can the federal Act be given that uniform application throughout the country essential to effectuate its purposes." *Dice v. Akron, C. & Y. R. Co.*, 342 U.S. 359, 361 (1952)

And federal law has long been clear that releases that contravene public policy are not enforceable. *See e.g. Brooklyn Sav. Bank v. O'Neil*, 324 U.S. 697, 704 (1945) ("It has been held in this and other courts that a statutory right conferred on a private party, but affecting the public interest, may not be waived or released if such waiver or release contravenes the statutory policy."); *Radio Corp. of Am. v. Raytheon Mfg. Co.*, 296 U.S. 459, 462 (1935) ("A release under seal is a good defense at law, unless its effect is overcome by new matter in avoidance. This will happen, for illustration, when it is so much a part of an illegal transaction as to be void in its inception."); *Davis v. Blige*, 505 F.3d 90, 106 (2d Cir. 2007) (copyright); *Graham Oil Co. v. ARCO Prods. Co.*, 43 F.3d 1244, 1247-48 (9th Cir. 1994) (franchise agreements); *Redel's, Inc. v. Gen. Elec. Co.*, 498 F.2d 95, 99 (5th Cir. 1974) ("A right conferred on a private party by federal statute, but granted in the public interest to effectuate legislative policy, may not be released if the legislative policy would be contravened thereby.").

Both the Third and Fourth Circuits have recently invalidated arbitration clauses that deprived parties of their ability to "effectively vindicate" their RICO claims. *See Gibbs v. Haynes Invs., LLC*, 967 F.3d 332, 344 (4th Cir. 2020) ("the effect of such provisions is to thereby make unavailable to the borrowers the effective vindication of federal statutory protections and

remedies"); *Williams v. Medley Opportunity Fund II, LP*, 965 F.3d 229, 242 (3d Cir. 2020).

And, as noted above, *Bridge* compels the conclusion that the common law notion of "justifiable reliance" may not be wielded to deny a plaintiff relief under RICO.

Allowing fraudsters to evade the RICO Act's private enforcement mechanism with boilerplate release language in a document integral to the fraudulent scheme, executed before the victim even knows of the fraud or that he has been injured, frustrates the RICO Act. The purported releases are unenforceable.

4. This Case Is an Ideal Vehicle

This case is an ideal vehicle for resolving this question as it is squarely at issue and potentially dispositive of petitioners' claims. Should the Court deny this petition, all of petitioners' claims are extinguished. Should the Court grant and reverse, petitioners may then pursue discovery on the merits for the first time in this case, which has been pending for nearly five years.

B. The Court Should Resolve Whether Parties May Release Federal Statutory Violations Prospectively If Some of the Conduct Commenced Before the Releases Were Executed

As a reminder, the Eighth Circuit extinguished all of petitioners' claims—those arising before the releases were executed, *and* those arising after the releases were executed—because some of the fraudulent representations were made before the releases

were executed. (App.14a.)[10] This aspect of the decision was also wrong and further entrenched another circuit split. It should be reversed.

1. The Circuits Are Split on this Question

There is an entrenched split in which the Seventh, Eighth and Eleventh Circuits have all held that parties may prospectively release future federal statutory violations, which contradict decisions from this Court, the Second, Third, Fourth, Fifth, Sixth, Ninth and Federal Circuits.

a. In holding that all of petitioners' claims arising after the releases were executed were prospectively released by the SAL Transaction Documents, the Eighth Circuit cited to the Seventh Circuit's decision in *MCM Partners v. Andrews-Bartlett & Assocs.*, 161 F.3d 443, 448 (7th Cir. 1998). There, the plaintiff had previously filed suit alleging an antitrust conspiracy commencing on April 17, 1992. The suit was settled, releasing the defendants from all claims arising before April 25, 1992. But plaintiffs filed another lawsuit later claiming that the anti-competitive conspiracy was continuing, and that the conspirators refused to deal with the plaintiff from July 1992 through October 1994 based on continued adherence to the April 17, 1992 anti-competitive agreement. The Seventh Circuit rejected this argument, reasoning that "this claim is

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[10] Incredibly, the Eighth Circuit used the releases to "extinguish" even those claims unrelated to the fraudulent representations such as petitioners' claims arising out of respondents' 2018 retaliation against petitioners (*supra*, p.10-11) that even respondents conceded were not subject to the release (C.A. Reply. Br. 1 & 24).

clearly based on pre-April 25, 1992 conduct and, as such, is expressly barred by the Release." *Id.* 448.

And just last year, the Eleventh Circuit relied on *MCM Partners* and expressly held, in the context of a class action settlement, that prospective releases of antitrust claims do not violate public policy: "releases of future claims are an important part of many settlement agreements." *In re Blue Cross Blue Shield Antitrust Litig. MDL* 2406, 85 F.4th 1070, 1088 (11th Cir. 2023).

b. By contrast, this Court and the majority of the Circuits have taken the diametrically opposite view. *See Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth*, 473 U.S. 614, 637 n.19 (1985) (holding that when a contract acts "as a prospective waiver of a party's right to pursue statutory remedies for antitrust violations, we would have little hesitation in condemning the agreement as against public policy"); *Lawlor v. Nat'l Screen Serv. Corp.*, 349 U.S. 322, 328-29 (1955) ("whether the defendants' conduct be regarded as a series of individual torts or as one continuing tort, the 1943 judgment [pursuant to settlement agreement] does not constitute a bar to the instant suit. . . . Acceptance of the respondents' novel contention would in effect confer on them a partial immunity from civil liability for future violations. Such a result is consistent with neither the antitrust laws nor the doctrine of res judicata."); *Gibbs,* 967 at 344 ("the effect of such provisions is to thereby make unavailable to the borrowers the effective vindication of federal statutory protections and remedies, the arbitration agreements at issue amount to a prospective waiver. Consequently, the entire arbitration agreement is unenforceable."); *Williams*, 965 F.3d at 242

("the arbitration agreement contains a forbidden prospective waiver of statutory rights")[11]; *Aspex Eyewear, Inc. v. Marchon Eyewear, Inc.*, 672 F.3d 1335, 1343 (Fed. Cir. 2012) ("A substantially single course of activity may continue through the life of a first suit and beyond. The basic claim-preclusion result is clear: a new claim or cause of action is created as the conduct continues."); *Watson Carpet & Floor Covering, Inc. v. Mohawk Indus.*, 648 F.3d 452, 461 (6th Cir. 2011) ("We hold that a mid-conspiracy settlement does not preclude liability for a coconspirator's subsequent actions that further the conspiracy."); *Int'l Techs. Consultants v. Pilkington PLC*, 137 F.3d 1382, 1388 (9th Cir. 1998) ("it cannot be emphasized too strongly that the continuation of conduct under attack in a prior antitrust suit is generally held to give rise to a new cause of action. . . . By winning the first action, the defendants did not acquire immunity in perpetuity from the antitrust laws." (cleaned up)); *Bingham v. Zolt*, 66 F.3d 553, 561 (2d Cir. 1995) ("each illegal diversion constituted a new and independent legally cognizable injury to the estate. As a consequence, with each diversion a new civil RICO cause of action accrued"); *Redel's,* 498 F.2d at 99 ("The prospective application of a general release to bar private antitrust actions arising from subsequent violations is clearly against public policy.").

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[11] *See also Toledo Mack Sales & Serv. v. Mack Trucks, Inc.*, 530 F.3d 204, 218 n.9 (3d Cir. 2008) ("The release does not apply to claims for antitrust damages based on events which occur after the execution of the release" because "parties may not waive liability for future antitrust violations").

2. Resolving this Question Is Important

Resolving this question is important for the same reasons stated above. (*Supra*, § A.2.)

3. The Eighth Circuit's Decision Is Wrong

For the same reasons that this Court, and the Second, Third, Fourth, Fifth, Sixth, Ninth and Federal Circuits have all held, it cannot be the case that a party can prospectively immunize themselves from violations of statutory schemes like RICO that serve an important public policy purpose. One cannot contract out of a Congressional remedial scheme when doing so frustrates the purpose of the Act.

On summary judgment, petitioners alleged post-release unlawful conduct with evidentiary support. Several times per week after the purported effectiveness of each of the store-specific FOERAs, petitioners contracted to buy inventory for each corresponding store, at prices represented to be BFWP. Respondents set those prices weekly (C.A. Pls. App. 445), and always in excess of BFWP (C.A. Pls. Br. 43-44, 51-52, 60-61; C.A. Reply Br. 20). Each sale in excess of BFWP is another RICO violation that caused injury to petitioners after signing the purported release.

It is particularly egregious in this case for the Eighth Circuit to have held that petitioners' RICO claims are barred because the purported releases here expressly exclude from the scope of the release claims that relate to "SAL's continuing obligations contained in the License Documents and this Agreement," such as providing a "hard discount" grocer program and charging BFWP. (*Supra*, p.12.) This carveout is obvi-

ously required because if a contract can be breached with impunity going forward, it's no contract.

Thus, the purported releases did not release any aspect of the fraudulent schemes underlying petitioners' RICO claims (the fraudulent inducement, or the subsequent BFWP violations) no matter when they occurred. And certainly not those violations that occurred after the releases were signed.

4. This Case Is an Ideal Vehicle

Again, this case is an ideal vehicle because it squarely presents the issue: if the Court denies this petition, it is extinguishing petitioners' claims. If the Court grants and reverses, petitioners can pursue discovery on the merits.

C. The Court Should Resolve Whether Denial of First-time Leave to Amend to Add a Plausible Claim Is Appropriate Merely Because a Plaintiff Has Not Yet Filed a Separate Formal Motion Seeking Leave

Fed. R. Civ. P. 15(a)(2) provides that courts "should freely give leave" to amend "when justice so requires"; a "mandate," this Court says, that "is to be heeded," for the Rules "reject the approach that pleading is a game of skill in which one misstep by counsel may be decisive to the outcome." *Foman*, 371 U.S. at 182. The Rules are designed "to facilitate a proper decision on the merits," not to avoid the merits based on "mere technicalities. *Id.* 181-82. But the Courts of Appeals have divergent views on whether to heed this "mandate."

1. The Circuits Are Spilt on this Question

a. The First, Fourth, Sixth, Eighth, and Eleventh Circuits believe that leave to amend is properly denied and the case dismissed with prejudice—regardless of the underlying merits—if the technicalities of a formal motion and/or a proposed amended complaint is not filed immediately with the request for leave to amend. *See e.g. Advance Tr. & Life Escrow Servs., LTA v. Protective Life Ins. Co.*, 93 F.4th 1315, 1338 (11th Cir. 2024) ("the plaintiff did not file a motion as required by our precedent and Rule 7(b), but attached a proposed [amended complaint]. . . . Because Johnson embedded his request in his opposition brief and did not file a motion for leave to amend, Johnson's request for leave to amend was not properly before the district court."); *Employees' Ret. Sys. v. MacroGenics, Inc.*, 61 F.4th 369, 394 (4th Cir. 2023) ("Plaintiffs failed to file a motion for leave to amend before the district court, only making their request in a footnote in response to Defendants' motion to dismiss, and did not present the district court with a proposed amended complaint."); *City of Miami Fire Fighters' & Police Officers' Ret. Tr. v. CVS Health Corp.*, 46 F.4th 22, 36 (1st Cir. 2022) (affirming denial of leave to amend because "plaintiffs simply included in their memorandum opposing the motion to dismiss a brief note asking for a conditional opportunity to move for leave to amend, 'if the Court grants any portion of the motion to dismiss.' No motion or argument was advanced in support of this request. Nor was any proposed amendment filed. The district court treated this 'contingent' request as holding 'no legal significance.'"); *Crosby v. Twitter, Inc.*, 921 F.3d 617, 627 (6th Cir. 2019) ("Ordinarily, if a district court grants

a defendant's 12(b)(6) motion, the court will dismiss the claim without prejudice to give parties an opportunity to fix their pleading defects. . . But this protection is not absolute. There are important procedural requirements to follow. And Plaintiffs skipped a critical one: a formal motion to amend.").

b. The Tenth Circuit has cases going both ways. *See Carraway v. State Farm Fire & Cas. Co.*, No. 22-1370, 2023 U.S. App. LEXIS 22004, at *23-24 (10th Cir. Aug. 22, 2023) ("Here, the district court did not explain its decision to dismiss with prejudice beyond reference to Mr. Carraway's failure to amend according to the Local Rules. . . . Under the circumstances, and absent further explanation or justification from the district court, this is not enough to support a dismissal of Mr. Caraway's complaint *with prejudice*" (emphasis original)); *Brooks v. Mentor Worldwide LLC*, 985 F.3d 1272, 1283 (10th Cir. 2021) ("A court need not grant leave to amend when a party fails to file a formal motion.").

c. The Second, Third, Fifth, Seventh and Ninth Circuits, however, follow this Court's mandate and do not stand on such mere technicalities; particularly if the complaint has not been amended before. *See e.g. Thomas v. Chevron U.S.A., Inc.*, 832 F.3d 586, 590 (5th Cir. 2016) ("to take advantage of the liberal amendment rules as outlined in the Federal Rules of Civil Procedure, the party requesting amendment, even absent a formal motion, need only set forth with particularity the grounds for the amendment and the relief sought"); *Loreley Fin. (Jersey) No. 3 Ltd. v. Wells Fargo Sec., LLC*, 797 F.3d 160, 190-91 (2d Cir. 2015) ("A lack of a formal motion is not a sufficient ground for a district court to dismiss without leave to amend. . . . [The dis-

trict] court denied Plaintiffs the opportunity to demonstrate that their claims deserve to be decided on the merits, and Plaintiffs should be given that opportunity now."); *Runnion v. Girl Scouts of Greater Chi. & Nw. Ind.*, 786 F.3d 510, 520 (7th Cir. 2015) ("The federal rule policy of deciding cases on the basis of the substantive rights involved rather than on technicalities requires that plaintiff be given every opportunity to cure a formal defect in his pleading. This is true even though the court doubts that plaintiff will be able to overcome the defects in his initial pleading. Amendment should be refused only if it appears to a certainty that plaintiff cannot state a claim. The better practice is to allow at least one amendment regardless of how unpromising the initial pleading appears because except in unusual circumstances it is unlikely that the court will be able to determine conclusively on the face of a defective pleading whether plaintiff actually can state a claim."); *Estate of Lagano v. Bergen Cnty. Prosecutor's Office*, 769 F.3d 850, 861 (3d Cir. 2014) ("We have held that whether or not a plaintiff seeks leave to amend, a district court considering a 12(b)(6) dismissal must permit a curative amendment unless such an amendment would be inequitable or futile."); *United States v. $11,500.00 in United States Currency*, 710 F.3d 1006, 1012 (9th Cir. 2013) (reversing the district court because "the claim was dismissed without giving him an adequate opportunity to amend. In the dismissal order, the district court accurately noted that Guerrero did not seek leave to amend his claim. But the district court could have offered that opportunity and did not do so.").

2. Resolving this Question Is Important

The proper standard for leave to amend is self-evidently a critical issue facing all courts nationwide and the Circuits are (literally and figuratively) all over the map on how to proceed.

Rule 15 "mandates" granting leave to amend when "justice so requires," and "justice" should not mean different things depending on geography. But that is the import of the current state of the law from coast to coast. While this Court has provided some contours of what "justice" means in *Forman*, the Circuits' divergence calls out for further guidance.

The Circuits' fractured approach is particularly problematic for two pragmatic reasons: (1) practitioners routinely seek leave to amend informally in response to a dispositive motion before filing a formal motion for leave to amend given longstanding understanding and direction from this Court that leave to amend should be granted "liberally"; and (2) modern legal practice spans multiple jurisdictions.

Local rules and practice cannot override the liberal approach to amending pleadings that Rule 15 mandates, *see Runnion*, 786 F.3d at 523 n.3, and parties and their attorneys with nationwide businesses and practices need uniform application of the Federal Rules whether they walk into a federal courthouse in Fairbanks or Fort Lauderdale or somewhere in between, particularly when the Rule determines whether a meritorious claim dies or survives at the discretion of a single judge.

3. The Eighth Circuit's Decision Is Wrong

This Court's precedent is clear: under Rule 15 (a), leave to amend "shall be freely given when justice so requires," and "this mandate is to be heeded." *Foman*, 371 U.S. at 182.

"If the underlying facts or circumstances relied upon by a plaintiff may be a proper subject of relief, he ought to be afforded an opportunity to test his claim on the merits." *Id.*

The District Court flat-out ignoring petitioners' request for leave to amend was itself an abuse of discretion. *Id.*[12]

And, critically, both petitioners' opposition in the district court (*supra*, p.13) and briefing in the Eighth Circuit (C.A. Pls. Br. 17-18, 51-52, 60-62) explained, with citation to legal authority and evidence in the record, how the Complaint could be amended to add another legal theory of relief: RICO claims based on the BFWP facts already alleged in petitioners' complaint. It cannot be "justice" to deny petitioners leave to amend on these facts.

Indeed, in *Johnson v. City of Shelby*, 574 U.S. 10 (2014) this Court summarily reversed the Fifth Circuit in a case precisely like this one. There, the petitioners had alleged sufficient facts for relief, but invoked the wrong legal theory. The Fifth Circuit granted summary judgment against the petitioners, holding that failure to invoke the right legal theory

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[12] And if the district court denied leave to amend based on futility, (C.A. Defs. Br. 61), because it entered summary judgment on the merits of petitioners' claims, that would require de novo review, which the Eighth Circuit did not do.

was "not a mere pleading formality," but "serves a notice function." *Id.* 11. In summarily reversing, this Court instructed that petitioners be allowed to add the proper legal claim to their complaint because a plaintiff needs to state only sufficient *facts* to support relief. *Id.* 12 (rejecting "punctilious" "theory of the pleadings" standard and ordering leave to amend be granted to add legal theory).

The Court should do the same here too.

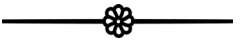
4. This Case Is an Ideal Vehicle

This case is an ideal vehicle to do precisely what this Court did in *Johnson*, potentially even by summarily reversing on this issue alone, or as part of a broader effort to address the entrenched split among the circuits concerning the Rule 15 standard for leave to amend.

Should the Court reverse on this issue alone, petitioners will be entitled to add the RICO claim to their complaint based on the BFWP pricing scheme. Then the district court (which ignored the argument when it was before that court) could determine whether the purported releases in the Transaction Documents apply to the claim (the BFWP pricing representation is one of the "continuing obligations contained in the License Documents" (*supra*, p.12)), and, even if so, whether enforcing the release to prospectively extinguish petitioners' RICO claims would violate public policy (also ignored by the district court and expressly not decided by the Eighth Circuit).

Or, of course, given the circuit splits noted above in §§ A and B, and the importance of all issues, the Court could also grant certiorari on all of the issues

and resolve the entrenched circuit splits for guidance and uniformity in the circuits on these important issues going forward.



CONCLUSION

For the foregoing reasons, the Court should grant this petition for a writ of certiorari.

Respectfully submitted,

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