No. 10-1500

In The
# Supreme Court of the United States

MYLAN LABORATORIES, INC., et al.,

*Petitioners,*

vs.

BLUE CROSS BLUE SHIELD
OF MASSACHUSETTS, et al.,

*Respondents.*

**On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The District Of Columbia Circuit**

## BRIEF IN OPPOSITION

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## QUESTION PRESENTED

Whether Petitioners have presented compelling reasons for review by this Court where the D.C. Circuit followed established Supreme Court precedent by remanding the case to the district court to determine if any non-diverse parties may be dismissed to preserve diversity jurisdiction.

## CORPORATE DISCLOSURE STATEMENT PURSUANT TO SUPREME COURT RULE 29.6

Respondent Blue Cross Blue Shield of Minnesota, Inc., through its counsel, states that it is a Minnesota not-for-profit health services corporation, a subsidiary of Aware Integrated, Inc., and that no publicly held corporation owns 10% or more of its stock.

Respondent Blue Cross and Blue Shield of Massachusetts, Inc., through its counsel, states that it is a Massachusetts non-profit hospital and medical services corporation, and that it has no parent corporation and that no publicly held corporation owns 10% or more of its stock.

Respondent Federated Mutual Insurance Company, through its counsel, states that it is a Minnesota corporation, has no parent company, and that no publicly held corporation owns 10% or more of its stock.

Respondent Health Care Service Corporation, through its counsel, states that it is an Illinois Mutual Legal Reserve Company incorporated under the laws of Illinois and has its principal place of business in Chicago, Illinois. Health Care Service Corporation is an independent licensee of the Blue Cross and Blue Shield Association, which operates through its Blue Cross and Blue Shield plans in Illinois, New Mexico, Oklahoma, and Texas, and several subsidiaries. Health Care Service Corporation is not a publicly held corporation. It is customer owned by its policy holders. It is has no parent corporation and has issued no stock.

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## STATEMENT OF THE CASE

Respondents are four health insurance providers who filed complaints in 2001 and 2002 to recover their own damages resulting from Petitioners' conspiracy to eliminate competition and charge exorbitant prices for two older generic drugs, Clorazepate and Lorazepam. There is no dispute that there is complete diversity of citizenship between the Respondents and the Petitioners. Three of the Respondents, BCBS-MA, BCBS-MN, and HCSC, also acted as third-party administrators to self-funded customers, and asserted in their complaints supplemental jurisdiction over the separate claims of these customers under 28 U.S.C. § 1367.

This case was actively litigated for almost a decade before Petitioners challenged jurisdiction. After several years of discovery and numerous pretrial motions this matter proceeded to trial in the district court in May 2005. On June 1, 2005, Petitioners recovered a substantial verdict that was the subject of post-trial motions that were not finally concluded until July 16, 2009. Throughout this lengthy period, Petitioners never questioned the jurisdiction of the district court to consider the claims of the self-funded customers. It was not until the week of oral argument in the D.C. Circuit in October 2010 that Petitioners moved to dismiss the case for lack of subject matter jurisdiction or, alternatively, to dismiss the claims of all self-funded customers.

The D.C. Circuit rejected Respondents' supplemental jurisdiction argument, and concluded that the self-funded customers' citizenship must be considered for diversity of citizenship purposes. However, the D.C. Circuit did not dismiss, but instead remanded the case to the district court to decide (1) whether the self-funded customers are indispensable parties, and (2) which, if any, of the self-funded customers' claims may be dismissed in order to preserve complete diversity. The D.C. Circuit reasoned that Rule 21 of the Federal Rules of Civil Procedure allows the district court to dismiss parties whose presence in the litigation destroys jurisdiction if those parties are not indispensible and if there would be no prejudice to the parties. By issuing its remand, the D.C. Circuit followed this Court's instruction to allow a jurisdictional defect to be cured under Rule 21 "when requiring dismissal after years of litigation would impose unnecessary and wasteful burdens on the parties, judges, and other litigants waiting for judicial attention." *Newman-Green, Inc. v. Alfonzo-Larrain*, 490 U.S. 826, 836 (1989). The appeals court most certainly did *not*, as Petitioners assert, treat Petitioners' jurisdictional objection as "waived." Pet. 17 n.4; *see* Pet. App. 4a-11a (analyzing motion to dismiss for lack of jurisdiction).

On remand, the district court held an initial hearing on May 9, 2011, and set a schedule for the parties to brief the indispensability issue. The district court has also allowed Respondents to make a factual showing to permit a determination as to which of the

self-funded customers may be dismissed in order to preserve complete diversity.

### 1. Petitioners' conspiracy

Clorazepate and Lorazepam are widely-used generic antianxiety drugs that became available in the 1970s. For many years, Mylan and several competitors manufactured and sold these generic drugs in the United States. In late 1997, Petitioners devised an exclusive dealing scheme to cut off Mylan's competitors from the raw material needed to produce these drugs. The avowed purpose of the scheme was to destroy competition and allow Mylan to charge supracompetitive prices. The scheme was so blatantly anticompetitive that Mylan had to agree to indemnify the other Petitioners from any lawsuit arising from the exclusivity arrangement.

The conspiracy immediately achieved its objective. Mylan's principal competitors could no longer procure raw material to produce Clorazepate and Lorazepam, and Mylan raised its wholesale prices for these older generic drugs by as much as 3200%. In spite of these huge price increases, Mylan gained market share due to the monopoly it had achieved. Consumers and their health plans spent more than one billion additional dollars to purchase Lorazepam and Clorazepate as a result of the exclusive dealing scheme and suppression of competition.

The conspiracy caused Respondents and their self-funded customers to pay much higher prices for

Clorazepate and Lorazepam. Although the Federal Trade Commission forced Petitioners to abandon the exclusive dealing scheme a year later, Respondents established at trial that the impact of the conspiracy caused prices for the two drugs to remain artificially high for many years. Respondents' expert calculated damages sustained by each Respondent and self-funded customer from 1998 through various months in 2003. Petitioners failed to present any alternative damage calculation, and on June 1, 2005, the jury returned a verdict for the damages in precisely the amount calculated by Respondents' expert.

Petitioners challenged the verdict through several post-trial motions, all of which were rejected by the district court after extensive briefing. On January 1, 2008, the district court found Petitioners' conduct willful and granted Respondents' motion to treble their damages under the laws of Massachusetts, Minnesota, and Illinois. On July 16, 2009, the district court adopted the recommendation of the magistrate judge to award prejudgment interest, bringing the resulting award to $76,823,943.

### 2. The self-funded customers' claims

As noted above, the four Respondents, as health insurers, filed suit to recover damages they individually sustained as a result of the conspiracy. In addition, Respondents BCBS-MA, BCBS-MN, and HCSC, sued as third-party administrators for their self-funded customers who also paid inflated prices for

Clorazepate and Lorazepam. The complaints did not allege the citizenship of the self-funded customers, but instead Respondents brought these claims pursuant to their contracts with the self-funded customers and their role as third-party administrators. The complaints invoked supplemental jurisdiction under 28 U.S.C. § 1367. Despite the absence of separate diversity of citizenship allegations in the complaints for the self-funded customers, Petitioners never raised a jurisdictional issue or concern at any time while the case was pending in district court. Further, Petitioners never moved to dismiss on jurisdictional grounds in the D.C. Circuit until the week of oral argument.

Shortly before the trial, Petitioners filed a motion *in limine* seeking to strike evidence of the damages sustained by the self-funded customers on the basis that Respondents lacked contractual authority to pursue these claims. At that time, Petitioners did not assert that the self-funded customers were "indispensable parties." To the contrary, Petitioners sought only to remove the damage claims of the self-funded customers from the lawsuit. The district court initially agreed with Petitioners and granted the motion *in limine* to exclude evidence of the damages of the self-funded customers. However, on a motion for leave to proceed under Rule 17 the district court allowed Respondents to pursue the claims of these customers through a ratification process under Rule 17(a). Refuting Petitioners' assertions that Respondents somehow hid these claims or otherwise acted in bad faith

(Pet. 5), in authorizing the ratification the district court rejected these same arguments, finding "no evidence that Plaintiffs' failure to earlier join their self-funded customers or obtain authorization to sue on their behalf was deliberate or tactical, nor is there any evidence that Plaintiffs undertook these claims in bad faith." Pet. App. 19a. The district court further found that:

> Defendants would not be prejudiced by the application of Rule 17(a) here. The claims of the self-funded customers were sufficiently asserted in the complaints, and Plaintiffs have always been clear that they were pursuing claims on behalf of their self-funded plans.

*Id.* 19a-20a. In response to Petitioners' eleventh hour protestations regarding the self-funded customer claims, the district court continued:

> [N]o additional discovery is needed, and Defendants are well aware of the nature of the claims and damages sought. The addition of the self-funded customers ... would not change the substance of the issues to be litigated at trial.

*Id.* 19a-20a. Although Petitioners objected to the ratification process, they never contended in district court that the inclusion of the ratified claims of the self-funded customers defeated diversity jurisdiction.

At trial, Respondents' expert presented aggregate damages for each Respondent and its self-funded customers and the jury awarded the amount of damages

presented. For a consensual remittitur after trial, Respondents' expert isolated the damages awarded to five self-funded customers who had opted out of the ratification process but for which damages were inadvertently included in the aggregate amounts presented (and awarded) at trial.

### 3. Proceedings in the district court following remand

On January 18, 2011, the D.C. Circuit ordered that this matter be remanded to the district court to proceed under Rule 21. The D.C. Circuit denied Petitioners' request for a panel rehearing on March 14, 2011. Petitioners did not petition the D.C. Circuit for *en banc* reconsideration of the remand decision. On May 2, 2011, the parties each submitted reports to the district court, and, on May 9, 2011, the district court held a status conference. At that conference, the court directed that by June 29, 2011, Respondents (1) submit a brief addressing whether the self-funded customers are indispensable parties under Rule 19; and (2) provide information regarding the citizenship of the self-funded customers together with a motion to dismiss and for a remittitur for those self-funded customers for which Respondents were unable to establish diversity of citizenship. Petitioners did not ask the district court to stay proceedings while their Petition to this Court was considered.

Accordingly, on June 29, 2011, Respondents submitted to the district court a brief demonstrating

that the self-funded customers are not indispensable parties under Rule 19. In addition, Respondents' June 29 submissions have established diverse citizenship for hundreds of the self-funded customers, including municipalities, counties, and school districts that were citizens of Minnesota, Massachusetts, and Texas and were therefore diverse from Respondents (whose states of citizenship are New York, New Jersey, Pennsylvania, Delaware, and West Virginia). For many of the corporate self-funded customers, Respondents have already submitted information showing that the state of incorporation and principal place of business at the time the complaint was filed were diverse to all Petitioners. For certain other corporations, Respondents have informed the district court that they will make a supplemental submission with respect to the principal place of business of these self-funded customers. Respondents have also provided a list of self-funded customers for which they were unable to prove complete diversity, have moved to dismiss those claims and asked for a remittitur of the damage award attributed to those claims.

## REASONS FOR DENYING THE PETITION

Petitioners have presented no "compelling reasons" for the Court to grant their petition for a writ of *certiorari* ("Petition"). *See* Sup. Ct. R. 10. The January 18, 2011 D.C. Circuit Opinion ("Opinion") follows nearly two centuries of Supreme Court precedent recognizing that nondiverse parties who are not

indispensable to an action may be dismissed to preserve diversity jurisdiction. The Opinion raises no federal question undecided by this Court, nor (contrary to Petitioners' strained analysis) is there any split among the other courts of appeals. The D.C. Circuit's remand to the district court to determine whether the self-funded customers are indispensable parties, and if not, to proceed under Rule 21, does not raise any issue that merits review by this Court.

## I. The January 18, 2011 Opinion of the D.C. Circuit follows well-established law dating back to the early 19th Century

The Opinion remanding this matter to the district court to proceed under Rule 21 was in accordance with more than a century of jurisprudence recognizing that the dismissal of parties that destroy diversity is a curing method that "had long been an exception to the time of filing rule." *Grupo Dataflux v. Atlas Global Group, L.P.*, 541 U.S. 567, 572 (2004).

For nearly two centuries, long before the advent of Federal Rule of Civil Procedure 21, this Court has permitted the dismissal of nondiverse parties who would otherwise defeat diversity jurisdiction, so long as those nondiverse parties are not indispensable parties. Indeed, as early as 1825, the Supreme Court recognized that dispensable, nondiverse parties may be dismissed to preserve the Court's jurisdiction over parties that are properly before it. *See Carneal v. Banks*, 23 U.S. (10 Wheat.) 181, 188 (1825) (cited in

*Newman-Green*, 490 U.S. at 834-35). In *Carneal*, the plaintiff, Banks, a citizen of Virginia, sued the heirs of Carneal, citizens of Kentucky, and the heirs of Harvie, citizens of Virginia. Finding that the non-diverse defendants were not indispensable, the Court held that the claim against the Harvie heirs could be dismissed without affecting the claims against the other diverse defendants: "The bill, therefore, as to Harvie's heirs, may be dismissed without in any manner affecting the suit against Carneal's heirs. That they have been improperly made defendants in his bill cannot affect the jurisdiction of the court as between those parties who are properly before it." *Id.*

Similarly, in an 1873 opinion, this Court noted that the appellants' objection to federal jurisdiction had been obviated by the lower court's dismissal of the claims against the two nondiverse defendants, whom the Court held were not indispensable parties. *See Horn v. Lockhart*, 84 U.S. 570, 579 (1873). "[T]he question always is, or should be, when objection is taken to the jurisdiction of the court by reason of the citizenship of some of the parties, whether . . . they are indispensable parties, for if their interests are severable and a decree without prejudice to their rights may be made, the jurisdiction of the court should be retained and the suit dismissed as to them." *Id.*

Today, under Rule 21, "[o]n motion or on its own, the court may at any time, on just terms, add or drop a party. The court may also sever any claim against a party." Fed R. Civ. P. 21. Modern courts

have universally recognized that Rule 21 "invests district courts with authority to allow a dispensable nondiverse party to be dropped at any time, even after judgment has been rendered." *Grupo Dataflux*, 541 U.S. at 572 (quoting *Newman-Green*, 490 U.S. at 832). And in *Newman-Green*, this Court held that courts of appeals – like district courts – also have the authority to cure jurisdictional defects by dropping nondiverse parties. *Newman-Green*, 490 U.S. at 832-33, 837.

Petitioners misleadingly claim that Respondents "did not even attempt" to meet their burden of pleading and proving diversity jurisdiction, and that such a failure means the entire case must be dismissed. Pet. 15. This is both factually untrue and a misstatement of the law. As noted above, Respondents pled that they are each diverse to all Petitioners, pled that they were third-party administrators who had the contractual authority to bring claims on behalf of their self-funded customers and invoked supplemental jurisdiction pursuant to 28 U.S.C. § 1367. Moreover, Petitioners' sweeping contention that the failure to properly plead or prove diversity jurisdiction is fatal (Pet. 12-16) is an obvious misreading of the case law. Indeed, whenever a court allows the dismissal of a nondiverse party or claim in order to preserve diversity, there has been a failure either to properly plead and/or to prove diversity, otherwise the "curing method" – employed at least since *Carneal* and as recognized in *Grupo Dataflux* – would not be necessary. For example, in *Newman-Green*, the jurisdictional spoiler

(Bettison), was a United States citizen domiciled in Caracas, Venezuela. *Newman-Green*, 490 U.S. at 828. The complaint had invoked jurisdiction under 28 U.S.C. § 1332(a)(3), which confers federal jurisdiction when a citizen of a state sues both aliens and citizens of a state different from the plaintiff's state. *Id.* Bettison, however, was neither an alien nor a citizen of a state and thus the plaintiff in *Newman-Green* failed to both properly plead and prove diversity. *Id.*

In allowing even federal appellate courts to cure jurisdictional defects, the Court in *Newman-Green* acknowledged that while this may not be "the most intellectually satisfying approach" to jurisdictional problems, it was a practical solution preferable to "requiring dismissal after years of litigation," an alternative that "would impose unnecessary and wasteful burdens on the parties, judges, and other litigants waiting for judicial attention." *Id.* at 836. Such practical considerations have long guided this Court. *See Mullaney v. Anderson*, 342 U.S. 415, 417 (1952) (permitting the addition of two plaintiffs to ensure court's jurisdiction: "To dismiss the present petition and require the new plaintiffs to start over in the district court would entail needless waste and runs counter to effective judicial administration"); *Caterpillar Inc. v. Lewis*, 519 U.S. 61, 75 (1996) (holding that jurisdictional defect arising from improper removal was cured once nondiverse defendant was dismissed due to settlement: "Once a diversity case has been tried in federal court . . . considerations of finality, efficiency, and economy become overwhelming.").

Here, in its January 18, 2011 Opinion, the D.C. Circuit simply followed the well-established, long-standing precedent of this Court and remanded this case to the district court to determine whether, under Rule 19, any of the nondiverse self-funded customers were indispensable and to then "proceed under Rule 21." Pet. App. 10a. Indeed, the posture of this case – with its long litigation history, multitude of court opinions and a three-week jury trial – makes a remand for dismissal of nondiverse claims the only just and practical disposition. By refusing to dismiss this action and instead remanding it to the district court to determine which claims may be dismissed in order to preserve complete diversity jurisdiction, the D.C. Circuit followed an efficient, practical course, thereby avoiding "unnecessary and wasteful burdens on the parties, judges, and other litigants waiting for judicial attention." *Newman-Green*, 490 U.S. at 836.

### A. The D.C. Circuit's Opinion conforms precisely to *Newman-Green*

In their effort to convince this Court that there are compelling reasons to grant a writ of *certiorari*, Petitioners unsuccessfully try to distinguish the D.C. Circuit's ruling from the scores of other cases over the decades in which federal courts have dismissed dispensable nondiverse parties to preserve jurisdiction.

Preliminarily, the D.C. Circuit did not – as Petitioners misleadingly assert – invoke the "narrow exception" of *Newman-Green*. Pet. 16. The "narrow

question" the Court addressed in *Newman-Green* was whether the *courts of appeals* could do what district courts could indisputably do – that is, dismiss dispensable non-diverse parties on their own accord – or whether a court of appeals must remand the case to the district court, thus leaving the matter to the district court's discretion. *See Newman-Green*, 490 U.S. at 832-33. In holding that courts of appeals did have this authority, the Court in *Newman-Green*, cautioned, however, that appellate courts (not district courts) should exercise this discretion sparingly, noting that if factual disputes arise, it might be more appropriate to remand to the district court. *Id.* at 837-38. And that is exactly what the D.C. Circuit did in this instance; it did not decide this issue itself, but rather remanded to the district court to address the indispensable party issue and then "to determine, which, if any, of the self-funded customers may be dismissed in order to restore complete diversity." Pet. App. 10a.

In trying to manufacture a "narrow" *Newman-Green* exception, Petitioners assert that *Newman-Green* should be limited to situations in which it is a *defendant* that should be dismissed to preserve diversity. Pet. 17. But the language of Rule 21 belies such a reading and neither *Newman-Green* nor any other Supreme Court decision has ever made this distinction. And of course courts have dismissed dispensable plaintiffs, in the same manner as defendants, to preserve jurisdiction. *See, e.g., Publicker Indus., Inc. v. Roman Ceramics Corp.*, 603 F.2d 1065,

1068-69 (3d Cir. 1979) (cited in *Newman-Green*, 490 U.S. at 832 n.6); *see also St. Paul Fire & Marine Ins. Co. v. Universal Builders Supply*, 409 F.3d 73, 81-82 (2d Cir. 2005); *LeBlanc v. Cleveland*, 248 F.3d 95, 98-99 (2d Cir. 2001).

Petitioners also incorrectly claim that *Newman-Green* sanctioned only the dismissal of a single party that was "otherwise irrelevant" to the case. Pet. 18. But again, nothing in the text of Rule 21 or any of the pertinent decisions of this Court restricts the ability of a court to dismiss so-called jurisdictional spoilers to only a single party or claim. In fact, this Court has previously acknowledged the dismissal of multiple parties to preserve jurisdiction. *See Carneal*, 23 U.S. at 188; *Horn*, 84 U.S. at 579. When appropriate, modern courts have examined the citizenship of large numbers of persons for purposes of ascertaining whether parties can be dismissed to preserve diversity. *See, e.g., Herrick Co. v. SCS Comms., Inc.*, 251 F.3d 315, 334 (2d Cir. 2001) (remanding to district court for determination of citizenship of Skadden, Arps, Slate, Meagher & Flom partners); *E.R. Squibb & Sons, Inc. v. Accident & Casualty Ins. Co.*, 160 F.3d 925, 938-39 (2d Cir. 1998) (enumerating considerations the district court must address on remand to determine diversity issues involving numerous unidentified Lloyd's of London underwriters and whether Rule 21 dismissal was appropriate); *E.R. Squibb & Sons, Inc. v. Accident & Casualty Ins. Co.*, 241 F.3d 154, 161, 164 (2d Cir. 1999) (affirming district court jurisdictional rulings as to this "large number of unspecified individuals").

Moreover, Petitioners' attempt to distinguish the nondiverse party in *Newman-Green* because he was "otherwise irrelevant" is a not a distinction found in any case law. Rather, long-established precedent provides that nondiverse parties may be dismissed when they are not indispensable to the case. *See, e.g.*, *Carneal*, 23 U.S. (10 Wheat.) at 188; *Horn*, 848 U.S. at 579; *Newman-Green*, 490 U.S. at 832-33, 838. Here, in accordance with this principle, the D.C. Circuit directed the district court to determine whether the self-funded customers were indispensable to this action. Pet. App. 10a. As noted above, this inquiry is already well underway: on June 29, 2011, Respondents submitted to the district court briefing as to why the self-funded customers are not indispensable parties; Petitioners' responsive brief is due July 18, 2011.

Finally, Petitioners try to distinguish *Newman-Green* because the defect was "easily curable." Pet. 18. The fact that the jurisdictional defect in *Newman-Green* could be easily cured was indeed a point that augured in favor of the *court of appeals* deciding the issue without remand to the district court. Here, however, the D.C. Circuit did not follow *Newman-Green* and decide the jurisdictional issue itself, but instead remanded the matter to the district court for further proceedings under Rule 21.

Petitioners claim that because the jurisdictional issues are "numerous and complex" this matter should have been dismissed rather than remanded. *Id.* They cite no law for this proposition, and indeed

there is none. Further, since this case has only recently been remanded to the district court, it is pure speculation for Petitioners to argue that there will be wide-ranging post-trial inquiries regarding citizenship. Judge Hogan is an experienced trial judge fully capable of addressing whatever proceedings may be necessary. As this Court has noted, such an interlocutory posture is itself "sufficient ground" for denial of *certiorari* review. *Hamilton Brown Shoe Co. v. Wolf Bros. & Co.*, 240 U.S. 251, 258 (1916); *see also Va. Military Inst. v. United States*, 508 U.S. 946 (1993) (Scalia, J., concurring).

While there are numerous claims asserted on behalf of self-funded customers, this does not mean the jurisdictional issues are "complex." As shown in Respondents' June 29, 2011 submission to the district court, hundreds of these self-funded customers are towns, counties, and school districts – entities for which the citizenship determination is simple and cannot be contested. *See Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274, 280-81 (1977); *Moor v. County of Alameda*, 411 U.S. 693, 717, 721 (1973). Hundreds more are corporations, for which the citizenship determination is also clear-cut. *See* 28 U.S.C. § 1332(c)(1); *Hertz Corp. v. Friend*, 130 S. Ct. 1181, 1192 (2010). To the extent there were entities for which a determination of diverse citizenship could not be made, Respondents have already sought a dismissal and remittitur of the damages awarded for these self-funded customer claims, and will seek any additional remittitur necessary when they provide

supplementation to the district court later this month. *See supra* pp. 7-8.

Petitioners also assert that because there are claims by a large number of parties, there may be complicated issues of state law determination. Petitioners have vastly overstated this purported concern, which they never raised previously in the district court. Even, however, if Petitioners were correct, issues regarding applicable state law have nothing to do with federal court jurisdiction, which is the only issue properly before this Court.

Justice Marshall noted in *Newman-Green* that if the entire case were dismissed, the plaintiff would simply refile the action in district court. *See Newman-Green*, 490 U.S. at 837. The same is true here. If this lawsuit were completely dismissed, a near-identical suit could be refiled in federal court by Respondents and hundreds of their customers that are diverse. The filing of a new lawsuit would cause the parties and the federal court system to redo a decade of litigation and "would entail needless waste and run[ ] counter to effective judicial administration." *See Mullaney*, 342 U.S. at 417.

### B. The D.C. Circuit's straightforward application of established law will not encourage a "flood" of state-law cases lacking diversity

The Opinion – which initially directs the district court to apply Rule 19 to determine whether parties

are indispensable and then to "proceed under Rule 21" – does not open the floodgates to unwarranted diversity litigation. Rules 19 and 21 give courts the discretion to address a given case based on its unique facts and circumstances. *See* Fed R. Civ. P. 19(b) ("the court must determine whether, in equity and good conscience, the action should proceed among the existing parties or should be dismissed"); *Provident Tradesmens Bank & Trust Co. v. Patterson*, 390 U.S. 102, 106-07, 109, 116-20 (1968) (Rule 19 analysis is case-specific and designed to reach most equitable result); Fed. R. Civ. P. 21 ("the court may at any time, on just terms, add or drop a party" or "sever any claim against a party"); *e.g., Sweeney v. Westvaco Co.*, 926 F.2d 29, 41 (1st Cir. 1990) ("We believe that this is an appropriate case for exercise of the power to dismiss a nondiverse party."); *Herrick*, 251 F.3d at 330-34 (remanding for district court to determine citizenship and, if parties are nondiverse, whether the facts appropriately call for application of Rule 21 to drop nondiverse party).

Thus, under Rules 19 and 21, district courts are able to apply "equity and good conscience" and determine what terms are "just" and therefore have the ability to dismiss actions in which one or both parties have fraudulently attempted to create diversity jurisdiction where none exists. Here, the D.C. Circuit made no new law or even suggested an expansive interpretation of the law. As such, its unremarkable application of a long-standing legal rule to avoid the waste of judicial time and litigant expense does

nothing to encourage a flood of spurious diversity filings in the federal court system.

As shown, the very nature of Rule 21 itself counters Petitioners' argument that litigants will suddenly perceive a carte blanche invitation to institute cases involving nondiverse parties. Rule 21 is permissive rather than mandatory, specifically empowering, but not compelling, courts to dismiss parties or claims at any time on terms the court deems just. *See, e.g., Rice v. Sunrise Express*, 209 F.3d 1008, 1016 (7th Cir. 2000). The careful application of Rule 21 to eliminate nondiverse parties from this case will not encourage others to file spurious lawsuits in federal court. *See Caterpillar*, 519 U.S. at 77 (defendants' argument regarding invitation to inappropriate diversity assertions depends on mistaken premise that the district court will not apply the law).

Moreover, the crux of the Opinion holds that there was no supplemental jurisdiction over the claims of the self-funded customers, relying on this Court's holding in *Exxon-Mobil Corp. v. Allapattah Servs., Inc.*, 545 U.S. 546 (2005). Thus, if anything, the Opinion will discourage, rather than encourage, federal court filings by those who seek to bring claims on behalf of others who are not diverse from all defendants.

## II. The D.C. Circuit's Opinion does not conflict with decisions of the Seventh or Eighth Circuits

There is no circuit split among the courts of appeals. Neither the Seventh nor the Eighth Circuit has adopted any such rule that parties may not be dismissed to cure diversity jurisdiction, nor has either Circuit ever adopted a rule that nondiverse *plaintiffs* may not be dismissed to preserve diversity jurisdiction. This is, of course, perfectly logical, as such a ruling would be contrary to the plain language of Rule 21 and long-standing law. Rather, in the two cases Petitioners cite, the Seventh and Eighth Circuits simply considered factual circumstances very different from those presented here and held that, under the facts of those cases, dismissal of the entire action was appropriate.

### A. The Seventh Circuit analyzed Rule 21 in an entirely different factual scenario

In *Sta-Rite Industries v. Allstate Insurance Co.*, the plaintiffs filed parallel suits in federal and state court because the lone defendant in the state court action was nondiverse and would thus have defeated jurisdiction in the federal action against the other defendants. 96 F.3d 281, 283-84 (7th Cir. 1996). After the district court dismissed the federal suit, finding the absent defendant "indispensable" under Rule 19, the plaintiffs discovered on appeal that one of their own citizenships was nondiverse to another defendant. *Id.* at 283. Before the Seventh Circuit the

plaintiffs therefore challenged the Rule 19 ruling below and additionally asked the appellate court to sever either the nondiverse plaintiff or the nondiverse defendant. *Id.*

The Seventh Circuit affirmed the lower court's Rule 19 determination as to the absent state-court defendant and held that the defendant who was determined to be nondiverse on appeal was similarly indispensable. *Id.* at 285-86. Accordingly, by definition the court could not employ Rule 21 to drop these parties, as a suit may not proceed without an indispensable party. *See* Rule 19(b); *Newman-Green*, 490 U.S. at 832-33, 838. Here, the D.C. Circuit's opinion acknowledges and conforms precisely to this rule, as it requires the district court to first determine that the self-funded customers are "not indispensable" under Rule 19 prior to addressing Rule 21. Pet. App. 10a.

As to the request on appeal to dismiss the nondiverse plaintiff, again the facts of *Sta-Rite* are inapposite and negate any purported circuit conflict. In that case, the plaintiffs' complaint sought declaratory relief based on the conduct of both of the plaintiffs, such that to remove one of them would render the court unable to accord complete relief to the remaining parties. *Id.* at 286-87. Here, by contrast, the self-funded customers' claims are independent and segregable from each other and from those of Respondents. Indeed, the case was set to proceed to trial without them. Pet. App. 17a (district court "effectively dismissed" the self-funded claims prior to their reinstatement via ratification). Accordingly,

the self-funded customers cannot be necessary, much less indispensable, and the district court can accord complete relief among the remaining parties. *See Abel v. Am. Art Analog, Inc.*, 838 F.2d 691, 694 (3d Cir. 1988). Petitioners' arguments rely on the erroneous premise that the self-funded customers are real parties in interest with respect to *Respondents*' claims. Certainly the self-funded customers are the real parties in interest for their own, respective claims for drug overcharges, but just as certainly they have no interest in Respondents' respective claims. *See* Pet. App. 17a.

Furthermore, the judicial economy interests in *Sta-Rite* were such that even if it were addressing a dispensable party, the court may well have declined to employ Rule 21. Unlike the present case, in *Sta-Rite* justness and efficiency were served *by refusing* to apply Rule 21, as there was a pending state action that offered a single forum for all claims and the best court for resolution of the state law "issues of first impression" presented in the case. *Id.* at 286-88. Additionally, that suit was still in its incipiency, rather than in a post-trial appellate posture, as here. *Id.* at 287.

Further belying Respondents' purported circuit split, the Seventh Circuit has itself employed Rule 21 to dismiss a dispensable, nondiverse party, *e.g.*, *Scaccianoce v. Hixon Mfg. & Supply Co.*, 57 F.3d 582, 585 (7th Cir. 1995), and recently affirmed, citing Rule 21 and *Newman-Green*, the district court's severance of two nondiverse parties to preserve jurisdiction. *Dexia Credit Local v. Rogan*, 602 F.3d 879, 883 (7th

Cir. 2010); *see also Dexia Credit Local v. Rogan*, 629 F.3d 612, 621-22 (7th Cir. 2010); *Wild v. Subscription Plus, Inc.*, 292 F.3d 526, 529 (7th Cir. 2002). This is just what the D.C. Circuit has given the district court the opportunity to do here after proper Rule 19 and evidentiary inquiries.

### B. Respondents' Eighth Circuit case likewise presents no conflict with the D.C. Circuit

In *Associated Insurance Management Corp. v. Arkansas General Agency*, the plaintiff sued as a collection agent on behalf of two insurers, but had no claims of its own and was not a real party in interest. 149 F.3d 794, 797 (8th Cir. 1998). Upon defendants' motion to dismiss for lack of jurisdiction, the diverse insurer joined as a plaintiff and the nondiverse insurer ratified the collection agent's pursuit of its claims under Rule 17(a). *Id.* On appeal, the Eighth Circuit held that the nondiverse insurer's continued participation via ratification destroyed diversity jurisdiction and should not have been permitted. *Id.* In denying the plaintiffs' request to drop the nondiverse insurer's claims, the Eighth Circuit expressed its displeasure with the plaintiffs' tactics, noting that the defendants had raised the jurisdictional issue prior to trial but rather than ask the district court to sever the actions at that juncture, the plaintiffs attempted to keep an inappropriate case in federal court. *Id.* at 798.

Thus, this case does not stand for the broad proposition Petitioners assert, but rather simply illustrates the discretionary nature of Rule 21, which can serve, along with Rule 11 and the statutory prohibition against collusive creation of jurisdiction, to check jurisdictional abuses. *See supra* Section I.B; *cf. Caterpillar*, 519 U.S. at 77 (rejecting argument that Court's holding would incent attempts at wrongful removals to federal court). *Associated Insurance Management* involved parties the court found to have flouted and attempted to manipulate jurisdictional rules in the face of an early challenge. *Associated Ins. Mgmt.*, 149 F.3d at 798. By contrast, this case involves Respondents who acted in good faith, and Petitioners who waited for a decade until the week of appellate oral argument to object to subject matter jurisdiction. Additionally, the original plaintiff in *Association Insurance Management* was a collection agent with no claims of its own, whereas the four Respondents here each asserted substantial distinct damage claims for independent injuries.

Demonstrating the harmony between the D.C. and Eighth Circuits on this issue, the Eighth Circuit has recently cited with approval a district court's ability to dismiss a nondiverse party via Rule 21, *Bailey v. Bayer CropScience L.P.*, 563 F.3d 302, 308-09 (8th Cir. 2009), and even acknowledged in *Associated Insurance Management* that the district court could have itself dismissed the claim of the nondiverse real party in interest to preserve jurisdiction over the diverse claim. *Associated Ins. Mgmt.*, 149

F.3d at 798; *see also Fetzer v. Cities Serv. Oil Co.*, 572 F.2d 1250, 1252-53 & n.4 (8th Cir. 1978) (affirming district court's severance of claims under Rule 21 to preserve diversity jurisdiction). There is no conflict among the circuits as to the meaning and application of Rule 21.

## CONCLUSION

Petitioners fail to state any compelling basis for a writ of *certiorari* to this Court. The Petition should be denied.

Respectfully submitted,

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