NO. 24-273

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

REPLY BRIEF IN SUPPORT OF CERTIORARI

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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.

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Respondents' opposition does not seriously contest that the circuits are split on the questions presented, and does not even attempt to dispute the importance of these questions. Critically, respondents concede that controlling law in the Eighth Circuit now provides that a party may immunize itself from Congressional acts —even prospectively—merely by inserting boilerplate disclaimer/release language into adhesion contracts the victim signs before learning of the unlawful scheme. This binding precedent on millions of Americans should not stand.

So, respondents attempt to deflect attention from these important federal questions by arguing the facts of petitioners' state law claims. But petitioners' principal claims have always been their RICO claims (Counts I & II in the Complaint). Petitioners argued every step of the way that federal and Missouri law invalidate the releases as a matter of public policy. (C.A. Def. App. 737-738; C.A. Pls. Br. 51-52; C.A. Pet. For Reh'g ECF 17-18; Pet.14.) And it is undisputed that the courts below disposed of all of petitioners' claims "as a matter of law," without a jury trial, before full discovery on the merits even commenced.

This case cries out for review not only because the Eighth Circuit's decision was egregiously wrong, but because its reasoning creates and deepens fractures in the circuits on questions of national importance.

First, on the question of whether boilerplate releases induced by a fraudulent scheme are enforce-

able, it is undisputed that the Eighth Circuit's decision here conflicts with cases from this Court, and the Second and Sixth Circuits. Indeed, respondents even highlight another circuit split on a subsidiary threshold point: whether state or federal law decides if a contract abrogates a federal remedial act. Because the Eighth Circuit's approach is an outlier and wrong, the Court should grant review.

Second, respondents concede that the Eighth Circuit's decision here contradicts this Court's decision in *Lawlor*, and holdings from the Third, Fifth, and Ninth Circuits as to whether a party may prospectively release claims for future violations of federal claims. Respondents' opposition highlights how the Seventh Circuit's erroneous and contrary decision in *MCM Partners* continues to metastasize as the Eleventh Circuit just last year and now the Eighth Circuit rely on and extend its holding, further entrenching the circuit split on this important question in real time.

Third, respondents concede that the circuits are figuratively and literally all over the map when it comes to following this Court's "mandate" in *Foman* that Rule 15 is designed to facilitate a decision on the merits rather than on "mere technicalities." Respondents do not even acknowledge this Court's decisions in *Foman,* or *Johnson*, in which this Court summarily reversed the Fifth Circuit, and instructed that leave to amend be granted in a case just like this one. Rather, respondents insist that local practice can erect technicalities thwarting amendment that the text and spirit of Rule 15 do not.

ARGUMENT

I. Respondents Engaged in a Wire Fraud Scheme and the Eighth Circuit Did Not Hold Otherwise.

1. Respondents' lead argument asserts that because the lower courts determined there was no *common law* fraud, there can be no *wire* fraud. (Opp.8-9.) That does not follow.

As petitioners noted (and respondents concede), this Court held unanimously in *Bridge v. Phx. Bond & Indem. Co.*, 553 U.S. 639 (2008), that civil RICO liability for a wire fraud scheme is not cabined by only those acts "actionable under the common law." (Pet.21.)

Mail and wire fraud is far broader. *See e.g.* 18 U.S.C. § 1343 ("any scheme or artifice to defraud"); *Carpenter v. United States*, 484 U.S. 19, 27 (1987) ("the words 'to defraud' in the mail fraud statute have the 'common understanding' of 'wronging one in his property rights by dishonest methods or schemes, and usually signify the deprivation of something of value by trick, deceit, chicane or overreaching.'" (internal quotations omitted)).

Both sides agree that the Eighth Circuit did not even conduct a wire fraud/RICO analysis. (Opp.16-17.) Instead, the Eighth Circuit "end[ed]" petitioners' entire case (including the RICO claims) because petitioners supposedly did not have a "right to rely," as a matter of Missouri common law fraud, on the misrepresenta-

tions at issue (App.13a-14a),[1] and refused to permit petitioners leave to amend to assert a RICO theory of liability based on the long-running, post-release fraudulent BFWP pricing scheme whose factual bases were already alleged in the complaint. (App.16a-17a.; Pet.13-14.)[2]

Thus, if this Court were to reverse on any of the important and unresolved threshold legal questions presented for review in this petition, the Eighth Circuit on remand could evaluate the RICO claims under the correct legal framework.

2. Had the lower courts employed the correct legal standard, they could not have "ended" petitioners' RICO claims "as a matter of law" on this incomplete discovery record. (C.A. Pls. Br. 59-62.)

a. First, recall that there are two misrepresentations at issue[3]: (1) that SAL provides a "hard discount" grocery program; and (2) that SAL charges BFWP.

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[1] This was clear error under Missouri common law. (*See e.g.* C.A. Pet. For Reh'g ECF 13-28.)

[2] The district court expressly (and erroneously) tied its analysis of the 18 U.S.C. § 1962(c) claims to its common law fraud analysis instead of the wire fraud standard. (App.53a; C.A. Pls. Br. 58-59.) And it rejected the § 1962(d) claims based on misapplication of distinguishable and outdated Eighth Circuit authority concerning the intra-corporate conspiracy doctrine (App.54a) that was subsequently abrogated by *Cedric Kushner Promotions, Ltd. v. King*, 533 U.S. 158 (2001), as several other circuits have recognized. (C.A. Pls. Br. 66-69.)

[3] Respondents attempt to distract this Court with discussion of *other* misrepresentations on SAL's website that were raised below but not here.

(Pet.8-9.)[4] Undisputedly, both are material obligations set forth in the transaction documents (*id.*); they are the core of what the business was supposed to be. That these representations were false fundamentally compromised petitioners' ability to assess risk.

Even respondents held back additional investment after learning the truth. But they did not tell their "partners," petitioners. (Pet.10.)

And the transaction documents expressly exclude from the scope of the releases claims related to these obligations (Pet.12, 31-32).[5]

The Eighth Circuit did not rule that either of these statements was true. Indeed, even the "limited" discovery the district court permitted showed that these two misrepresentations were verifiably false at the time of contracting. (Pet.9, 15; C.A. Pls Br. 37 & 42-44.)[6]

Respondents do not maintain here that these two misrepresentations were true. They cannot: respondents themselves concluded that petitioners did not get what they signed up for because respondents/SAL were

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[4] Respondents are liable for these misrepresentations under various theories that the Eighth Circuit did not reach. (C.A. Pls. Br. 62-69.)

[5] The Eighth Circuit's opinion omits this exclusionary language from its quotation of the release language. (*Compare* Pet.12 *with* App.14a.)

[6] While the district court cherry-picked evidence to draw inferences in respondents' favor, this was clear error given the record (Pet.15-16), and the Eighth Circuit did not affirm or adopt any of those factual findings with respect to the "hard discount" and BFWP misrepresentations. That review can be conducted on remand.

not "running the [hard discount] model anymore." (Pet.9.) And the BFWP misrepresentation is clearly false based on objective data and evidence (Pet.10, 13-15; C.A. Pls. App. 450-454), respondents' direct involvement in pricing (*id.* 455-456), and the post-hoc admission that they also secretly inflated pricing to cover certain services SAL claims to have provided (*id.* 464-465).

Respondents emphasize the number of disclaimers and releases petitioners signed, and argue that petitioners were "on notice" of the falsehoods. (Opp.9-10.) But whether the disclaimers/releases have any legal effect simply begs the questions presented for review, and it is undisputed that—despite petitioners' "extraordinary" due diligence—petitioners never learned the truth behind these two misrepresentations before signing the transaction documents. (Pet.17-18.) Further, "on notice" relates only to justifiable reliance; which is undisputedly not an element for RICO liability.

And because reliance need not be proved for RICO, the Eighth Circuit's state law analysis (denying petitioners any recovery) conflicts with the RICO Act (which provides for recovery here).

b. In addition to the fraudulent scheme inducing investments in the stores and the transaction documents, respondents have never contested that the long-running, post-release scheme to secretly charge in excess of BFWP is a classic RICO violation, as respondents were running a deceptive scheme to defraud Owner-Operators throughout the country out of their money and property over several years by "skimming off the top," with secretly inflated pricing. (Pet.9-10, 13-14, 23, 25.) But the Eighth Circuit did not reach the merits of this claim either.

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

Respondents feign confusion concerning how the Eighth Circuit's decision conflicts with the RICO Act. (Opp.15-16.) But the clash is straightforward. As noted above, the only supposed infirmity the Eighth Circuit cited with respect to the "hard discount" and BFWP misrepresentations was the Eighth Circuit's (erroneous) conclusion that petitioners had no "right to rely" on these misrepresentations.

But Congress chose wire fraud instead of common law fraud as a predicate act for RICO. (Pet.21 (*citing Bridge*).) So, while Congress afforded petitioners a remedy here under RICO, the Eighth Circuit wielded one of the very state common law concepts Congress rejected for RICO (justifiable reliance) to deny RICO relief.

What's more, respondents concede that the purported releases themselves were secured as an integral part of the fraudulent scheme. (Pet.i, 23, 27.) Thus, respondents employed the very fraudulent conduct Congress prohibited to immunize themselves from the remedies that Congress prescribed for the same unlawful conduct.

And respondents completely ignore the prohibitions in the FTC Act against "unfair methods" and "deceptive acts or practices," and the FTC regulations prohibiting franchisors from requiring franchisees to waive reliance on representations. (Pet.24-25.)

Thus, respondents cannot deny a direct conflict with the cases petitioners cited. (Pet.20-27.) Respondents do not even attempt to explain away the

conflict with this Court's decisions in *Brooklyn Sav. Bank v. O'Neil*, 324 U.S. 697 (1945) or *Radio Corp. of Am. v. Raytheon Mfg. Co.*, 296 U.S. 459 (1935), or any of the numerous circuit courts holding that, in a variety of contexts (not just FELA), releases that contravene federal public policy are unenforceable. (*See* Pet.26-27 (*citing Davis* (C.A.2); *Williams* (C.A.3); *Gibbs* (C.A.4); *Redel's* (C.A.5); *Graham* (C.A.9)).)

Respondents' discussion of *Street v. J.C. Bradford & Co.*, 886 F.2d 1472 (6th Cir. 1989), does not dispute the conflict with the Eighth Circuit's decision here, particularly because respondents concede that respondents and SAL were "partners" with, and owed fiduciary duties to, petitioners. (Pet.2, 8, 22.) Rather, respondents argue that there is "doubt" about *Street*'s validity. (Opp.15.)[7] But that just reinforces why certiorari should be granted, particularly because respondents highlight a subsidiary threshold legal question splitting the circuits: does state or federal law determine whether a purported release abrogates a federal cause of action? (Pet.25-6; Opp.14 n.4.)

Respondents' discussion of *Turkish v. Kasenetz*, 27 F.3d 23 (2d Cir. 1994), further underscores the circuit split and why the Eighth Circuit's published decision is a wrongly-decided outlier:

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[7] Respondents' citation (Opp.15) to *Erie R.R. v. Tompkins*, 304 U.S. 64 (1938) and *O'Melveny & Myers v. FDIC*, 512 U.S. 79 (1994) shows respondents are grasping at straws. *O'Melveny* and *Erie*, of course, concern state law claims. But the focus here is petitioners' federal claims under the RICO Act, which (respondents concede) furthers an important federal public policy. (Pet.22-23.)

> The Second Circuit reached the unremarkable conclusion that, as a matter of public policy, a party may not use a contractual limitation of liability or exculpation clause to shield itself *prospectively* from liability for intentional misconduct such as fraud.

(Opp.17 (emphasis original).) Respondents' emphasis on the prohibition of "prospective" application of release language confirms the circuit split and the Eighth Circuit's error on the second question presented for review here (discussed next). But there was no "prospective" application in *Turkish*. There as here, the plaintiff was premising a RICO claim on misrepresentations in the relevant document itself—there the "Stipulation of Settlement," and here the transaction documents. And the Eighth Circuit here reached the exact opposite legal conclusion the Second Circuit did in *Turkish*.

Because even Respondents concede that a party may not use a contractual exculpation clause to shield itself from liability for fraudulent conduct, the Eighth Circuit's published decision here is an egregiously wrong outlier for the millions of Americans who live in the circuit, and it should not stand.

III. The Court Should Resolve Whether Parties May Release Federal Statutory Violations Prospectively.

As noted above, even respondents concede here (as they did in the Eighth Circuit (C.A. Reply 24.)), that it is "unremarkable" that "a party may not use a contractual limitation of liability or exculpation clause to shield itself *prospectively* from liability for intentional misconduct such as fraud." (Opp.17.) But that is pre-

cisely what the Eighth Circuit permitted respondents to do. (Pet.19, 31-32.)

Respondents concede that on *summary judgment*, petitioners marshaled evidence establishing how *each week after* the purported releases were signed, respondents set new prices at which they charged petitioners for inventory, those prices fluctuated but were always higher than BFWP,[8] respondents never explained how the prices were determined, and petitioners did not learn the truth until shortly before filing this action. (Pet.10, 31.)

Thus, new RICO violations, with new injuries, occurred each week after the releases were signed—violations that cannot be released prospectively according to this Court in *Lawlor v. Nat'l Screen Serv. Corp.*, 349 U.S. 322 (1955), as well as *Toledo* (C.A.3), *Redel's* (C.A.5), and *Pilkington* (C.A.9). (Pet.29-30.) Respondents have nothing to say about these cases.[9]

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[8] Respondents claim that petitioners never offered any evidence of pricing for a "particular" "item." (Opp.10 n.2.) But petitioners were denied adequate discovery (Pet.12-13) yet still identified whole categories of items where they were charged in excess of BFWP. (*See e.g.* C.A. Pls. App. 451-454.)

[9] Further, respondents' attempt to distinguish some of the other cases (Opp.12-14) fails. Their characterization of *Mitsubishi* fails because the Eighth Circuit wielded the releases to "end" *all* of petitioners' claims. And their characterization of the others fails because, as explained in text, petitioners' evidence shows that there was new post-release conduct, creating new post-release injuries, and thus "new" post-release RICO claims. But even if respondents' characterizations are correct (they are not), that would still manifest a circuit split with the cases respondents ignore.

Instead, respondents acknowledge how the Seventh Circuit in *MCM Partners v. Andrews-Bartlett & Assocs.*, 161 F.3d 443 (7th Cir. 1998) reached the diametrically opposite conclusion: that conduct post-dating the release, which causes additional injury, *can* be released prospectively. (Pet.28-29; Opp.11-12.) Respondents further note how *In re Blue Cross Blue Shield Antitrust Litig. MDL* 2406, 85 F.4th 1070 (11th Cir. 2023) built on *MCM Partners* to reinforce and extend that principle even further. (*Id.*) And that the Eighth Circuit then relied on *MCM Partners* to reach its (erroneous) conclusion here.

There is therefore a clear and intractable circuit split on this important question that continues to metastasize in real time. And the Eighth Circuit's decision here is on the wrong side of that split.

IV. 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.

Here too, respondents concede a clear and intractable split among the circuits. (Pet.33-35.) There is a national patchwork of cases and local rules that provides inconsistent "justice" based on geography—even within a circuit.

Respondents further concede that this question has profound, nationwide importance because practitioners from coast to coast routinely request leave to amend in response to a dispositive motion given Rule 15's plain language, as well as this Court's (and many circuits') long-standing guidance that leave to amend

should be given freely, and may not be denied on "mere technicalities." (Pet.36.)

Respondents principally rely on Eighth Circuit law to argue that the Eighth Circuit was correct. But that does not resolve the circuit split or establish the Eighth Circuit was right.

First, respondents claim that because local practice requires a motion, a district court can deny leave to amend if no separate, formal motion has been filed. (Opp.18-19.) But nowhere does Rule 15 require a "motion," and respondents concede that the Second, Third, Fifth, Seventh, and Ninth Circuits have concluded the exact opposite (Pet.34-36), including the Seventh Circuit stating expressly that a "district court does not have the discretion to remove the liberal amendment standard by standing order or other mechanisms." *Runnion v. Girl Scouts of Greater Chi. & Nw. Ind.*, 786 F.3d 510, 523 n.3 (7th Cir. 2015). (Pet.36.)

Second, respondents claim that petitioners did not "set forth with particularity the grounds for the amendment." (Opp.19.) But of course petitioners did. The petition documents it several times, which respondents ignore. (Pet.13-14, 19, 37.)

Third, respondents suggest that the district court denied leave based on "futility." (Opp.19-20.) But the district court did no such thing—it ignored petitioners' request. (Pet.14.) And even if futility were the basis, the Eighth Circuit's review should have been de novo, *Mt. Hawley Ins. Co. v. City of Richmond Heights*, 92 F.4th 763, 769 (8th Cir. 2024), which the Eighth Circuit manifestly did not do. (Pet.37 n.12; App.16a-17a.)

Finally, Respondents just ignore that the Eighth Circuit's decision here conflicts with *Foman v. Davis*, 371 U.S. 178 (1962) and that this Court summarily reversed on this precise issue in *Johnson v. City of Shelby*, 574 U.S. 10 (2014). (Pet.37-38.) This Court should reverse for the same reason here.

CONCLUSION

This petition clearly raises several questions of national importance on which the circuits are split, and that the Eighth Circuit got wrong. For the foregoing reasons, the Court should grant this petition for a writ of certiorari.

Respectfully submitted,

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