No. 15-693

IN THE

Supreme Court of the United States

PNC BANK, N.A., as successor to the Community Bank of Northern Virginia,

Petitioner,

v.

BRIAN W. AND CARLA M. KESSLER, on behalf of themselves and all others similarly situated,

Respondents.

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

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the district court abused its discretion in finding that, where plaintiffs sought relief from a lender's common scheme of paying illegal kickbacks, misstating the APR by charging for title services that were not bona fide, and misleading borrowers about those charges on the HUD-1 Settlement Statement, common questions predominated over individual ones.
2. Whether the Court should grant review to consider petitioner's complaint that the district court failed to analyze the superiority and manageability requirements, where the opinions below demonstrate that the court considered both.

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INTRODUCTION

The court of appeals affirmed the certification of a class action seeking relief from a predatory mortgage lending scheme. The scheme involved a bank's payment of kickbacks to undisclosed third parties that did not provide any services, and annual percentage rate ("APR") disclosures that were inaccurate because the bank charged borrowers for title services that were not bona fide. Because the claims turn on the existence or non-existence of uniform practices, the court of appeals correctly concluded that the district court did not abuse its discretion in identifying legal questions that were common and finding that those questions would predominate over individualized issues of damages.

PNC Bank's predominance argument is riddled with errors. PNC repeatedly relies on the premise that Rule 23 requires plaintiffs to demonstrate not only that class action treatment is appropriate but that the common issues will be resolved in their favor. This Court rejected that position in *Amgen Inc. v. Connecticut Retirement Plans & Trust Funds*, 133 S. Ct. 1184, 1191 (2013). In attempting to conjure up conflicts among the circuits, PNC invokes inapposite cases, mischaracterizes the cases it cites, and ignores dispositive distinctions between this case and those with which PNC asserts a conflict. Additionally, some of the issues on which PNC argues — wrongly — that appellate courts are divided are issues of statutory interpretation or common law not encompassed within the Rule 23 questions that PNC presents here.

As to superiority and manageability, PNC's position rests on the demonstrably false premise that the lower courts failed to address these issues at all. In fact, both

the district court and the court of appeals squarely addressed these issues.

Ultimately, PNC does not disagree with the court of appeals — or demonstrate any disparity among the circuits — about the legal standards for determining predominance, superiority, or manageability. PNC's real complaint is about the application of these standards to the particular facts and legal claims here. Certiorari should be denied.

STATEMENT OF THE CASE

Respondents are individuals who obtained residential mortgages between May 1998 and December 2002 from the Community Bank of Northern Virginia (CBNV), a financial institution later acquired by petitioner PNC Bank. Pet. App. 13a-14a & n.13. Respondents allege that CBNV engaged in a systemic practice of illegally kicking back fees to undisclosed third parties that provided no services in violation of the Real Estate Settlement Procedures Act (RESPA) and providing inaccurate APR disclosures as the result of wrongly excluding bogus title services in violation of the Truth In Lending Act (TILA) and the Home Ownership and Equity Protection Act (HOEPA). Respondents claim that CBNV's conduct, including the associated mail and wire fraud, is also actionable under the Racketeer Influenced and Corrupt Organizations Act (RICO). *Id.* at 3a-7a, 13a.

This action began as a set of consolidated lawsuits under RESPA and RICO only, on behalf of a subset of the respondents against several defendants involved in the kickback scheme. *Id.* at 5a-6a. In 2003, a class settlement with a maximum total payout of $33 million was proposed. Objecting class members opposed that settlement on the ground that the representative plaintiffs failed to assert TILA and HOEPA claims that

provided substantial statutory damages. *Id.* at 6a-7a. The district court approved the settlement, but in 2005 the court of appeals reversed, holding that the district court had not sufficiently analyzed the propriety of class certification and in particular whether the named plaintiffs were adequate representatives under Rule 23(a)(4) in light of their failure to assert the TILA and HOEPA claims. *Id.* at 6a-9a. On remand, the district court concluded that the putative TILA/HOEPA claims were time-barred and approved a modified settlement agreement. *Id.* at 9a-11a. Objectors again appealed, and in 2010, the court of appeals again reversed, expressing doubt about the district court's TILA/HOEPA analysis in light of the possible availability of equitable tolling and holding that the named plaintiffs did not satisfy Rule 23(a)(4) because the proposed settlement created a conflict between the named plaintiffs, whose RESPA claims (and potential TILA/HOEPA claims) depended on tolling, and the group of putative class members who had timely claims under those statutes without the need for equitable tolling. *Id.* at 11a-12a.

Following the second reversal, counsel for the settling plaintiffs and the objecting plaintiffs together filed a joint consolidated amended complaint (the operative complaint here) asserting RESPA, RICO, and TILA/HOEPA claims. *Id.* at 13a. As a result of the bankruptcy of one defendant and a successful motion to dismiss by the FDIC as receiver for another, by the time of class certification the only defendant remaining was petitioner PNC, as successor to CBNV. *Id.* at 13a-14a.

In 2013, the district court granted class certification and certified five subclasses to address concerns about the adequacy of representation. *Id.* at 79a-80a. As relevant here, the court found predominance because the

"same alleged fraudulent scheme" was at issue in all of the plaintiffs' claims. *Id.* at 82a (citation and internal quotation marks omitted). As to manageability, contrary to petitioner's characterization, the district court did not defer the issue. Rather, the district court found that the class was manageable as to liability, even as it recognized that some individualized inquiry might be needed for damages. *Id.* at 83a-84a.

After granting PNC's Rule 23(f) petition to appeal the class certification ruling, the court of appeals affirmed. The court first rejected PNC's primary arguments (which PNC does not raise here) that each subclass needed separate counsel for the representation to be adequate, that the district court had impermissibly ordered "conditional" certification, that the class was not ascertainable, that no common issues existed, and that the district court erred in various procedural respects such as the amount of time allowed for discovery and for briefing. *Id.* at 18a n.18, 19a-34a. The court of appeals then turned to the predominance, superiority, and manageability arguments that PNC urges this Court to review.

Regarding predominance, the court set forth the legal framework for its analysis in these terms:

> Issues common to the class must predominate over individual issues. This requirement under Rule 23(b) tests whether proposed classes are sufficiently cohesive to warrant adjudication by representation. It is a far more demanding standard than the commonality requirement of Rule 23(a). Because the nature of the evidence that will suffice to resolve a question determines whether the question is common or individual, a district court must formulate some prediction as

> to how specific issues will play out in order to determine whether common or individual issues predominate in a given case.

Id. at 34a-35a (citation and internal quotation marks omitted). In turn, common questions, the court explained, are those that "'generate common *answers* apt to drive the resolution of the litigation.'" *Id.* at 31a (quoting *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541, 2551 (2011)).

The court identified four common issues:

> (1) Whether the structure created by CBNV and the loan production officers resulted in an unlawful kickback scheme that was a per se violation of RESPA.
>
> (2) Whether CBNV's uniform method of excluding certain title charges from the APR calculation resulted in inaccurate TILA/HOEPA disclosures.
>
> (3) Whether CBNV's acts tolled the claims of class members.
>
> (4) Whether the evidence presented proves a RICO conspiracy.

Id. at 34a.

The court rejected PNC's arguments that these issues are not susceptible to common proof. Regarding equitable tolling, PNC argued that respondents could not commonly prove the "actively misled" and "due diligence" elements of the doctrine. The court held that these issues did not require individualized inquiry: First, the court held that a uniform and classwide practice of supplying a HUD-1 Settlement Statement that provided misleading information to the borrower can constitute an independent act of concealment to support equitable tolling. *Id.* at 40a-43a. Second, due diligence on

respondents' part could be shown by their participation in the loan closing process, because "a borrower ought to be able to rely on the documents provided by a financial institution," *id.* at 45a, and need not "'have proceeded from the outset as though he were dealing with thieves,'" *id.* (quoting *Jones v. Childers*, 18 F.3d 899, 907 (11th Cir. 1994)). The court accordingly found, without deciding whether equitable tolling would ultimately be warranted, that the issue was suitable for classwide treatment because common issues of fact and law predominated. *Id.* at 46a.

Regarding the propriety of certifying a RESPA class action, the court rejected PNC's argument that an individualized analysis of each transaction was needed to discern what services were provided. Because respondents were attacking a common practice of paying kickbacks to an undisclosed third party that was providing *no* services in return, the court explained, individualized analyses of the value of the services each borrower received were unnecessary. *Id.* at 47a-48a. On TILA/HOEPA, the court found that PNC's objections to class certification were unavailing because respondents were challenging a classwide practice provable by "simple arithmetic" as to whether the APR was misstated and by classwide proof on the issue of whether the title charges were bona fide. *Id.* at 50a-51a. As to RICO, the court held that the district court did not abuse its discretion in permitting a classwide inference that respondent borrowers relied on the misleading disclosures in the HUD-1 Settlement Statements; accordingly, the court of appeals rejected PNC's argument that the claims would turn on individualized facts. *Id.* at 54a.

Finally, and contrary to the petition's characterization, the court of appeals addressed both superiority and manageability. The court held that the district court had not abused its discretion in finding superiority, particularly in light of the "tremendous burden that presiding over tens of thousands of nearly identical cases alleging RESPA, TILA, HOEPA, and RICO claims would impose on the courts." *Id.* at 57a. PNC's "tag-along" manageability challenge failed, the court of appeals held, because PNC relied on the same arguments it had made as to commonality and predominance. *Id.* PNC also argued that the district court failed to address manageability, but the court of appeals noted that, as to the individualized damages issue, the district court was not required "to settle on any particular solution at the same time that it certified the class." *Id.* at 58a. Accordingly, the district court "did not err by deciding that it could address *this aspect of case management*" — i.e., the determination of damages — "more fully at a later date." *Id.* (emphasis added).

REASONS FOR DENYING THE WRIT

I. In Contesting Predominance, The Petitioner Does Not Dispute The Legal Standard Applied, Only The Fact-Bound Result, Which Was Correct.

The court of appeals relied on settled precedent in identifying as common issues those questions that "'generate common *answers* apt to drive the resolution of the litigation,'" *id.* at 31a (quoting *Wal-Mart*, 131 S. Ct. at 2551), and then evaluating predominance by determining whether "[i]ssues common to the class … predominate over individual issues," *id.* at 34a (citation and internal quotation marks omitted). The court also required that respondents "affirmatively demonstrate"

that the prerequisites of class certification are met "*in fact*." *Id.* at 17a (citation and internal quotation marks omitted). PNC does not disagree with these standards. PNC does not contend that any court of appeals disagrees with them, either.

The source of PNC's disagreement is not the law but its application by the court of appeals to these facts. In such a circumstance, as this Court's rules make clear, review is disfavored. *See* S. Ct. R. 10 ("A petition for a writ of certiorari is rarely granted when the asserted error consists of . . . the misapplication of a properly stated rule of law."). The absence of a dispute over the Rule 23 legal standard is sufficient reason to deny review on the first question presented.

In any event, the finding of predominance was within the district court's discretion, and the court of appeals did not err in affirming it. The lower courts correctly found that the central dispute concerns whether CBNV operated a scheme in which *as a matter of practice* it paid illegal kickbacks and provided a materially inaccurate APR. *See, e.g.*, Pet. App. 50a ("[I]mproper charges . . . were added to *every* loan." (emphasis added)). Resolution of that dispute will "drive the resolution of the litigation" and largely determine whether all respondents' claims will succeed or fail.

PNC's claim that the court of appeals analyzed predominance in a single sentence without identifying the common questions, Pet. 2, is far off base. After several pages of analysis, the court of appeals specifically identified no fewer than four common questions presented. Pet. App. 30a-34a. The court's subsequent analysis of predominance spans *twenty-one* pages of PNC's Petition Appendix and contains a detailed

discussion of PNC's arguments on that requirement. *Id.* at 34a-55a.

Although PNC repeatedly claims that the Rule 23 requirements were merely pleaded and not demonstrated, PNC acknowledges that the existence of the scheme was supported by evidence. *See* Pet. 18 (citing respondents' expert analysis of the loan files); *see also, e.g.,* Jt. App'x, *In re: Community Bank of N. Va. Mortgage Lending Practices Litig.*, No. 13-4273 (3d Cir. filed Dec. 23, 2013), at 1378-79 (reflecting finding by the Virginia State Corporation Commission that EquityPlus and Equity Guaranty, two of CBNV's partners in the scheme challenged here, brokered mortgage loans from CBNV and others from 1998-2002 and in the course of such activities "collected charges for title and related services not actually performed" among other unlawful practices). In assailing the analysis of the TILA/HOEPA claims below, PNC urges this Court to reinterpret this evidence and consider other evidence. Pet. 17-18. But "[a] court of law, such as this Court is, rather than a court for correction of errors in fact finding, cannot undertake to review concurrent findings of fact by two courts below in the absence of a very obvious and exceptional showing of error." *Exxon Co., U.S.A. v. Sofec, Inc.*, 517 U.S. 830, 841 (1996) (quoting *Graver Tank & Mfg. Co. v. Linde Air Prods. Co.*, 336 U.S. 271, 275 (1949)) (internal quotation marks omitted); *see generally United States v. Johnston*, 268 U.S. 220, 227 (1925) ("We do not grant a certiorari to review evidence and discuss specific facts.").

Moreover, in taking issue with the evidence, PNC suggests that respondents were required at the class-certification stage to prove the truth of their claims, not merely demonstrate their suitability for class treatment

under Rule 23. Pet. 15. This Court squarely rejected that view in *Amgen Inc. v. Connecticut Retirement Plans & Trust Funds*, 133 S. Ct. 1184 (2013): "Rule 23(b)(3) requires a showing that *questions* common to the class predominate, not that those questions will be answered, on the merits, in favor of the class." *Id.* at 1191; *see also id.* ("To gain certification under Rule 23(b)(3), Amgen and the dissenters urge, Connecticut Retirement must first establish that it will win the fray. But the office of a Rule 23(b)(3) certification ruling is not to adjudicate the case; rather, it is to select the 'metho[d]' best suited to adjudication of the controversy 'fairly and efficiently.'").

Because neither PNC nor any court of appeals disagrees with the Rule 23 standard applied here, this Court's review is unwarranted.

II. The Circuits Are Not Divided Regarding The Circumstances Under Which RESPA, TILA, Or HOEPA Claims Are Appropriate For Class-Action Treatment.

A. RESPA. PNC argues that class treatment for the RESPA claim is inconsistent with statements by several courts of appeals that RESPA kickback cases are "generally not a good fit for class action treatment." *Howland v. First Am. Title Ins. Co.*, 672 F.3d 525, 530 (7th Cir. 2012); *see* Pet. 14-15 (citing *Howland*; *Culpepper v. Irwin Mortgage Corp.*, 491 F.3d 1260 (11th Cir. 2007); *O'Sullivan v. Countrywide Home Loans, Inc.*, 319 F.3d 732 (5th Cir. 2003); and *Schuetz v. Banc One Mortgage Corp.*, 292 F.3d 1004, 1014 (9th Cir. 2002)). However, all the cases PNC cites involved claims for which analysis of individual loans was necessary because the court needed to compare the services performed to the amount paid. *See Howland*, 672 F.3d at 530;

Culpepper, 491 F.3d at 1275; *O'Sullivan*, 319 F.3d at 741; *Schuetz*, 292 F.3d at 1014.

Here, by contrast, respondents are seeking relief for payments made where no services were performed at all. Pet. App. 47a; *see Busby v. JRHBW Realty, Inc.*, 513 F.3d 1314, 1325-26 (11th Cir. 2008) ("Busby claims that no services at all were provided in return for the ABC Fee. . . . [T]hat question — whether RealtySouth did or did not provide 'any services' in exchange for the ABC Fee — is a binary and predominant issue here. We conclude, therefore, that this matter is suited for class review."). CBNV admitted in a letter to state regulators in Virginia that it had structured its business so that only its own employees were providing settlement services in connection with the loans at issue. *See* Jt. App'x, *In re: Community Bank of N. Va. Mortgage Lending Practices Litig.*, No. 13-4273 (3d Cir. filed Dec. 23, 2013), at 833 (explaining that "[t]he loan originators and processors of the limited liability mortgage affiliates are now employees of the Bank"). What CBNV concealed from the borrowers in the HUD-1 Settlement Statements was that the overwhelming majority of the settlement fees paid by the borrowers at closing were not being paid to CBNV, but instead to an undisclosed third party that was not providing any settlement services.

Accordingly, the court of appeals appropriately distinguished *Howland*, *see* Pet. App. 47a n.22, because where no services are performed, an individualized analysis of whether respondents paid too much is unnecessary: charging something for nothing violates RESPA by definition. 12 U.S.C. § 2607(b) ("[N]o person shall accept any portion, split, or percentage of any charge made or received for the rendering of a real estate settlement service in connection with a transaction

involving a federally related mortgage loan other than for services actually performed."). Additionally, the court of appeals declined to opine whether *Howland*'s generalization would be accurate in the bulk of cases, *see* Pet. App. 47a n.22, and therefore expressed no disagreement with the Seventh Circuit.

Indeed, *Howland* itself recognized precisely the distinction the court of appeals drew here. 672 F.3d at 532. So have the Ninth and Eleventh Circuits, distinguishing PNC's authorities *Schuetz* and *Culpepper*, respectively. *Edwards v. First Am. Corp.*, 798 F.3d 1172, 1181 (9th Cir. 2015); *Busby*, 513 F.3d at 1324-26 & n.7. No conflict of authority exists.

As a subsidiary point, PNC cites *Howland* for the proposition that plaintiffs must show evidence in order to proceed under a no-services theory. Pet. 15. However, PNC waived this point by failing to raise it below. *See* Br. of Def.-Appellant PNC Bank, *In re: Community Bank of N. Va. Mortgage Lending Practices Litig.*, No. 13-4273 (3d Cir. filed Dec. 23, 2013), at 48-49 & n.8 (citing *Howland* only for the proposition that RESPA claims are "generally not a good fit for class action treatment" because individualized analysis of each alleged kickback is usually required); *see generally Pa. Dep't of Corr. v. Yeskey*, 524 U.S. 206, 212-13 (1998) ("Where issues are neither raised before nor considered by the Court of Appeals, this Court will not ordinarily consider them." (citation and internal quotation marks omitted)).

Moreover, the Third Circuit expressed no disagreement with the requirement that plaintiffs provide evidence in support of the no-services theory, and the respondents did provide such evidence. *See, e.g.*, Jt. App'x, *In re: Community Bank of N. Va. Mortgage Lending Practices Litig.*, No. 13-4273 (3d Cir. filed Dec.

23, 2013), at 833, 1378-79. PNC's real dispute is over the interpretation of that evidence, not the legal rule applied. *See supra* Part I.

B. TILA/HOEPA. PNC does not claim that a circuit split exists regarding the certification of TILA/HOEPA claims or otherwise dispute the legal standard applied. Instead, PNC opines that class actions are not generally advisable in this context, but it cites only a treatise, not any case so holding. Pet. 16. Moreover, TILA itself expressly contemplates class actions. *See* 15 U.S.C. § 1640(a)(2)(B).

Here, class treatment is appropriate because respondents are challenging defendants' uniform practice of charging for title services that were not bona fide and misstating the APR as a result. *See* Pet. App. 34a (identifying as common question "[w]hether CBNV's uniform method of excluding certain title charges from the APR calculation resulted in inaccurate TILA/HOEPA disclosures"); *id.* at 50a ("The Plaintiffs assert that CBNV improperly excluded certain charges from its APR calculation — improper charges that were added to every loan — that resulted in a materially misstated APR.").

At bottom, PNC's disagreement does not concern the legal standard, only its application to this case. Review is unwarranted. *See supra* Part I.

III. The Circuits Are Not Divided Over Any Question Concerning The Merits Of The Underlying Claims.

Having failed to show a split over the certifiability of RESPA class actions and not having disputed the TILA, HOEPA, or (most importantly) Rule 23 standards applied below, PNC spends much of its petition trying to

conjure up circuit splits regarding ancillary questions of substantive RICO or equitable tolling law.

As a threshold matter, contrary to PNC's characterization of these questions as involving "shortcuts to class certification," Pet. 21, these questions are not class-certification questions at all, but questions of statutory interpretation or common law that go to the viability of the underlying claims. For instance, although PNC uses Rule 23 rhetoric to describe its RICO argument (heading: "The Plaintiffs' RICO Claims Are Not Subject To Class-Wide Proof," *id.* at 22), in fact the question that PNC raises is whether the causation element of RICO can be shown using an inference of reliance, *see id.* at 23-26. Likewise, although PNC frames its equitable tolling discussion in terms of whether that legal question may be "Subject To Class-Wide Proof," *id.* at 19 (heading), PNC's argument concerns whether respondents can satisfy the "active misleading" and "due diligence" requirements of equitable tolling on the basis of the misleading HUD-1 statements that CBNV provided to respondents, *id.* at 19-21. Because PNC's alleged circuit splits concern substantive questions of statutory interpretation or common law rather than questions about class action standards, these questions do not fall within the questions presented, which concern only the application of Rule 23, *see id.* at i.

In any event, PNC fails to demonstrate that any court of appeals would have decided the equitable tolling or RICO issues differently than the court of appeals did here.

A. Equitable tolling. Ultimate success for some of the class members' RESPA and TILA/HOEPA claims depends on whether the statute of limitations may be equitably tolled based on a fraudulent-concealment

theory. That theory requires defendants (1) to have actively misled plaintiffs, (2) so as to prevent plaintiffs from recognizing the validity of their claims in time, (3) unless the plaintiffs' ignorance is attributable to a lack of due diligence. Pet. App. 38a. The court of appeals concluded that active misleading and due diligence were common issues because the former could be satisfied by CBNV's common practice of providing misleading HUD-1s and the latter by respondents' participation in the loan closing process. *Id.* at 40a-46a.

PNC fails to show that any circuit would take a different view of either of these questions. Regarding active misleading, the court of appeals relied on a federal regulation governing HUD-1 statements to conclude that "borrowers should be able to rely on [the HUD-1] information in fact being of the requisite nature and quality." *Id.* at 42a. PNC disagrees that respondents would be misled by HUD-1 statements that misrepresent the charges and actual recipients of the settlement fees at issue, and PNC cites *Arthur v. Ticor Title Ins. Co.*, 569 F.3d 154 (4th Cir. 2009), for the proposition that a HUD-1 states only the amounts charged and collected without representing anything about the correctness of those charges. But the passage from *Arthur* on which PNC relies analyzed the "falsity" element of a state-law claim for negligent misrepresentation based on a HUD-1, not the question whether the HUD-1 was "misleading" for the purposes of federal equitable tolling. 569 F.3d at 157, 162 n.3. Rejecting the state-law claim in a footnote, *Arthur* did not discuss or cite any federal statute, regulation, or case about HUD-1s, nor did *Arthur* consider whether a HUD-1 that was not literally "false" could nonetheless be "misleading." By contrast, here, the court of appeals concluded that "HUD-1s that deviate from the requirements of [the applicable regulation] thus

can be materially *misleading* because transmission of a HUD-1 impliedly warrants compliance with that section's specific requirements." Pet. App. 43a (emphasis added); *accord Sosa v. Chase Manhattan Mortg. Corp.*, 348 F.3d 979, 983 (11th Cir. 2003) ("Absent any connivance . . . a consumer would always pay a fee to a settlement service provider intending that it be used for a service actually performed.").[*]

Regarding due diligence, PNC's examples of cases in which individuals did not read their loan documents miss the point. The court of appeals did not make a factual assumption about precisely what each member of the class did at closing; instead, the court relied on each member's *participation* in the closing process and rejected the notion that, in the absence of indicia that should give a borrower cause to awaken suspicion, due diligence requires additional measures beyond such participation. Pet. App. 43a-46a. This conclusion follows the reasoning of the Eleventh Circuit and a prior Third Circuit decision that due diligence does not require plaintiffs to have acted as if the party across the table were a thief or assume that party is lying. *See id.* at 45a-46a (relying on *Jones v. Childers*, 18 F.3d 899, 907 (11th Cir. 1994), and *Sheet Metal Workers, Local 19* v. *2300 Group, Inc.*, 949 F.2d 1274, 1282 (3d Cir. 1991)); *see generally In re U.S. Foodservice Inc. Pricing Litig.*, 729 F.3d 108, 128 (2d Cir. 2013), *cert. denied sub nom. U.S. Foods, Inc. v. Catholic Healthcare W.*, 134 S. Ct. 1938 (2014) ("[F]raudulent concealment can be demonstrated

[*] The charges challenged here were in fact false. The HUD-1 statements represented that certain charges were paid to CBNV when in fact they were illegally split with third parties. The HUD-1 statements also uniformly reflected charges for a title abstract and title examination when no such services were provided.

via class-wide, generalized evidence."). Accordingly, here, "full *participation in the loan process* is alone sufficient to establish the due diligence element." Pet. App. 44a (emphasis added). The court did not specify that such "participation" necessarily required reading a "blizzard of paper," Pet. 21 (quoting Pet. App. 45a), only that doing so would constitute "ample diligence," Pet. App. 45a.

PNC further argues that the court of appeals relied on allegations alone rather than requiring proof. As noted, however, the court of appeals required — and found — that common issues would predominate, *id.* at 46a, and *Amgen* refutes PNC's theory that respondents must prove the merits of their claims at the certification stage. *See supra* Part I. Ultimately, contrary to PNC's sweeping characterization of the decision, Pet. 32-33, the court of appeals rightly refrained from deciding on the merits whether equitable tolling was warranted; it held only that the tolling question could be resolved on a classwide basis. Pet. App. 46a.

B. RICO. In charging that the decision below conflicts with other circuits insofar as it permitted respondents' reliance on the misleading information provided by CBNV to be inferred for purposes of the causation element of a RICO claim, PNC relies on inapposite cases and overlooks a critical distinction that harmonizes the case law and shows that no conflict exists.

One of the elements of the RICO claim is that CBNV's alleged mail and wire fraud — in disseminating HUD-1 Settlement Statements that falsely identified CBNV as retaining origination fees, falsely identified payments to title companies for services the borrowers did not receive, and failed to identify the persons actually

receiving payments from the borrowers' loan proceeds — proximately caused respondents' injury. *Holmes v. Sec. Investor Prot. Corp.*, 503 U.S. 258, 268 (1992). One method of proving causation is to show that respondents relied on the fraudulent conduct. *Bridge v. Phx. Bond & Indem. Co.*, 553 U.S. 639, 659 (2008).

Whether courts will allow reliance on a fraud to be inferred classwide depends on the type of action the fraud induced. For example, where plaintiffs are induced to pay money by fraudulent statements as to the existence or amount of a debt or the defendant's intentions to supply goods or services in return for payment, an inference of reliance is permissible because no rational economic actor would pay a bill he or she does not actually owe or pay money for nothing. Thus, in a case alleging a scheme of fraudulent overbilling by a food distributor, the class's reliance on the fraud could be inferred "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." *U.S. Foodservice*, 729 F.3d at 120. And where lenders allegedly induced plaintiffs to pay for the opportunity to receive a loan the lenders never intended to make, "the fact that a class member paid the nonrefundable up-front fee in exchange for the loan commitment constitutes circumstantial proof of reliance on the misrepresentations and omissions regarding [the principal defendant's] past and the defendant entities' ability or intent to actually fund the promised loan." *CGC Holding Co., LLC v. Broad & Cassel*, 773 F.3d 1076, 1091-92 (10th Cir. 2014); *see also Klay v. Humana, Inc.*, 382 F.3d 1241, 1259 (11th Cir. 2004) (allowing inference of reliance for class of doctors who sued HMOs for misrepresenting, in contracts with the doctors, that the

doctors would be paid for providing medical services), *abrogated on other grounds*, *Bridge*, 553 U.S. at 661.

By contrast, where the action at issue is one that might have happened without the fraud because many factors potentially factored into the decision-making process, courts generally do not permit a classwide inference of reliance. For instance, where fraudulent representations allegedly induced plaintiffs to participate in a pyramid marketing scheme, classwide reliance could not be inferred, because some people could rationally choose to participate in a pyramid scheme even knowing its nature; some participants in a pyramid scheme do profit. *Torres v. S.G.E. Mgmt., L.L.C.*, 805 F.3d 145, 156-58 (5th Cir. 2015). The other RICO cases PNC cites are to similar effect. *See Sergeants Benevolent Ass'n Health & Welfare Fund v. Sanofi-Aventis U.S. LLP*, 806 F.3d 71, 90-93 (2d Cir. 2015) (RICO fraud claim against drug manufacturer for failing to disclose drug risks; reliance could not be inferred classwide because doctors' prescribing decisions were "multifaceted" and could not be attributed to drug safety information alone); *McLaughlin v. Am. Tobacco Co.*, 522 F.3d 215, 225 (2d Cir. 2008), *abrogated in part by Bridge*, 553 U.S. 639 (RICO fraud action against cigarette manufacturers; reliance was individualized because "each plaintiff in this case could have elected to purchase light cigarettes for any number of reasons, including a preference for the taste and a feeling that smoking Lights was 'cool'"); *Sandwich Chef of Texas, Inc. v. Reliance Nat'l Indem. Ins. Co.*, 319 F.3d 205, 220-21 (5th Cir. 2003) (RICO claim that insurance companies charged corporate customers excessive rates; reliance held to be individualized issue because plaintiff companies individually negotiated their insurance packages and knew their rates were higher than the rates that defendants filed with regulators).

In its effort to cast the decision below as anomalous, PNC cites only decisions from the *Torres* line of cases, while ignoring the *U.S. Foodservice* line and the distinction between the two — a distinction that courts of appeals, including PNC's own authorities, consistently recognize. *See, e.g.*, *Sergeants Benevolent Ass'n*, 806 F.3d 88-89; *Torres*, 805 F.3d at 156-57. Indeed, the Second Circuit decided both *Sergeants Benevolent Ass'n* and *McLaughlin* on one hand and *U.S. Foodservice* on the other. As these two lines of cases illustrate, the generalization that RICO fraud cases are usually inappropriate for class treatment because of individualized reliance issues, *see* Pet. 22, is not applicable to all RICO fraud cases.

Respondents' reliance on CBNV's misleading HUD-1 statements falls under the *U.S. Foodservice* line of cases. Like the would-be borrowers in *CGC Holding Co.*, a rational borrower would not pay CBNV something for nothing. *See* 773 F.3d at 1091-92. Accordingly, the borrowers' payments based on the HUD-1s presented by CBNV reflected borrowers' reliance on the representation that (as in *U.S. Foodservice*), the charges were "honestly owed." 729 F.3d at 120. *Torres*, *McLaughlin*, *Sandwich Chef*, and *Sergeants' Benevolent Ass'n* are therefore distinguishable. Contrary to PNC's contention, the decision below does not conflict with the decision of any other court of appeals.

PNC's discussion of *Bumpers v. Community Bank of Northern Virginia*, 747 S.E.2d 220 (N.C. 2013), is both incorrect and irrelevant. The *Bumpers* plaintiffs, contrary to PNC's representation, Pet. 24, are not members of this certified class, having long ago excluded themselves, and they asserted claims different from those here — North Carolina statutory claims for

excessive pricing and misrepresentation. 747 S.E.2d at 222-24. Further, PNC rips conclusions from *Bumpers* out of context. In *Bumpers*, the fact that the plaintiff borrowers were aware of alternative title companies did not, as PNC implies, Pet. 24, defeat the reliance element of plaintiffs' state-law misrepresentation claim. Rather, it defeated plaintiffs' separate claim for excessive pricing under North Carolina deceptive practices law. 747 S.E.2d at 228-29 (reasoning that the existence of alternative title companies showed that "[p]laintiffs entered into their loan transactions freely" — a fact that defeats a claim under state deceptive practices law). As to reliance, the court held only that the state appellate court had erred in failing to analyze reliance as required under state law. *Id.* at 227.

PNC's remaining authorities are not about RICO at all, but common-law fraud claims where reliance was a separately defined element (and which in one case was defined differently for different class members based on which state's law applied). *See Gunnells v. Healthplan Servs., Inc.*, 348 F.3d 417, 434-35 (4th Cir. 2003); *Castano v. Am. Tobacco Co.*, 84 F.3d 734, 742 n.15 (5th Cir. 1996). This Court has rejected the proposed analogy between elements of RICO fraud and elements of common-law fraud. *Bridge*, 553 U.S. at 655-56.

Finally, PNC claims that an inference of reliance violates its right to raise individualized defenses under the Rules Enabling Act and due process. Pet. 25. At the threshold, these issues should not now be considered because PNC failed to raise them to the court of appeals. *Yeskey*, 524 U.S. at 212-13. In any event, PNC never explains how class proceedings would disable it from raising individualized defenses or otherwise change the burden of proof. This Court has made clear that even

where the law permits plaintiffs to invoke a presumption that alters the burden of proof (as opposed to the inference invoked here, which does not, *see CGC Holding Co.*, 773 F.3d at 1094 n.12), defendants retain the opportunity for rebuttal in a class proceeding on a case-by-case basis; the possibility of successful individualized rebuttals of some plaintiffs' claims does not undermine the predominance of common issues. *See Halliburton Co. v. Erica P. John Fund, Inc.*, 134 S. Ct. 2398, 2412 (2014) (explaining that although the rebuttable nature of the fraud-on-the-market presumption "has the effect of leaving individualized questions . . . in the case," individualized rebuttals do not defeat certification unless they are so widespread as to "overwhelm" the common questions (internal quotation marks and alteration omitted)).

IV. The Petition's Argument On Superiority And Manageability Depends On Mischaracterizing The Decision Below.

PNC mischaracterizes the court of appeals as having "punt[ed]" on the questions of superiority and manageability. Pet. i, 26. PNC's entire argument that the court of appeals contravened basic class-action principles by assuming rather than ensuring that the Rule 23 prerequisites were satisfied flows from this false premise. *Id.* at 26-28. In fact, the court of appeals squarely addressed superiority and manageability, and so did the district court.

As to superiority, the court of appeals concluded that the district court did not abuse its discretion in finding superiority because of the difficulty of filing individual cases "'almost a decade after [class members] first received notice that this case had been prosecuted and settled for them,'" Pet. App. 57a (quoting the district

court's decision), and because of the "tremendous burden that presiding over tens of thousands of nearly identical cases alleging RESPA, TILA, HOEPA, and RICO claims would impose on the courts." *Id.*

The court of appeals also separately considered PNC's two manageability arguments. PNC's first argument, the court noted, reiterated "the same factors that [it argued] defeat commonality and predominance." *Id.* (citation and internal quotation marks omitted). Having already rejected these arguments earlier in its opinion, the court needed little time to dispatch them again. *Id.* PNC's second argument was that the district court's acknowledgment that individualized issues existed *as to damages* amounted to a failure to address manageability *at all*. *See id.* But noting the presence of individualized issues is not tantamount to conceding unmanageability, as the court of appeals explained:

> By refusing to settle on any particular solution at the same time that it certified the class, the District Court was not ruling that the litigation was unmanageable. That a class action may require some inquiry into facts specific to individual class members, such as damages, is not a novel observation, nor does it necessarily mean that a class action will be unmanageable.

Id. at 58a. The court of appeals concluded that the district court "did not err by deciding that it could address *this aspect of case management*" — i.e., the determination of damages, not (as PNC claims) the question of manageability itself — "more fully at a later date." *Id.* (emphasis added). The opinion below thus clearly addresses both superiority and manageability. PNC cites no authority holding that, in order to find manageability, a district court must announce at

certification how it will resolve each trial management issue that might arise.

Moreover, the gravamen of PNC's underlying argument against manageability — that the presence of individualized issues defeats it — is easily rebutted by Rule 23 itself, whose predominance requirement clearly contemplates certified class actions in which some individualized issues are present. *See* Fed. R. Civ. P. 23(b)(3) (requiring that common questions "predominate" over individualized questions, not that no individualized issues exist). PNC provides no reason to apply manageability in a way that overrides the standard for predominance and reengineers the balance Congress has struck in that rule.

CONCLUSION

The petition for certiorari should be denied.

Respectfully submitted,

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